

DYNAMISM AND THE EROSION OF PROCEDURAL  
SAFEGUARDS IN INTERNATIONAL GOVERNANCE  
OF TERRORISM

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TERRORISM

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# Dynamism and the Erosion of Procedural Safeguards in International Governance of Terrorism

Dynamisme en de erosie van procedurele waarborgen in  
internationale governance op het gebied van terrorisme

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## **List of Acronyms and Abbreviations**

AEO	Authorized Economic Operator
AIS	Automatic Identification System
AML/CFT	Anti-Money Laundering/ Counter-Terrorism Financing
API	Advance Passenger Information
AT	Assessment Team (of the Financial Action Task Force)
CEN	Customs Enforcement Network
CTAG	Counter Terrorism Action Group
CTC	Counter Terrorism Committee
CTED	Security Council's Counter Terrorism Committee, Executive Directorate
CTITF	Counter Terrorism Implementation Task Force
EAPCCO	Eastern Africa Police Chiefs' Cooperation Organization
ESAAMLG	Eastern and Southern African Anti-Money Laundering Organization
FATF	Financial Action Task Force
FSAP	Financial Sector Assessment Program
FSRB	FATF Style Regional Body
G8	Group of Eight Industrialized Countries
GCTS	Global Counter terrorism Strategy
IAEA	International Atomic Energy Agency
IAPL	International Association of Penal Law
IATA	International Air Transport Association
iARMS	Illicit Arms Records and Tracing Management System
ICAO	International Civil Aviation Organization
ICC	International Criminal Court
ICJ	International Court of Justice
ICPAT	Capacity Building Program against Terrorism
ICRC	International Committee of the Red Cross
ICRG	International Cooperation Review Group
ICTY	International Criminal Tribunal for the Former Yugoslavia
IFI	International Financial Institutions
IGAD	Intergovernmental Authority on Development

IHL	International Humanitarian Law
ILC	International Law Commission
IMO	International Maritime Organization
INTERPOL	International Criminal Police Organization
IOM	International Organization for Migration
ISPS	International Ship and Port Facility Security
IWeTS	Weapons Electronic Tracking System
LRIT	Long Range Identification and Tracking of Ships
MENA	Middle East and North Africa
MLA	Mutual Legal Assistance
MRTD	Machine-Readable Travel Documents
NCCT	Non-Cooperative Countries and Territories
NFP	National Focal Point
NGO	Non-Governmental Organization
OECD	Organization for Economic Co-operation and Development
OFC	Offshore Financial Centres Assessment
OIC	Organization of Islamic Conference
PIA	Preliminary Implementation Assessment
PNR	Passenger Name Record
RILO	Regional Intelligence Liaison Offices
SAFTI	Secure and Facilitated International Travel Initiative
SALW	Small Arms and Light Weapons
SARP	International Standards and Recommended Practices
SLTD	Stolen and Lost Travel Documents
SOLAS	Safety of Life at Sea
SWIFT	Society for Worldwide Interbank Financial Telecommunication
UN	United Nations
UNHCR	United Nations High Commissioner for Refugees
UNODA	United Nations Office for Disarmament Affairs
UNODC	United Nations Office on Drugs and Crime
UNOHCHR	Office of the High Commissioner for Human Rights
UNREC	United Nations Regional Centre for Peace and Disarmament
UNTOC	United Nations Convention against Transnational Organized Crime
WCO	World Customs Organization

## 1.1. Overview

Consider the following two problematic situations that arise in connection with the implementation of international counter-terrorism regulation. The two situations similarly reflect distinctive trends that contemporary international governance of terrorism manifests and the consequences that these trends give rise to.

The first situation concerns the countering of terrorism financing. A family in Somalia had been receiving monthly payments sent from relatives living in Western states. The family, like millions of other households across Somalia, relied on the remittance money for subsistence. However, the flow of such remittance money stopped since the only money service business (MSB) that used to transfer remittance money to Somalia ceased its operations. The MSB, which was dependent on major international banks for carrying out its financial transactions, was forced to cease operations after the only international bank that used to service the remittance business terminated its services to MSBs, including this Somali MSB, as a precautionary counter-terrorism financing measure.

The reluctance of international banks to provide services to MSBs is driven by international counter-terrorism financing standards. In particular, counter-terrorism financing standards adopted by the Financial Action Task Force (FATF) require financial institutions such as banks to take precautionary measures to minimise the risk of exposure to terrorist financing. Consequently, banks have resorted to highly risk-averse, precautionary business policies especially with respect to clients that operate in developing states and regions that are perceived to be particularly vulnerable to terrorist abuse.

Let us now consider the second situation, which concerns counter-terrorism in international air travel. In this situation, an individual from the Horn of Africa, a region with a predominantly Muslim population, travels to a Western state. This individual is

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subjected to intrusive interrogation lasting several hours by border control officials at the destination airport. The person is subjected to such interrogation as a precautionary terrorism risk minimisation measure due to his previous air travel history, which includes pilgrimage to an Islamic site and flight reservations where he had placed a request for *halal* meals on board. Border control officials at the destination state had received information on the travel history of the individual prior to his arrival at the destination airport. This information was collected and relayed to the officials of the destination state by the airline involved through the Advanced Passenger Information (API) and Personal Name Record (PNR) systems.

The API and PRN are systems of collecting and exchanging personally identifiable information about the identity and travel history of international travellers, including data on flight reservation history, cancelled or missed flights, payment details, special requests placed during reservations, meal preferences, the traveller's companions and so on. API and PRN data enables national authorities to construct a personal profile of international travellers, which helps to determine, for the purposes of immigration decisions, the security risk individuals pose. API and PRN systems have come into use in several states in recent years. Furthermore, the International Civil Aviation Organisation (ICAO) is encouraging the universal application of API and PNR systems and engaging in the development of uniform international standards for their use.

Three important observations can be made from the above two situations. Firstly, both the finance and aviation counter-terrorism situations represent an overlooked dimension that international governance of terrorism has expanded into. This dimension is the international governance of terrorism through regulatory measures. It focuses on the standardization and monitoring of public values, e.g. safe banking and immigration, in everyday activities of a private and governmental nature and is distinct from the more visible military responses to terrorism.

The second observation that emerges from both of the situations discussed above is that the normative measures in question exhibit a high degree of flexibility. That is to say, the counter-terrorism measures in question are innovative and implemented with a tentative mind-set where there is room for constant improvement. The idea of private actors (banks) undertaking precautionary counter-terrorism financing

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measures, using their own judgment of the terrorism risk their clients pose is innovative. The relevant international governance bodies such as the FATF set the international standards, which serve as parameters within which such judgments would be exercised by banks globally. The making of these standards is subject to constant refinement and has in some instances seen changes as a result of iteration between affected parties, governmental bodies, civil society representatives, and the banks.<sup>1</sup> Similarly, the use and international exchange of API and PNR data is new and is being promoted for global applicability.<sup>2</sup> Some aspects of these data systems are not settled matters. The precise data set to be entered into those systems and the duration of retention of such data are subjects of debate.<sup>3</sup> In this respect, the API and PNR systems represent, like the case of counter-terrorism measures applied by banks, a cyclical mode of grappling with global problems through continuously-evolving governance solutions, which in turn produce their own problems, and solutions for those problems and so on.

The third observation is that both situations entail unwarranted victimisation of private actors (i.e. individuals and businesses) and global injustice. In the case of counter-

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<sup>1</sup> The noteworthy example is the debate in the United Kingdom and the United States where civil society and governments have engaged the major banks to re-evaluate their risk-averse policy that led to the summary termination of services to MSBs. *See*, e.g., Manuel Orozco and Julia Yansura, 'Keeping the Lifeline Open: Remittances and Markets in Somalia', Oxfam America, African Development Solutions, and Inter-American Dialogue, 2013; Aimen Dean, Edwina Thompson, and Tom Keatinge, 'Draining the Ocean to Catch one Type of Fish: Evaluating the Effectiveness of the Global Counter-Terrorism Financing Regime', 7(4) *Perspectives on Terrorism*, 2013 (online journal, <http://www.terrorismanalysts.com>). Some banks have also recently started to reconsider their 'disproportionate risk-aversion' policies in light of the consequent profit loss they encountered. *See*, comments by Douglas Flint, chairman of HSBC, quoted in Howard Davies, 'The Dilemma of Defining Risk Appetite in Banking', *Financial Times*, 9 September 2014.

<sup>2</sup> API and PNR exchange is currently required for passengers flying to or from the United States, the European Union and European Economic Area, Australia, Russia, South Africa, and some parts of Latin America and Asia, including in Brazil, Colombia, Mexico, China, Japan, India, Indonesia, South Korea, and Saudi Arabia.

<sup>3</sup> National authorities require the data set to be as extensive as possible, while airlines push for a more limited dataset as the administration of extensive data entails a heavy financial burden. Some states require relatively shorter durations of retention of such data pursuant to their national data privacy laws, while other states push for relatively longer retention periods. *See* further, Collin J. Bennett, 'What Happens When You Book an Airline Ticket? The Collection and Processing of Passenger Data Post-9/11', in Elia Zureik and Mark Salter, *Global Surveillance and Policing: Borders, Security and Identity*, Routledge, 2005, 113-138; Christian Kaunert, Sarah Léonard, and Patryk Pawlak, eds., *European Homeland Security: A European Strategy in the Making?*, Routledge, 2012.

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terrorism measures by banks, the private parties that are negatively affected by the termination of banking services include the MSBs, which are rendered out of business, and individual senders and receivers of remittance money. But the effect of the disruption of the flow of remittance money also leads to global injustice in that what is at stake is the financial exclusion of a significant proportion of populations in poor societies that heavily rely on these remittances. In some countries, such as Somalia, where a formal banking system is non-existent, the termination of the services of MSBs entails a humanitarian crisis as not just individuals, but also government departments and international disaster relief agencies rely on MSBs for money transfer. Likewise, the utilization of API and PNR data on international travellers affects private parties, i.e. the individual travellers, who are subjected to immigration decisions that are based on such data. The systemic utilization of profiling in government immigration decision-making has implications for the broader issue of global migration. API and PNR-based security profiling is mainly used in the Global North, where immigration policy is essentially a matter of restricting the influx of persons from the Global South. Consequently, the use of governance tools that have a systematic impact on immigration processing (in this case, profiling) potentially entails a disproportionate negative effect on persons originating from the 'usual suspect' regions or societies in the Global South who become subjected to more intrusive screening and denial of entry.

This thesis assesses a wide range of international counter-terrorism regulatory initiatives and shows that the above observations reflect interrelated dimensions of a broader transformation in international governance of terrorism. It claims that current international regulatory counter-terrorism measures not only represent an issue-area expansion, but also a distinctive approach to international governance. The positive aspects (innovation and functional efficacy in governance) and the negative aspects (individual victimhood and global injustice) of current international counter-terrorism regulation, as exemplified in the above scenarios, are both products of this distinctive approach to international governance.

The central objectives of this thesis are to provide a *descriptive* and *critical* account of this contemporary approach to international governance of terrorism. By analysing international counter-terrorism regulation, particularly in the areas of terrorism

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financing, cross-border movement of persons and goods, and the control of arms and dangerous materials, the descriptive component of this thesis identifies defining trends in current international governance of terrorism. Those trends are collectively characterised as representing a *dynamic* mode of governance – an open and flexible mode of governance that responds to a technically sophisticated and continually evolving global problem. The thesis uses the concept of dynamism to develop an analytical framework that serves to unveil how international counter-terrorism regulation operates and what its consequences are. The critical component of the thesis identifies the specific modalities through which this dynamic mode of governance systematically produces and entrenches the victimisation of non-state actors, i.e. individuals and entities, and global injustice. The critical component of the thesis also highlights the mechanisms through which this mode of governance privileges the state and certain non-state actors. The descriptive and critical components of the thesis form an integrated account of current trends in international governance of terrorism. That is, the prevalence of dynamic governance and the specific mechanisms through which it produces and entrenches privilege and victimhood are presented as mutually supportive pillars of a distinct mode of international governance that is both significant and alarming.

The subsequent sections of this first chapter further introduce this thesis by discussing the central propositions, the theoretical approach, the methods used, and the structure of the thesis.

### **1.2. Central Propositions**

This thesis defends the following interrelated propositions:

1. Contemporary international governance of terrorism is conceptualised as a cosmopolitan project – as a project of tackling a global public problem through the shared contributions of global society – that engages and adversely affects non-state actors in new ways.
2. This cosmopolitan international governance of terrorism manifests a trend of dynamism, which is a mode of governance characterised by the suppression of



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formal elements of international law and the fostering of *openness* in terms of the institutional framework, and *flexibility* in terms of substantive regulatory measures;

3. Dynamism in international governance of terrorism entails, and is sustained by, the erosion of procedural safeguards that provide mechanisms of contestation and accountability in governance;
4. The combination of dynamic governance and the erosion of procedural safeguards, while allowing for functional robustness in tackling the problem of terrorism, gives rise to concern as it normalises, and hence entrenches, the victimisation of non-state actors arising from international governance of terrorism.
5. Finally, the normalization and entrenchment of the victimisation of non-state actors has a special resonance in non-democratic societies from the Global South where the adverse consequences of international governance of terrorism are most felt and domestic procedural safeguards are lacking.

The thesis further stipulates that addressing the victimisation of non-state actors requires not only the mobilisation and reinstatement of procedural safeguards in international governance bodies on terrorism but also rethinking the ways in which counter-terrorism regulatory norms of a *public international* character permeate into and produce global effects through *private* law.

### 1.3. Methodological Approach

The study of international governance of terrorism in this thesis is informed by two core methodological approaches derived from contemporary social theories on governance and critical legal studies. The first methodological approach enables one to embrace disorderly complexity in governance. The second methodological approach allows one to critically examine the role of governance in mediating societal relationships of dominance and injustice.

With regard to the first theoretical approach, a recent school of thought in social theory understands governance as a social phenomenon that can also be manifested within

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complexities, i.e. in the absence of well-defined orderly structures. There are various theoretical strands within this school of thought.<sup>4</sup> Among these, the theory of assemblage is particularly relevant here. Assemblage theory advances the idea that collective meaning is found in apparently disorderly social complexities, or assemblages, including governance.<sup>5</sup> Governance in this sense is understood as a social phenomenon with ‘emergent properties’.<sup>6</sup> That is, phenomena built out of aggregated contributions of disparate processes, which reflect distinct properties only as a whole and not individually.<sup>7</sup>

This approach allows for the conceptualisation of international governance beyond the bounds of established understandings of international legal regimes as consisting of well codified and institutionally integrated systems.<sup>8</sup> The term ‘international governance of terrorism’ is used in this thesis to capture the wide range of normative instruments, institutional practices, and issue-areas that are involved in countering terrorism. The normative instruments under study are not limited to hard legal instruments (treaties and binding decisions of international bodies, such as the UN Security Council) but also include instruments of varying normative degrees, such as

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<sup>4</sup> These include complexity theory, chaos theory, and the theory of governance networks. See, Joris Van Wezemael, ‘The Contribution of Assemblage Theory and Minor Politics for Democratic Network Governance’, 7(2) *Planning Theory*, 2008, 165-185; Eva Sørensen and Jacob Torfing, ‘Making Governance Networks Effective and Democratic through Metagovernance’, 87(2) *Public Administration*, 2009, 234-258; (eds.), *Theories of Democratic Network Governance*, Palgrave Macmillan, 2007. For an overview of the literature, see Erik-Hans Klijn, ‘Governance and Governance Networks in Europe: an assessment of ten years of research on the theme’, 10(4) *Public Management Review*, 2008, 505-525.

<sup>5</sup> Further on assemblage theory, see, Gilles Deleuze and Felix Guattari, *Kafka: towards a minor literature*, University of Minnesota Press, 1986; John-David Dewsbury, ‘The Deleuze-Guattarian Assemblage: Plastic Habits’, 43 *Area*, 2011, 148–153; Manuel DeLanda, *A New Philosophy of Society: Assemblage Theory and Social Complexity*, Continuum, London/New York, 2006.

<sup>6</sup> A term used both in social and natural sciences to refer to the formation of complex phenomena (institutions in social sciences, and organisms in natural sciences) through the aggregation of spontaneous and disparate elements and processes. See, Timothy O’Connor, ‘Emergent Properties’, 31(2) *American Philosophical Quarterly*, 1994, 91-104; George E. Marcus and Erkan Saka, ‘Assemblage’, 23 (2-3) *Theory, Culture & Society*, 2006.

<sup>7</sup> Joris Van Wezemael, above note 4, p170.

<sup>8</sup> E.g. the United Nations International Law Commission has defined self-contained international regimes as an ‘interrelated cluster of rules...on a limited problem together with the rules for ...the administration of those rules’, see ‘Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law’, Report of the Study Group of the International Law Commission, UN Doc A/CN.4/L.682, para 152(1).

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regulatory standards, and widely accepted recommendations adopted by international organizations and international private self-regulatory bodies. For example, international counter-terrorism regulation with respect to civil aviation include not only the international counter-terrorism conventions on hijacking and aircraft and civil aviation safety,<sup>9</sup> but also international standards and widely applied recommendations adopted by the ICAO concerning passenger information management and travel document standardization and control.<sup>10</sup> In terms of governance bodies, this study covers the activities of not only multilateral bodies of universal membership through which international treaties are traditionally adopted, but also those of limited membership and informal international bodies, such as the Financial Action Task Force (FATF) and the Group of eight industrialised states (G8) respectively. Similarly, in terms of issue-areas, this thesis explores contemporary international counter-terrorism governance in various under-explored regulatory dimensions. In contrast to the bulk of international law literature that deals with military and criminal justice dimensions of counter-terrorism,<sup>11</sup> this thesis deals with mundane regulatory areas of

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<sup>9</sup> Consisting of the 1963 Convention on Offences and Certain Other Acts Committed on board Aircraft (Aircraft Convention); the 1970 Convention for the Suppression of Unlawful Seizure of Aircraft (Hijacking Convention); the 1971 Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation (Civil Aviation Convention); the 1988 Protocol for the Suppression of Unlawful Acts of Violence at Airports Serving International Civil Aviation (Airport Protocol, which supplements the Civil Aviation Convention); the 2010 Convention on the Suppression of Unlawful Acts Relating to International Civil Aviation (New Civil Aviation Convention); the 2010 Protocol Supplementary to the Convention for the Suppression of Unlawful Seizure of Aircraft (the Beijing Protocol). For detailed legal commentary, see Abraham Abramovsky, 'Multilateral Conventions for the Suppression of Unlawful Seizure and Interference with Aircraft Part I: The Hague Convention', 13 *Columbia Journal of Transnational Law* (1974), 401; Sami Shubber, 'Aircraft Hijacking Under the Hague Convention 1970- A New Regime?', 22 *International and Comparative Law Quarterly* (1973), 687; Javid Rehman, *Islamic State Practices, International Law and the Threat from Terrorism*, Hart Publishing, Portland: 2005, p130, footnote 1.

<sup>10</sup> Paul S. Dempsey, 'Aviation Security: The Role of Law in the War against Terrorism' 41(3) *Columbia Journal of Transnational Law*, 2003, 649.

<sup>11</sup> E.g. Kimberley Trapp, *State Responsibility for International Terrorism*, Oxford University Press, 2011; 'Holding States Responsible for Terrorism before the International Court of Justice', 3(2) *Journal of International Dispute Settlement*, 2012, 279–298; Helen Duffy, *The 'War on Terror' and the Framework of International Law*, Cambridge University Press, 2005; Tal Becker, *Terrorism and the State: Rethinking the Rules of State Responsibility*, Hart Publishing, 2006; Andrea Bianchi, ed., *Enforcing International Law Norms Against Terrorism*, Hart publishing, 2004; Larissa van den Herik and Nico Schrijver, eds., *Counter-Terrorism Strategies in a Fragmented International Legal Order: Meeting the Challenges*, Cambridge University Press, 2013, chapters by Andrea Bianchi (pp283-316), Michael Wood (p317-333), Steven Ratner (p334-355), Elizabeth Wilmschurst (p356-372), Christian Tams (p373-422), Charles Garraway (p425-453), Robert Goldman (p454-481), David Kretzmer (p559-588); Christopher Greenwood, 'War,

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counter-terrorism, such as financial transactions, land, air, and maritime transport, manufacturing and trade of arms and dangerous materials, trading and business practices, issuance of governmental documents, border control, immigration and customs administration. These various instruments and institutions from multiple issue-areas of counter-terrorism are presented as an ‘amalgam’<sup>12</sup> that manifest collective characteristics.

The second theoretical approach is the critical assessment of international governance of terrorism, which is informed by critical legal studies. Critical legal studies examines the ways in which legal norms and institutions serve partial interests and hence create or reproduce privilege and dispossession in society.<sup>13</sup> Critical legal thinking with respect to international law specifically starts from the premise that there is perpetual dissensus in global society.<sup>14</sup> The premise of perpetual dissensus, i.e. the impossibility of perfect

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Terrorism, and International Law’, 56(1) *Current Legal Problems*, 2003, 505-530; Christine Gray, *International Law and the Use of Force*, Oxford University Press, 2008, p193-253; Ryan Goodman and Derek Jinks, ‘International law, US War Powers, and the Global War on Terrorism’, 118 *Harvard Law Review*, 2005, 2653-2662; Chris Miller (ed.), *War on Terror*, The Oxford Amnesty Lectures 2006, Manchester University Press, 2009; Christian Tams, ‘The Use of Force against Terrorists’, 20 *European Journal of Int’l Law*, 2009, 359-397; ‘International Law and the “War on Terror”: A Look Back’, *Proceedings of the Annual Meeting of the American Society of International Law*, 2009; Ana María Salinas de Frías, Katja Samuel, and Nigel White, *Counter-Terrorism: International Law and Practice*, Oxford University Press, 2012; Dino Kritsiotis, ‘The War on Terror and the Problematique of the War Paradigm’, 9 *Human Rights & Human Welfare*, 2009, 11-27.

<sup>12</sup> Term also used in, among others, Larissa van den Herik and Nico Schrijver, ‘The Fragmented Response to Terrorism’, in Larissa van den Herik and Nico Schrijver, eds., *Counter-Terrorism Strategies in a Fragmented International Legal Order: Meeting the Challenges*, Cambridge University Press, 2013, at 22. There is debate on whether this amalgam of norms and institutions constitutes a self-contained ‘regime’ under international law. See, e.g., Rosalyn Higgins, ‘The General International Law of Terrorism’, in Rosalyn Higgins and Maurice Flory, *Terrorism and International Law*, Routledge, 1997; Daniel Moeckli, ‘The Emergence of Terrorism as a Distinct Category of International Law’, 44 *Texas Int’l Law Journal*, 2008, 157-183; Ben Saul, *Terrorism*, Hart Publishing, 2012; (ed.), *Research Handbook on International Law and Terrorism*, Edward Elgar, 2014, Preface, pix-xi. This thesis does not engage with this debate. Instead, the point of departure for this thesis is that there is a considerable amount of normative and institutional constellation at the international level that deals with terrorism distinctly. And these norms and institutions exhibit a degree of interrelatedness and shared trends that warrant a closer engagement, regardless of their fit with the established parameters of a self-contained regime.

<sup>13</sup> For an overview of the various strands of critical legal studies in international law, see, Nigel Purvis, ‘Critical Legal Studies in Public International Law’, 32(1) *Harvard Int’l Law Journal*, 1991, 81; David Kennedy, ‘A New Stream of International Law Scholarship’, 7(1) *Wisconsin Int’l Law Journal*, 1988, 1-49.

<sup>14</sup> See, e.g., Martti Koskeniemi, ‘Legal Cosmopolitanism: Tom Franck’s Messianic World’, 35 *N.Y.U. Journal of Int’l Law and Politics*, 2002-2003, 471-486, p486; see also, ‘The Subjective Dangers of Projects

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universal consensus, is based on two theoretical outlooks. The first is internal to the normative project itself; that international norms are inherently indeterminate and therefore their application is bound to always involve a choice between competing interpretations.<sup>15</sup> The second theoretical outlook concerns the actors involved: global society is divided along social, economic, and political lines, and therefore a complete alignment of interests and preferences among global actors is unachievable.<sup>16</sup> In other words,

The indeterminacy of international norms and divergence in what actors seek to realize through such norms leads to the view that international legal governance is a perpetually contested activity and always serves partial interests. The normative standpoint of critique espoused in this thesis is, therefore, the view that legal governance should be evaluated for how well it accommodates dissensus by serving as a platform of contestation and by being attentive to victimhood.<sup>17</sup> This view holds

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of World Community', in Antonio Cassese, ed., *Realizing Utopia: The Future of International Law*, Oxford University Press, 2012, 3-13.

<sup>15</sup> On the indeterminacy of international legal arguments, see Martti Koskenniemi, *From Apology to Utopia: The Structure of International Legal Argument*, Cambridge University Press, 2005; and David Kennedy, *International Legal Structures*, Nomos, 1987. For an application in the area of the use of force, see Marieke de Hoon, 'Collateral Damage from Criminalizing Aggression? Lawfare through Aggression Accusations in the Nagorno Karabakh Conflict', 5(1) *European Journal of Legal Studies*, 2012, 0-61.

<sup>16</sup> In Koskenniemi's terms, this is a deep-seated suspicion toward the notion of 'international community' and those who invoke it. See, Martti Koskenniemi, "'International Community" from Dante to Vattel', in Vincent Chetail (ed), *Vattel's International law from a XXI Century Perspective*, Leiden, Brill 2011, pp 49-74; 'The Politics of International Law: Twenty Years Later', 20(1) *European Journal of Int'l Law*, 2009, 7-19. I use the phrase 'interests and preferences' in order to incorporate the multitudes of explanatory theories in social science that generally fall under the two major categories of Rationalist and Constructivist schools of thought. 'Interests' represents the range of material (power) considerations Rationalist theories are founded on; 'Preferences' represents the ideational (subjective/intersubjective) considerations Constructivist theories are premised on. For a representative application of the two schools of thought in analysis of international governance, see, Stephen Walt, 'Alliance Formation and the Balance of World Power', 9(4) *International Security*, 1985, 3-43; John J. Mearsheimer, 'The False Promise of International Institutions', 19(3) *International Security*, 1994/95, 5-49; Nicolas G. Onuf, *World of Our Making: Rules and Rule in Social Theory and International Relations*, University of South Carolina Press, 1989; Alexander Wendt, 'Anarchy is What States Make of It: the Social Construction of Power Politics', 46(2) *International Organization*, 1992, 391-425.

<sup>17</sup> The idea of (international) law as a platform of contestation is expounded in Koskenniemi's work, particularly in what he refers to as the 'culture of formalism', i.e. legal governance serving as a framework of interaction that allows 'the taking of any conceivable position' with regard to substantive issues. See, Martti Koskenniemi, *From Apology to Utopia: The Structure of International Legal Argument*, Cambridge University Press, 2005 (Reissue with new epilogue), p565; 'What is International

that in a world of perpetual dissensus, procedural safeguards that mitigate the hegemony of specific actors and ideas over others, and respond to victimhood should be the enduring components of legal governance.

Finally, this thesis adopts socio-legal research methods in order to produce a multi-layered analysis beyond a purely doctrinal legal research.<sup>18</sup> The specific methods used are discussed below.

#### 1.4. Methods Used

This thesis uses legal analysis in combination with the social scientific methods of discourse analysis, institutional analysis as the primary research methods. The social scientific methods of semi-structured qualitative interviews and non-participant observation are also used as secondary research methods to complement the conclusions drawn using the primary research methods. The primary research methods are deployed to undertake two core types of analysis: textual analysis and institutional analysis.

The textual analysis involves the analysis of primary documentary sources of varying normative value. These primary sources consist of the United Nations General Assembly and Security Council meeting records and resolutions, the International Law Commission's reports to the General Assembly, international treaties, and standards, recommendations, reports, and guidance notes adopted by international bodies, all publicly available on their respective websites.<sup>19</sup> These normative instruments are

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Law For?', in Malcolm D. Evans, (ed.), *International Law*, Oxford University Press, 2010, 32-57. On formalism and positivism in international law, which this thesis does not necessarily subscribe to, see Jean D'Aspremont, 'The Foundations of the International Legal Order', 18 *Finnish Yearbook of Int'l Law* 2007, 219-255, 'The Politics of Deformalization in International Law', 3(2) *Goettingen Journal of Int'l Law*, 2011, 503-550, *Formalism and the Sources of International Law: A Theory of the Ascertainment of Legal Rules*, Oxford Monographs in International Law, Oxford University Press, 2011.

<sup>18</sup> On the characterization of legal research as 'hermeneutic' and for a general overview of interdisciplinary legal research, see Bart van Klink and Sanne Taekema (eds.), *Law and Method: Interdisciplinary Research into Law*, Mohr Siebeck, 2011.

<sup>19</sup> Particularly useful online databases were the UN Counter-terrorism Committee's digital compendiums of international 'good practices, standards and codes' on the implementation of Security Council Resolutions 1373 (2001) and 1624 (2004), both available at <http://www.un.org/en/sc/ctc/practices.html> (last accessed 6 June 2015), similar compendium on counter-terrorism in border control prepared by the UN Counter-Terrorism Implementation task

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analysed using both legal analysis and discourse analysis. The legal analysis involves doctrinal interpretation of the contents of normative instruments and a critical appraisal of those instruments in light of other, more fundamental legal norms. The discourse analysis here involves the textual interpretation of documents using their ordinary linguistic meanings and intertextuality. Intertextuality refers to the meaning to be derived from a text's linkage with other texts. For example, whether a UN General Assembly resolution on terrorism frames terrorism as a criminal or political question can be inferred from whether the resolution makes constant references to documents concerning with suppression of crimes or resolution of political disputes.

The second core analysis used in this thesis is institutional analysis. This involves the analysis of the composition and functioning of international governance bodies on terrorism. It assesses the correlation of their membership and decision making processes with the particular policies, and hence interests, they promote. Institutional analysis enables one to identify common trends that transpire from the mandates and practice of international governance bodies on terrorism.

Instruments and institutions from three particular issue-areas of counter-terrorism are used as examples throughout this thesis to illustrate the analytical and critical propositions made regarding current international governance of terrorism. These issue-areas are the financing of terrorism, the control of arms and dangerous materials, and the cross-border movement of persons and goods. These three examples are selected due to the relative public availability of source material in these issue-areas.

This thesis does not adopt or endorse any particular definition of terrorism in delimiting the normative instruments and institutions that constitute the subject of study.<sup>20</sup> Instead, a rather straightforward criterion is applied: international normative

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Force (CTTF), available at <http://www.un.org/en/sc/ctc/resources/index.html> (last accessed 6 June 2015), the United Nations Office on Drugs and Crime (UNODC)'s compilation of international instruments on terrorism 'International Instruments Relating to the Prevention and Suppression of International Terrorism', New York, UN, 2008, available at [www.unodc.org](http://www.unodc.org), and the United Nations Official Documents System (ODS) available at [documents.un.org](http://documents.un.org).

<sup>20</sup> There is some discrepancy in scholarly accounts of the precise set of international norms and institutions. For example, compare the accounts of Bassiouni and Saul, in M. Cherif Bassiouni, *International Terrorism: Multilateral Conventions (1937-2001)*, Transnational Publishers, 2001 and Ben Saul, *Terrorism: Documents in International Law*, Hart Publishing, 2012.



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instruments and institutions that are undertaken under the explicit rubric of counter-terrorism (using the term ‘terrorism’ and its variants) are regarded as constituting the framework of international governance of terrorism, and are covered by this study.<sup>21</sup> For example, in the case of counter-terrorism financing, there are general international banking standards that may in fact have counter-terrorism utility (e.g. the Basel Committee standards on banking supervision<sup>22</sup>), but only those that are specifically adopted for counter-terrorism financing purposes (e.g. Basel Committee’s Guidelines on Terrorism Financing<sup>23</sup>) are included in this study.

In addition to the above primary methods, semi-structured qualitative interviews and non-participant observation were used as secondary research tools. The interview were conducted using open-ended questions<sup>24</sup> with persons that possess either first-hand or close experiences with the workings of the United Nations on counter-terrorism. These are highly-placed diplomats from the Permanent Missions of states to the United Nations covering the Security Council, or one of the Security Council’s sanctions committees, or the Sixth Committee (Legal Committee) of the General Assembly, as well as United Nations personnel, and can be regarded as key informants.<sup>25</sup> Non-participant observation, which refers to direct access to the subject of study without taking part in the activity itself, was conducted by attending meetings of the Executive Directorate of the Counter-Terrorism Committee and the Security Council as an observer.<sup>26</sup> The interviews and non-participant observations were

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<sup>21</sup> In his recent work surveying international normative instruments on terrorism, Ben Saul also uses similar method of identification. See, Ben Saul (ed.), *Terrorism*, Documents in International Law, Hart Publishing, 2012.

<sup>22</sup> Visit, [www.bis.org](http://www.bis.org), discussed later on in Chapter 4.

<sup>23</sup> ‘Sound Management of Risks Related to Money Laundering and Financing of Terrorism’, Guidelines of the Bank for International Settlements, January 2014.

<sup>24</sup> Examples of such questions are: what are the major issues of disagreement among states with regard to counter-terrorism? And what is the role of the Security Council’s Counter-Terrorism Committee in addressing (any) such disagreements?

<sup>25</sup> Sixteen individuals were interviewed: 4 from Asia, 2 from Africa, 5 from Europe and North America, 2 from South America, and 3 from the Security Council’s Counter-terrorism Committee’s Executive Directorate personnel. 4 from Asia, 2 from Africa, 5 from Europe and North America, 2 from South America, and 3 from the Security Council’s Counter-terrorism Committee’s Executive Directorate personnel. Further interviews were conducted in November 2012 and December 2013 with two experts at the Horn of Africa Intergovernmental Authority on Development (IGAD)’s Capacity Building Program against Terrorism (ICPAT) in Addis Ababa, Ethiopia.

<sup>26</sup> Undertaken in New York City at the United Nations headquarters offices, in October-November 2011. For a brief introduction to non-participant observation, *see*, e.g., Feng Liu and Sally Maitlis,



engaged in during the beginning of the research project to help identify broader trends in international governance of terrorism, which informed the direction of the research.

Lastly, a remark concerning the delimitation of the analysis in this thesis. The objective of this thesis is, however, limited to analysing *how* international counter-terrorism regulation is being shaped and *what* the overall effects of this manner of regulating are. The aim of the thesis thus is not to explain why these regulations have evolved as they have.<sup>27</sup>

## 1.5. Structure of the Thesis

The thesis is divided into seven chapters, including this chapter. Chapters 2 and 3 present a historical survey of the conceptualisation of international governance of terrorism, to comparatively highlight the distinct conceptualization of contemporary international governance of terrorism. Chapter 2 characterizes the earliest international legal undertakings on terrorism from the League of Nations era as efforts of aristocratic mutual-protection of political leaders, grounded on the purported victimhood of the state, rather than the public, by acts of terrorism. Chapter 3 tracks international legal activities related to terrorism in the post-World War II period. Through a legal and discourse analysis of documents of the United Nations General Assembly and the International Law Commission, this chapter illustrates that despite the erosion of the previous portrayal of the state as the victim, the core conceptual underpinning of international governance of terrorism during this period remained centred on inter-state relations.

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‘Non-Participant Observation’ in Albert J. Mills, Gabrielle Durepos, and Eiden Wiebe (eds.), *Encyclopaedia of Case Study Research*, Sage Publications, 2010, 610-612. Generally on participant observation, see John Lofland, David A. Snow, and Lyn H. Lofland, *Analyzing Social Settings: A Guide to Qualitative Observation and Analysis*, 4<sup>th</sup> ed., Wadsworth, 2005; Paul Atkinson and Martyn Hammersley, ‘Ethnography and Participant Observation’, in Norman K. Denzin, and Yvonna S. Lincoln (eds.), *Handbook of Qualitative Research*, SAGE Publications, 1994, 248-261.

<sup>27</sup> For an example of literature that does such explanatory study, see, Vivien A. Schmidt, ‘Discursive Institutionalism: The Explanatory Power of Ideas and Discourse’, 11 *Annual Review of Political Science*, 2008, 303-326.

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Chapter 4 outlines the radical departure in the conceptual foundation of international governance of terrorism starting around the middle of 1980's and continuing on to the present. This chapter illustrates that previous state-centred arguments deployed to justify international governance of terrorism (such as state-victimhood and peaceful inter-state relations) have currently given way to cosmopolitan arguments, and in particular the linking of counter-terrorism with the interests and rights of the ordinary individual (such as human welfare and the common good). This chapter further posits that counter-terrorism as a cosmopolitan project entails that international governance of the subject has taken on the nature of proactive problem management, permeating into various routine private and governmental activities, and engaging and affecting non-state actors in new ways.

Chapter 5 presents the central characterization of current international governance of terrorism, i.e. dynamism. It claims that current international governance of terrorism has become a dynamic enterprise that is characterised by a multi-faceted and absorptive framework (i.e. openness), and trial-and-error and adaptive substantive measures (i.e. flexibility). This chapter illustrates these claims using international counter-terrorism regulation activities taking place in the issue-areas of terrorism financing, the control of arms and dangerous materials, and the cross-border movement of persons and goods.

Chapter 6 points out another significant trend in contemporary international monitoring of counter-terrorism norms: the erosion of procedural safeguards. This is a tendency to pursue the enforcement and monitoring of international norms in a de-legalised framework and through a state-empowerment perspective. This trend supplements the trend of dynamism in the development of international regulatory measures and together they offer an integrated account of contemporary international governance of terrorism.

The concluding chapter, Chapter 7, summarizes the core propositions of the thesis regarding dynamism and the erosion of procedural safeguards in international governance of terrorism and highlights systemic and global justice implications of this mode of governance that give reason for concern. This chapter lastly forwards some further thoughts on directions for future research drawn from the conclusions of the thesis.



## EARLY INTERNATIONAL GOVERNANCE OF TERRORISM AS ARISTOCRATIC MUTUAL PROTECTION

### 2.1. Introduction

The earliest international legal responses to terrorism, which took place in the 1920's and 1930's, were few and limited to the area of criminal justice only. The two notable legal initiatives relating to terrorism in this period were the work of the International Association of Penal Law (IAPL)<sup>1</sup> and the League of Nations, the predecessor of the United Nations. These early international legal activities on terrorism contrast sharply with current efforts to counter-terrorism not only because they were limited in number and scope but more importantly due to the conceptual underpinning they reflected. The IAPL and the League of Nations initiatives were founded on a common understanding of the problem of terrorism and how it ought to be addressed. This chapter elaborates this conceptual underpinning in order to provide a contrasting backdrop that will help highlight the distinctiveness of current international governance of terrorism, which will be discussed in later chapters of this thesis.

This chapter shows that the international legal initiatives on terrorism under the auspices of the IAPL and the League of Nations represented an approach to international governance that was based on aristocratic mutual protection of high placed government officials as representatives of the state, and thus on the protection of the state. That is, those legal initiatives were underpinned by an understanding of terrorism as a problem that primarily targets states' political authority and counter-terrorism as a project of privileged protection offered to high placed government officials.

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<sup>1</sup> This association of criminal science and legal experts was established in 1889 as *Union Internationale de Droit Pénal*, and was later reconstituted in 1924 as International Association of Penal Law. See, M. Cherif Bassiouni, 'AIDP: International Association of Penal Law: Over a Century of Dedication to Criminal Justice and Human Rights', 38 *DePaul Law Review*, 1989, p899. See also the website of the Association, [www.penal.org](http://www.penal.org).

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In this sense, these international legal initiatives were simply continuations of an even earlier era when sovereigns cooperated in prosecuting each other's political enemies using bilateral agreements. During this earlier era, bilateral extradition treaties, i.e. treaties for the surrender of suspects and fugitives,<sup>2</sup> were used to suppress acts against political leaders and sovereigns across borders.<sup>3</sup> Christine van den Wijngaert observes more broadly:

From the thirteenth century, B.C., to the eighteenth century, A.D., extradition specifically targeted individuals suspected of religious or political offenses against sovereigns.... Many fleeing offenders were captured by medieval despots, eager to surrender mutual political adversaries to solidify political power.<sup>4</sup>

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<sup>2</sup> Generally on extradition treaties, see M. Cherif Bassiouni, *International Extradition: United States Law and Practice*, Oxford University Press, 2007; M. Cherif Bassiouni, *International Extradition and World Public Order*, Sijthoff, 1974; Isidoro Zanolli, *Extradition in Multilateral Treaties and Conventions*, Martinus Nijhoff Publishers, 2006. For a representative format and content of contemporary extradition treaties, see United Nations Model Treaty on Extradition, adopted by General Assembly Resolution 45/116 of 14 December 1990 (as amended by Resolution 52/88 of 4 February 1998). There are few recent extradition treaties concluded multilaterally. E.g., the European Convention on Extradition of 1957, the Inter-Governmental Authority on Development (IGAD) Convention on Extradition of 2009, and the Inter-American Extradition Convention of 1981.

<sup>3</sup> Bilateral extradition treaties also served as international enforcement mechanisms of ordinary national criminal laws. This was shown by the inclusion of a diverse list of ordinary crimes, with no detectable common criteria, except that the crimes must not be 'petty offences' entailing minor punishment the extradition of which would not be worth the cumbersome legal process involved. James J. Kinneally, 'The Political Offense Exception: Is the United States-United Kingdom Supplementary Extradition Treaty the Beginning of the End?', 2 *American Univ. Journal of Int'l Law and Policy*, (1987) 203–227, p204. [comments that formal extradition entails cumbersome legal process]. The typical list of ordinary crimes contained in these bilateral extradition treaties includes murder, manslaughter, arson, robbery, burglary, forgery, fabrication of counterfeit money, embezzlement, theft, fraud, perjury, rape, bigamy, abduction, piracy and other crimes committed at sea, slavery, and the destruction of railroads. See, e.g. Art. II, Extradition Treaty between the United States of America and Chile, of 17 April 1900; art. II, Convention between the United States and Portugal for the mutual extradition of criminals, of 7 May 1908; art. II, Treaty between the United States and the Republic of San Marino for the mutual extradition of criminals, of 10 January 1906; art. II, Extradition Treaty between the Kingdom of Belgium and the United States of America, of 26 October 1901; art. II, Extradition Treaty between the Republic of Bolivia and the United States of America, of 21 April 1900; art. II, Treaty between the United States and Serbia for the mutual extradition of fugitives from Justice, of 25 October 1901

<sup>4</sup> Christine Van den Wijngaert, *The Political Offence Exception to Extradition: The Delicate Problem of Balancing the Rights of the Individual and the International Public Order*, Kluwer, 1980, p4ff.

The international legal responses to terrorism undertaken through the multilateral platforms of the IAPL and the League of Nations similarly represented efforts for the ‘mutual protection of established governments’.<sup>5</sup> The IAPL began work on the formulation of international legal definition and criminalization of international terrorism in 1926.<sup>6</sup> The League of Nations commenced work on an international convention on terrorism in 1934, which was finalized in 1937 (hereinafter ‘the 1937 Terrorism Convention’).<sup>7</sup> The following discussion of the contents of both of these legal instruments reveals a common premise: that terrorism victimizes the state by targeting high placed government officials.

## 2.2. The IAPL Draft Penal Law

The IAPL’s work on the topic of terrorism was undertaken through international expert conferences, known as the Conference for the Unification of Penal Law. The aim of the conferences was the adoption of a multilateral international legal instrument for the criminalization and prosecution of serious crimes. The significant component

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<sup>5</sup> Phrase borrowed from Sir Hersch Lauterpacht’s remark in 1954 during the process of the work of the United Nations International Law Commission on the Draft Code of Offences against the Peace and Security of Mankind. Full quote:

*...the international community was no longer a society for the mutual protection of established governments. A revolution might be a crime against the State, but it was no longer a crime against the international community. So long as international society did not effectively guarantee the rights of man against arbitrariness and oppression by governments, it could not oblige States to treat subversive activities, when they did not amount to hostile expeditions, as a crime’* Yearbook of the International Law Commission, 1954, Vol. I, p149.

<sup>6</sup> Bogdan Zlataric, ‘History of International Terrorism and its Legal Control’, in M. Cherif Bassiouni, ed, *International Terrorism and Political Crimes*, Charles C Thomas Publisher, 1975, 474-484, p478 (hereinafter: Zlataric, ‘History of International Terrorism’).

<sup>7</sup> League of Nations Convention for the Prevention and Punishment of Terrorism, 1937. See, Saul K. Padover, ‘Patterns of Assassination in Occupied Territory’, 7(4) *Public Opinion Quarterly*, 1943, 680–693; Ben Saul, ‘The Legal Response of the League of Nations to Terrorism’, 4(1) *Journal of International Criminal Justice*, 2006, 78-102 (hereinafter: Saul, ‘League of Nations’). For a political analysis of the discourse on terrorism in the context of the work of the League of Nations, see Ditrych, Ondrej, ‘International Terrorism in the League of Nations and the Contemporary Terrorism Dispositif’, 6(2) *Critical Studies on Terrorism*, 2013, 225-240. The work of the IAPL on terrorism did not become a binding legal instrument. The 1937 Terrorism Convention was adopted by the League of Nations but never entered into force due to lack of sufficient number of ratifications. See, Mark Alan Lewis, *International Legal Movements against War Crimes, Terrorism, and Genocide, 1919—1948*, ProQuest, 2008, p204 (hereinafter: Lewis, *International Legal Movemenets*).

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of this process was the adoption of international criminal law definition of crimes. International terrorism was dealt with as one of those crimes starting from the third round of these conferences, held in 1930.<sup>8</sup> The definition of international terrorism was developed in subsequent rounds of conferences and a final text was adopted in the 1935. This text defined international terrorism as follows:

International acts directed against the life, physical integrity, health or freedom of a head of state or his spouse, or any person holding the prerogatives of a head of state, as well as crown princes, members of governments, people enjoying diplomatic immunity, and members of the constitutional, legislative or judicial bodies.<sup>9</sup>

The chapeau of this article further specifies that these acts are to be regarded as international terrorism ‘...if the perpetrator creates a common danger, or a state of terror that might incite a change or raise an obstacle to the functioning of public bodies or a disturbance to international relations.’<sup>10</sup>

The material elements (*actus reus*<sup>11</sup>) that constitute terrorism under this definition manifest the intended privileged protection of the state in two ways. The first is by directly providing selective protection to high placed government officials and governmental interests. The definition clearly listed the protected targets as: ‘a head of

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<sup>8</sup> Zlataric, ‘History of International Terrorism’, p478.

<sup>9</sup> *Idem*, p481-82.

<sup>10</sup> *Ibid.*

<sup>11</sup> The material element (*actus reus*) and the mental element (*mens rea*) are the two fundamental components of the definition of a crime. While the *actus reus* element refers to the physical act that is rendered a crime, such as the killing of another person, the *mens rea* element refers to the existence of a certain state of mind on the part of the perpetrator of such act – intent to commit the prohibited act or (in some cases) negligence where there exists a duty to care. For an elaboration of the two elements in the context of the Rome Statute of the International Criminal Court, see Kai Ambos, ‘General Principles of Criminal Law in the Rome Statute’, 10(1) *Criminal Law Forum*, 1999, 1–32. For a discussion from the particular crime of ‘terrorism’ under international law, see Antonio Cassese, ‘The Multifaceted Criminal Notion of Terrorism in International Law’, 4(5) *Journal of International Criminal Justice*, 2006, 933–958. [Cassese, however, begins from the premise that there is a distinct crime of terrorism under international customary law – a contention that is highly disputed. See, Ben Saul, *Defining Terrorism in International Law*, Oxford Monographs in International Law, Oxford University Press, 2006.

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state...crown princes, members of governments, people enjoying diplomatic immunity, and members of the constitutional legislative or judicial bodies....' All were persons occupying high governmental offices. The exclusive protection of governmental interests was reflected in another element of the material act of terrorism in the definition, the creation of 'common danger'. There is little elaboration regarding the precise content of the concept of 'common danger' in the IAPL conference documents.<sup>12</sup> In the literature, some of the terms used interchangeably for 'common danger' are 'general security'<sup>13</sup> and 'public security'.<sup>14</sup> When linked with the exclusion of all non-governmental actors from the list of protected targets, the IAPL definition of terrorism reflected an understanding that it was attacks against high placed government officials that produced an especially serious public danger which would be qualified as terrorism. The premise that such serious public danger is at stake only when symbols of state authority – heads of states, crown princes, members of governments, people enjoying diplomatic immunity, and members of the constitutional legislative or judicial bodies – are under attack reflected what Bogdan Zlataric referred to as an aristocratic privilege the legal instrument sought to protect.<sup>15</sup>

The second manifestation of the privileged protection of the state in the IAPL definition of the crime of terrorism was the exclusive targeting of acts that threatened the stability of the political establishment. The definition specifically targeted acts that (a) incite a change, (b) raise an 'obstacle to the functioning of public bodies', or (c) disturb international relations. The common thread that runs through these three scenarios is the disturbance of the political status quo, both at the national level (inciting change, obstructing public bodies) and the international level (disturbing international relations). Moreover, the definition provided a low threshold for states to demonstrate the existence of such scenarios: it sufficed to show that those acts '*might* incite a change' or '*might* raise an obstacle to the functioning of public bodies' or '*might* raise a disturbance to international relations' (emphasis added). In other words, it was

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<sup>12</sup> The term was first used during the first round of Conference for the Unification of Penal Law in the definition of an international crime of 'the intentional use of any means capable of bringing forth a common danger'. This international crime was later refined into the crime of international terrorism carrying with it the term 'common danger' undefined. *See*, Zlataric, 'History of International Terrorism', p478.

<sup>13</sup> Saul, 'League of Nations', p83.

<sup>14</sup> Lewis, *International Legal Movements*, p220.

<sup>15</sup> Bogdan Zlataric, 'History of International Terrorism', p474-484.



sufficient for a state to show that the unfolding of the crime could hypothetically lead to the above mentioned situations.

In sum, the IAPL's conceptualization of terrorism was anchored on the notion of state victimhood, and consequently the legal response was designed to exclusively address threats to high placed government officials. The work of the IAPL had a strong influence on the discussions within the League of Nations as several prominent members of the former participated, as government advisers or independent experts, during the preparation of the 1937 Terrorism Convention.<sup>16</sup> The League of Nations' international legal instrument on terrorism, discussed below, reveals a conceptual orientation that is similar to the one underlying the IAPL.

### **2.3. The League of Nations Draft Convention on Terrorism**

As mentioned earlier, the League of Nations adopted an international convention on terrorism in 1937. This Convention provided both a generic definition of acts of terrorism and a list of specific international acts that should be criminalized when they fit the generic definition.<sup>17</sup> The combined reading of the two provisions frames terrorism in terms of state victimhood, and therefore the preservation of governmental interests as the central objective of counter-terrorism.

Article 1(2) of the 1937 Convention generally defined 'acts of terrorism' as:

'criminal acts directed against a state and intended or calculated to create a state of terror in the minds of particular persons, or a group of persons or the general public'.<sup>18</sup>

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<sup>16</sup> E.g. Vespasien Pella, a member of the IAPL, played a significant role in the drafting of the international terrorism convention of the League of Nations. *See*, Lewis, *International Legal Movements*, p167. Another prominent jurist who served as a rapporteur on the topic of terrorism for the IAPL during the Copenhagen Conference, M. Thomas Givenovich, was invited to provide his expert opinion during the deliberations within the League of Nations on the topic. *See*, Zlataric, 'History of International Terrorism', p 481; *see also*, 'Legislation Regarding Political Terrorist Crimes: Study by M. Thomas Givenovitch', Geneva, 3 May 1935, League of Nations Doc. CRT.9, cited in Saul, 'League of Nations', p98.

<sup>17</sup> For a detailed legal discussion of the elements of the 1937 Convention, *see* Saul, 'League of Nations'.

<sup>18</sup> Art. 1(2), League of Nations Convention for the Prevention and Punishment of Terrorism, 1937.

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Article 2 provided the following list of specific core acts that states parties are under obligation to criminalize:

- (1) Any wilful act causing death or grievous bodily harm or loss of liberty to:
  - a. Heads of states, persons exercising the prerogatives of the head of the state, their hereditary or designated successors;
  - b. The wives or husbands of the above-mentioned persons;
  - c. Persons charged with public functions or holding public positions when the act is directed against them in their public capacity.
- (2) Wilful destruction of, or damage to, public property or property devoted to a public purpose belonging to or subject to the authority of another High Contracting Party
- (3) Any wilful act calculated to endanger the lives of members of the public
- (4) An attempt to commit an offence falling within the foregoing provisions of the present article
- (5) The manufacturing, obtaining, possession, or supplying of arms, ammunition, explosives or harmful substances with a view to the commission in any country whatsoever of an offence falling within the present article

Under the generic definition of terrorism of article 1(2), the material element of terrorism is composed of (a) ‘criminal acts’ that are (b) ‘directed against the state’. Although the list of ‘criminal acts’ reproduced above included attacks against the general public and even individuals,<sup>19</sup> the ultimate target of protection under the Convention remained similar to that found in the IAPL definition of terrorism: the state. This was reflected in the generic requirement that any of the listed criminal acts must be ‘directed against a state’ in order to constitute terrorism under the Convention.

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<sup>19</sup> Art. 1(3), ‘wilful act calculated to endanger the lives of members of the public’.

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The 1937 Terrorism Convention provided little or no guidance for the interpretation of the term ‘directed against the state’. The most plausible interpretation, inferred from the negotiating history during the drafting of the Convention, is that such acts should be directed against ‘the interests of the state’. The interest of the state obviously includes its personal and material assets, but it also includes a political element as can be inferred from the debate on the matter during the negotiations for the 1937 Terrorism Convention.<sup>20</sup> The term ‘the interests of the state’ was agreed upon after two other proposed terms were rejected. One of those proposed terms framed the concept as ‘the control of governmental power’, and was rejected on the ground that it was too restrictive. The other proposal, rejected for being too broad, used the term ‘honour, security, and public order’.<sup>21</sup> What could be understood from the proposals is that the term ‘the interests of the state’ constituted a compromise between these two proposals, incorporating not only the material and personal assets of the state, but also the intangible interest of political authority.

By requiring that any of the acts listed under Article 2 be directed against the interests of the state (i.e. officials, material assets or political authority of the state) in order to be regarded as terrorism, the 1937 Convention cast the victim state as the central object of terrorism. Attacks on members of the public designed to create a state of terror, therefore, were not to be regarded as acts of terrorism under the 1937 Convention unless the state regarded such an act to be directed against it. An example could be an attack on a religious group directed at terrorizing and inducing a particular behaviour from that religious group. Such an attack would amount to terrorism according to the Convention only when its perpetrators aimed to vicariously threaten or inflict damage on the state; in other words when the religious group is attacked not due to its religious identity as such but as a result of its association with the state.

In sum, the League of Nations legal responses to terrorism, like those of the IAPL, depicted an international normative response to terrorism that was designed for the mutual-protection of states and high placed government officials.

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<sup>20</sup> Saul, ‘League of Nations’, p90.

<sup>21</sup> *Ibid.*

## 2.4. The Breakdown and Continuity of the Mutual-Protection Model

During the early twentieth century, consensus on the state as the victim of terrorism and the utilization of international legal mechanisms for the mutual-protection of high placed government officials was fostered within processes that were dominated by European powers, particularly those that were undergoing a period of internal political instability due to anarchist, leftist and separatist movements.<sup>22</sup> These states sought to mobilize international legal response under the rubric of counter-terrorism to contain the threat from those sub-state movements that targeted established governments.

The IAPL was essentially composed of experts and representatives from European states, and all of its conferences took place in European cities.<sup>23</sup> At the League of Nations, the work on the 1937 Convention was spearheaded by the Council – an organ composed of four permanent members (France, Britain, Italy and Japan) and four other non-permanent members of the League of Nations<sup>24</sup> – instead of the Assembly.<sup>25</sup> The Council in turn delegated the work on the drafting of the Convention to the

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<sup>22</sup> European states that faced separatist minority problems constituted the bulk of the support base for the 1937 Convention. This group was mainly composed of Central, Eastern, and Southern European states such as Bulgaria, Czechoslovakia, Greece, Portugal, Romania, Turkey, and Yugoslavia. Lewis, *International Legal Movements*, p238; Saul, 'League of Nations', p87. These states by the creation of a strict extradition regime under the Convention sought a means to repress political opponents or deprive the separatist forces of safe harbor and operating ground in neighboring states. The very impetus for the making of the 1937 Convention came following assassination of King Alexander I of Kingdom of Serbs, Croats and Slovenes (Yugoslavia) by Croat separatists. See, Hamilton F. Armstrong, 'After the Assassination of King Alexander', *Foreign Affairs*, 1 January, 1935. Still others sought to stifle domestic political dissent through an international instrument on terrorism. For example, the Soviet Union supported the 1937 Convention possibly out of a belief that '...a collective extradition agreement might legitimize an extradition request for Trotsky [a political dissident] and other opponents of Stalin.' Lewis, *International Legal Movements*, p239. Further in this category of states, German jurists affiliated with the Nazi regime during the Conference for the Unification of Penal Law proposed that not only terrorists but also all 'political refugees and escaped nationals should automatically be sent back to their home countries without requiring any investigation as to whether they had committed actual crimes there...' *Ibid*, p229.

<sup>23</sup> see Zlataric, 'History of International', p479-81.

<sup>24</sup> Art. 4, the Covenant of the League of Nations, 1924.

<sup>25</sup> John Dugard, 'International Terrorism: Problems of Definition', 50 (1) *International Affairs*, 67–81, p68.

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Committee for the International Repression of Terrorism, which was composed of eleven states, ten European and one South American.<sup>26</sup>

The dominance of European powers in the IAPL and League of Nations processes was also a function of the fact that significant portions of the Global South had not yet achieved self-government. The entire continent of Africa was still under European domination – most as direct colonies and a few as mandate territories<sup>27</sup> under the League of Nations – and hence did not become members of the League of Nations, with the exception of Liberia, Ethiopia, South Africa and Egypt.<sup>28</sup> The major European imperial powers also held sway over a vast portion of Asia.<sup>29</sup> British colonial rule in Asia covered the area presently under the jurisdictions of India, Pakistan, Bangladesh, and Sri Lanka.<sup>30</sup> Most of South-East Asia – covering today's Vietnam, Cambodia and Laos – and several Islands in the South Pacific region were under French rule. A large portion of the Middle East that was previously under the Ottoman Empire had been transferred into French and British mandates.<sup>31</sup> The Dutch East Indies were also still

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<sup>26</sup> These states were Belgium, UK, Chile, France, Hungary, Italy, Poland, Romania, USSR, Spain, and Switzerland. Saul, 'League of Nations', p80.

<sup>27</sup> The Mandate territories were: Ruanda-Urundi (present day Rwanda and Burundi), Tanganyika (later united with Zanzibar to form the present day Tanzania), German Kamerun (present day Cameroon), Togoland (present day Togo and parts of Ghana), and South-West Africa (present day Namibia).

<sup>28</sup> Of these four, Liberia and Ethiopia were the only self-governing African states in the League of Nations. Egypt joined the League only in 1937, after the conclusion of a treaty further extending the degree of independence of Egypt from British rule. See, Manley O. Hudson, 'Admission of Egypt to Membership in the League of Nations', 31(4) *American Journal of International Law*, 1937, 681-683. By this time, however, the League of Nations debates on the 1937 Convention have been concluded. The other African member of the League, South Africa, was a dominion of Britain, and although it was a member of the League of Nations, its seat was filled by Britain.

<sup>29</sup> By the wake of the First World War, the British Empire alone covered almost a quarter of the world's landmass, and a fifth of the world's population. See, Ferguson, Niall. *Empire: The Rise and Demise of the British World Order and the Lessons for Global Power*, Basic Books, 2002.

<sup>30</sup> Further, see, Andrew Porter (ed.) *The Oxford History of the British Empire: The Nineteenth Century*. Vol. III, Oxford University Press, 1999.

<sup>31</sup> The transfer was undertaken through the Treaty of Sèvres of 10 August 1920 and the Treaty of Lausanne of 24 July 1923 signed between the Allied and Associated Powers and Turkey (the counterparts of the Treaty of Versailles signed between the Allied and Associated Powers and Germany). See, Lawrence Martin, *The Treaties of Peace 1919-1923*, Vol. II, Carnegie Endowment for International Peace, New York, 1924 (reprinted in 2007).

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intact, covering mainly today's Indonesia.<sup>32</sup> There were only five Asian member states of the League of Nations, and out of these, one – India – was represented by Britain.<sup>33</sup>

After the Second World War (WWII), as self-governance spread across the world and global political fault-lines were drawn (the Cold War and the independence/self-determination movements), the conceptual premises that underpinned the IAPL and the League of Nations legal instruments on terrorism met dissent. The IAPL and League of Nations responses to terrorism, which were designed for the privileged protection of states, gave way to a new set of international legal responses to terrorism that were geared toward the scrutiny of states.

This post-WWII international legal response to terrorism proceeded from a position of suspicion toward the state and was designed to provide for the protection of states *from* each other. As the following chapter shows, this shift did not entail a radical change of paradigm. What changed was the portrayal of the state not only as a victim but also as a perpetrator of terrorism. What remained unchanged was the fundamental concept that terrorism was a governmental and inter-governmental (international-relations) problem and that international governance of terrorism protects and addresses governmental interests and inter-governmental relationships. The following chapter will elaborate on this point by discussing various relevant legal and policy initiatives from that period, which were mostly undertaken by or under the auspices of the United Nations.

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<sup>32</sup> The Dutch East Indies constituted 'about [the size of] half of Europe excluding Russia, and they had a population of [more than 60 million] in 1930.' John A. Fairlie, 'The Dutch East Indies', 26 (4) *American Political Science Review*, 1932, 711-715, p711.

<sup>33</sup> The five states were China, Iran, Iraq, India and Thailand. See, official records at the website of the United Nations Office in Geneva, [www.unog.ch](http://www.unog.ch).



## POST-WAR INTERNATIONAL GOVERNANCE OF TERRORISM AS MUTUAL-SCRUTINY OF STATES

### 3.1. Introduction

In the period between the end of the Second World War and the late 1980's, international governance of terrorism shifted from serving as a pact of mutual-protection against the threat to high placed government officials, and hence the state, to serving as a tool of mutual-scrutiny among states. The perception of state victimhood prevalent during the League of Nations era was still a central component in the post-second world war (also 'post-war') period, even if the privileged protection of high placed government officials prevalent during the League of Nations era was no longer central in this period. What fundamentally changed was the perception of the origin of the threat. The main threat of terrorism to states was understood to come from other states, and not from non-state actors as such. The objective of international legal responses instead became the control and scrutiny of state conduct.

Post-war international governance of terrorism, however, still represented continuity with the League of Nations era in its orientation toward addressing governmental or inter-governmental concerns. The problem of terrorism was conceptualized and responded to within the prism of inter-state relations. Acts carried out by non-state actors were addressed only to the extent that they were linked to states or had implications for interstate relations.

Similar to the League of Nations era, the post-war period international legal responses to terrorism were limited in number and scope. Normative initiatives specifically addressing terrorism were mainly concentrated at the United Nations, in particular at the General Assembly and its subsidiary bodies. The Security Council, which today spearheads counter-terrorism, was largely inactive on the topic during the period discussed in this chapter due to the Cold War impasse among its permanent members.<sup>1</sup>

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<sup>1</sup>By the United Nations' own account, the first Security Council resolution relating to the issue of international terrorism was adopted only in 1989. UN Security Council, Res. 635 of 9 June 1989. *See*



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This chapter explores two sets of international normative documents considered during this period. They constitute the bulk of what can be identified as a general<sup>2</sup> multilateral normative response to terrorism during the post war period. These documents relate to the work of the United Nations International Law Commission (ILC) on the Draft Code of Offences against the Peace and Security of Mankind and the work of United Nations General Assembly and are of varying legal normativity.<sup>3</sup> What follows is an analysis of these documents which combines a legal interpretation of normative texts and analysis of the discursive contexts those texts are situated in, and hence find their meaning from.

A ‘splinter’ movement that dealt with specific manifestations of terrorism as individual criminal acts was also developing under the auspices of specialised international institutions, parallel to the dominant discourse at the United Nations that conceptualised terrorism through the prism of inter-state relations. This splinter movement will be briefly introduced at the end of this chapter. This movement is a precursor of current international governance of terrorism, which will be discussed in the next chapter.

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website of the United Nations <http://www.un.org/terrorism/sc-res.shtml> (last accessed 6 June 2015). See also Ben Saul, *Defining Terrorism in International Law*, Oxford Monographs in International Law, Oxford University Press, 2006.

<sup>2</sup> ‘General’ here refers to substance, i.e. one that attempts to address the problem of terrorism as such, as opposed to specific acts of terrorism such as aircraft hijacking or hostage taking.

<sup>3</sup> There are varied theories on the legal value of resolutions of the United Nations General Assembly. The general consensus is that such documents, particularly those that are of ‘declarative’ nature (elaborating and declaring principles of international law found in the Charter of the organization or customary international law), hold a legal value as indicators of customary international law (specifically ‘*opinio juris*’) or as ‘soft law’. See Marko Divac Öberg, ‘The Legal Effects of Resolutions of the UN Security Council and General Assembly in the Jurisprudence of the ICJ’, 16(5) *European Journal of International Law*, 2005, 879–906; Rosalyn Higgins, *The Development of International Law Through Political Organs of the United Nations*, Oxford University Press, 1963; B. Sloan, ‘General Assembly Resolutions Revisited, (Forty Years After)’, 58 *British Yearbook of Int’l Law*, 1987, 39-150; From the perspective of international relations, see Kenneth W. Abbott, and Duncan Snidal, ‘Hard and Soft Law in International Governance’, 54(3) *International Organization*, 2000, 421–456. For a critique, see Prosper Weil, ‘Towards Relative Normativity in International Law?’, 77 *American Journal of Int’l Law*, 1983, 413.

### 3.2. The International Law Commission's Draft Code of Offences

In 1947, the General Assembly invited the ILC to prepare what it referred to as a “...draft code of offences against the peace and security of mankind”.<sup>4</sup> The proposed draft code (hereinafter ‘the Draft Code of Offences’) would contain general principles of international criminal law and a list of international crimes that relate to ‘peace and security of mankind’, which included ‘international terrorism’.

The ILC’s work proceeded in two phases, each consisting of several rounds of meetings: the first phase extended from 1949 until 1954, and the second phase from 1977 up to 1996.<sup>5</sup> During both phases, terrorism was conceptualized within the prism of inter-state peaceful relations and responded to by subjecting the activities of the state to scrutiny. This orientation toward the mutual scrutiny of states is specifically manifested in the provisions of the ILC’s Draft Code of Offences relating to (1) the definition of international terrorism, and (2) the scope and purpose of the Code in general.

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<sup>4</sup> UN General Assembly Resolution 177(II) of 21 November 1947 (no para.). Further on the draft code, *see* Antonio Cassese, ‘Affirmation of the Principles of International Law Recognized by the Charter of the Nuremberg Tribunal’, United Nations Audio-visual Library of International Law, available at [http://legal.un.org/avl/ha/ga\\_95-I/ga\\_95-I.html](http://legal.un.org/avl/ha/ga_95-I/ga_95-I.html) (last accessed 6 June 2015).

<sup>5</sup> After the ILC submitted its finalized report on the Draft Code in 1954, the General Assembly decided not to take action on the report until an agreement would be reached on one of the crimes listed in the Code (the crime of aggression). The process of developing a definition of aggression took several years, resulting in the suspension and later abandonment of the work on Code of Offences from the agenda of the General Assembly. The second phase of work on the Code of Offences started in 1977 after the General Assembly reached at a consensus on the definition of aggression. *See*, Official Records of the General Assembly, Thirty-Second Session, Annexes, agenda item 131, document A/32/470, quoted in the Work of the International Law Commission, 7th ed. Vol. I, United Nations Publication, p98 and UN General Assembly Resolution 33/97 of 16 December 1978. The agreed definition of aggression was adopted under General Assembly resolution 3314 (XXIX) of 14 December 1974. States and concerned international organizations were called upon by the General Assembly to ‘submit their comments and observations’ based on the 1954 report of the ILC. After the submission of comments and observations by some states and international organizations, the General Assembly invited the ILC to resume work on the Code of Offences with the mandate to ‘elaborate’ on the 1954 draft (Third Report) ‘taking duly into account the results achieved by the process of progressive development of international law.’ para. 1, General Assembly Resolution 36/106 of 10 December 1981.

### 3.2.1. The Definition of International Terrorism under the Draft Code of Offences

The various definitions of international terrorism developed during the course of the preparation of the Draft Code of Offences invariably targeted the activities of states against other states, explicitly excluding the acts of private actors that do not affect inter-state relations. In his First Report (1950), the Special Rapporteur assigned to the preparation of the Draft Code of Offences, Jean Spiropoulos, gave a short definition of the crime of international terrorism as “organized terroristic activities carried out in another state”.<sup>6</sup> He explained that such activity-centered definition shows that “[the] crime may be the result of ... state or private activity”;<sup>7</sup> hence all “organized terroristic activities” would be international crimes regardless of the involvement of states in the activity.<sup>8</sup> However, the majority members of the ILC held the view “...that some crimes, according to their definition, could only be committed by the authorities of the state while other crimes could be committed by any individual”.<sup>9</sup> This majority view held that the type of terrorism that constituted an offence against the peace and security of mankind was only that which was wholly or partially undertaken by a state; hence excluding similar acts planned and executed independently by non-state actors.

The Second Report (1951) of the Special Rapporteur, in line with the majority view during the previous session, adopted the following definition of the crime of international terrorism:

The undertaking, encouragement or toleration by the authorities of a state of organized activities intended or calculated to create a state of terror in the

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<sup>6</sup> First report of the Special Rapporteur on a Draft Code of Offences against the Peace and Security of Mankind, Report of the International Law Commission to the General Assembly, second session 1950, document A/1316, *Yearbook of the International Law Commission*, 1950, Vol. II, p263 (hereinafter ‘YBK of the ILC’).

<sup>7</sup> YBK of the ILC, 1950, p263.

<sup>8</sup> The other key criteria proposed by the Special Rapporteur was that such acts be ‘organized’ to fall under the Draft Code of Offences, i.e. isolated instances of terrorist acts by individuals or groups would not be regarded as international crimes. This proposal was rejected by a majority vote and the final formulation of the crime of international terrorism left the term ‘organized’ out. See, the Special Rapporteur’s first proposal, YBK of the ILC, 1950, Vol. II, p263.

<sup>9</sup> Second Report on a Draft Code of Offences, A/CN.4/44, p58, YBK of the ILC, 1950, p263.

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minds of particular persons or a group of persons or the general public in another state.<sup>10</sup>

By requiring the involvement of authorities of a state, this definition designated the state as the sole target of the international legal response to terrorism.<sup>11</sup> Similar formulations of the definition of international terrorism were adopted in subsequent rounds of meetings during this first phase of the work on the Draft Code of Offences. In the Third Report (1954) of the Special Rapporteur, for example, the following definition of international terrorism was adopted:

The undertaking or encouragement by the authorities of a state of terrorist activities in another State, or the toleration by the authorities of a state of organized activities calculated to carry out terrorist acts in another State.<sup>12</sup>

During the first reading of the second phase of work on the Draft Code of Offences (1990),<sup>13</sup> likewise, the ILC adopted a definition of terrorism that targeted state actors, with slight modification. The text reads as follows:

An individual who as an agent or representative of a State commits or orders the commission of any of the following acts:

— undertaking, organizing, assisting, financing, encouraging or tolerating acts against another State directed at persons or property and of such a nature

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<sup>10</sup> Second Report on a Draft Code of Offences, A/CN.4/44, in *YBK of the ILC*, 1951, p58

<sup>11</sup> The segment ‘...intended or calculated to create a state of terror in the minds of particular persons, or a group of persons or the general public’ was directly taken from the 1937 Terrorism Convention, see Second Report on a Draft Code of Offences, A/CN.4/44, in *YBK of the ILC* 1951, p59. Under the 1937 Terrorism Convention, this segment was used within a context that was mainly designed to protect the state by targeting the activities of non-state actors as discussed in the preceding chapter; but the ILC definition here reversed this by borrowing those words and transplanting them into a context that was solely designed to scrutinize the activities of states.

<sup>12</sup> Art. 5, Draft Code of Offences, in Third Report relating to a Draft Code of Offences Code of Offences against the Peace and Security of Mankind, A/CN.4/85, in *YBK of the ILC*, 1954, Vol. II, p150.

<sup>13</sup> At this point, the title was changed from ‘Draft Code of Offences’ to ‘Draft Code of Crimes’; but, for purposes of consistency, I will continue to use here the short title ‘Draft Code of Offences’. For summary of the procedural history, see Report of the International Law Commission on the work of its thirty-fifth session (3 May-22 July 1983), document A/38/10.

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as to create a state of terror in the minds of public figures, groups of persons or the general public shall, on conviction thereof, be sentenced...<sup>14</sup>

The ILC commentaries accompanying the reports of meetings during the second phase of the work on the Draft Code of Offences also consistently underscored that international terrorism "...can be committed only by the authorities of a State".<sup>15</sup> The commentary accompanying the 1990 Report of the Working Group specifically responded to suggestions for the inclusion of terrorism by private actors under the purview of the Draft Code of Offences. This report distinguished between state (sponsored) terrorism and terrorism by private actors, and committed the Draft Code of Offences exclusively to addressing the former. An excerpt from the commentary reads:

International terrorism is terrorism organized and carried out by a state against another state, whereas internal terrorism is organized and carried out in the territory of a state by nationals of that state.... *it has not seemed possible to consider terrorism by individuals as belonging to the category of crimes against peace, to the extent that such activities are not attributable to a state.*<sup>16</sup> (emphasis added)

The emphasized part of the quote might seem to suggest that the exclusion of the acts of private actors from the definition of terrorism was driven by the need to limit the operation of the Code within the realm of state responsibility, which requires the attribution of an act to a state. This is, however, not the case. The Draft Code of Offences was intended for the establishment of individual criminal responsibility, and not state responsibility. The very project was initiated with the specific aim of codifying the legal developments registered by the Nuremberg Tribunals, among which was the concept of individual criminal responsibility under international law.<sup>17</sup> The delimitation of the definition of terrorism under the

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<sup>14</sup> Report of the International Law Commission on the work of its forty-third session, 29 April - 19 July 1991, document A/46/10, P97 in *YBK of the ILC*, 1991, vol. II(2), p 97.

<sup>15</sup> *YBK of the ILC*, 1954, Vol II, p136.

<sup>16</sup> Report of the International Law Commission on the work of its forty-second session, 1 May - 20 July 1990, document A/45/10, p28.

<sup>17</sup> UN General Assembly Resolution 95(I) of 11 December 1946, and Resolution 177(II) of 21 November 1947. Also see, 35th plenary meeting, verbatim record of the General Assembly, p. 684, cited in, 'The Charter and Judgment of the Nürnberg Tribunal – History and Analysis', Memorandum

Draft Code of Offences to acts that are attributable to a state, while there was no need for the establishment of state responsibility, served to indicate the characterization of terrorism. Namely, international terrorism was conceived as a governmental act.

Suggestions were made by a few members of the ILC and member states of the UN to broaden the definition of the offence of international terrorism so as to cover instances of individual terrorism that are not attributable to a state.<sup>18</sup> The definition of international terrorism under the Draft Code of Offences had expanded during the second phase to cover the activities of ‘agents and representatives of a state’ in general, and not only ‘authorities of a state’ as was the case during the first phase of the work on the Code. The reference ‘agents and representatives of a state’ is more expansive than ‘authorities of a state’ as it included all governmental personnel regardless of the degree of authority attached to their office or function. The description ‘agents and representatives’ also covers actors that would be considered to represent the state under the rules of state responsibility, without necessarily being part of the governmental apparatus.<sup>19</sup>

This expansion of the scope of the definition of the offence of international terrorism, however, stopped short of including the acts of private actors not attributable to a state. The ILC retained its choice to exclusively use the notion of

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submitted to the International Law Commission by the Secretary General, 1949 (A/CN.4/5), p.11. *See also*, Antonio Cassese, above note 4.

<sup>18</sup> E.g. Algeria (Mr. Mahiou): ‘State terrorism must certainly be included as a crime against the peace and security of mankind, but the Commission must specify the exact conditions in which an individual act of terrorism, without being linked to a State, could be regarded as such a crime.’, Summary records of the meetings of the forty-seventh session, ILC, 2 May-21 July 1995, in *YBK of ILC*, 1995, Vol. I, Para 30. At several stages of the second phase of work on the Draft Code of Offences, the General Assembly invited states (and international organizations) to participate in the process by way of expressing their observations and comments on the work of the ILC. The General Assembly made such calls by resolutions 37/102 of 16 December 1982, 39/80 of 13 December 1984, 40/69 of 11 December 1985, 41/75 of 3 December 1986, 42/151 of 7 December 1987, 43/164 of 9 December 1988, 44/32 of 4 December 1989, 47/33 of 25 November 1992, and 48/31 of 9 December 1993.

<sup>19</sup> More on the rules on state responsibility, see ILC’s Draft Articles on Responsibility of States for Internationally Wrongful Acts (hereinafter ‘ARSIWA’), 2001 (A/56/10), in *YBK of the ILC*, 2001, vol. II, part two; James Crawford, ‘The ILC’s Articles on Responsibility of States for Internationally Wrongful Acts: a Retrospect’, 96 *American Journal of Int’l Law*, 2002, 874-890; James Crawford, Alain Pellet, and Simon Olleson, (eds.), *The Law of International Responsibility*, Oxford University Press, 2010.

international terrorism for cases wherein states are involved.<sup>20</sup> The majority of states that submitted comments and observations, similar to the majority members of the ILC, echoed the view that the Draft Code of Offences should address international terrorism only in so far as the later engages inter-state relationships.<sup>21</sup>

### 3.2.2. The Purpose and Scope of the Draft Code of Offences

The debate at the ILC concerning the purpose and scope of the Draft Code of Offences further illustrated the dominant post-war orientation of international normative responses to terrorism towards scrutinising the activities of states. The overall purpose of the Code reflected, as can be seen in the selection of the specific offences that it dealt with, a tendency to perceive issues within the prism of inter-state relations; peace meant inter-state peace, and terrorism meant an act that is carried out or sponsored by state against another state. Consequently, the scope of the Draft Code of Offences was limited to governing states' conduct towards each other. The debate was centred on how exactly, and not whether, to exclusively hold the state to account for international terrorism.

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<sup>20</sup> International terrorism by private individuals was addressed under the category of 'crimes against humanity', which required a higher threshold of gravity for consideration as an international crime, *see* Report of the International Law Commission on the work of its forty-second session, 1 May - 20 July 1990, Document A/45/10, p28.

<sup>21</sup> *See*, Comments and Observations Received Pursuant to General Assembly Resolution 36/106, document A/CN.4/358 and Add.1-4, in *YBK of the ILC*, 1982, vol. II(1); Comments and Observations Received Pursuant to General Assembly Resolution 37/102, document A/CN.4/369 and Add. 1 and 2, in *YBK of the ILC*, 1983, vol. II(1); Observations of Member States and Intergovernmental Organizations Received Pursuant to General Assembly Resolution 39/80, document A/CN.4/392 and Add.1 & 2, in *YBK of the ILC*, 1985, vol. II(1); Observations of Member States Received Pursuant to General Assembly Resolution 41/75, document A/CN.4/407 and Add.1 & 2, in *YBK of the ILC*, 1987, vol. II(1); Observations of Member States Received Pursuant to General Assembly Resolutions 43/164 and 44/32, document A/CN.4/429 and Add.1-4, in *YBK of the ILC*, 1990, vol. II(1); Comments and Observations Received from Governments, document A/CN.4/448 and Add.1, in *YBK of the ILC*, 1993, vol. II(1); and Observations of Governments on the Report of the Working Group on a Draft Statute for an International Criminal Court, document A/CN.4/458 and Add.1-8, in *YBK of the ILC*, 1994, vol. II(1).

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The full title of the Draft Code of Offences read “Draft Code of Offences against the Peace and Security of Mankind”.<sup>22</sup> When determining which activities would fall under this cosmopolitan label, however, the prism of inter-state relations was applied. The ILC interpreted the term ‘offences against the peace and security of mankind’ as only referring to “...*offences which contain a political element* and which endanger or disturb the maintenance of international peace and security”<sup>23</sup> (emphasis added). The reports of the ILC deliberations do not contain explicit elaboration of what the phrase “offences which contain a political element” meant. However, there was an apparent consensus that regarded ‘political element’ as the involvement of the state or inter-state relationships in a given matter, particularly when the situation would likely give rise to inter-state conflict.<sup>24</sup> This can be inferred from the nature of the twelve acts selected as constituting crimes under the Draft Code of Offences using the ‘political element’ criterion. These twelve acts were: aggression, the threat of aggression, preparation of war, fomenting civil strife or tolerating activities calculated to foment civil strife in another state, undertaking or encouraging terrorist activities in another state or toleration of activities calculated for terrorist acts in another state, violation of peace treaties, unlawful annexation of territory, intervention, genocide, crimes against humanity, and war crimes.<sup>25</sup>

The ILC added that “...such matters as piracy, traffic in dangerous drugs, traffic in women and children, slavery, counterfeiting currency, damage to submarine cables, etc., [should not] be considered as falling within the scope of the draft code.”<sup>26</sup> This

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<sup>22</sup> Yearbook of International Law Commission, 1954, Vol. 1, p132. ‘The interests of mankind as a whole, not only in time of war, had to be considered.’

<sup>23</sup> Second Report on a Draft Code of Offences against the Peace and Security of Mankind, Mr. J. Spiropoulos, Special Rapporteur, A/CN.4/44, found in *YBK of the ILC*, 1951, vol. II, p58.

<sup>24</sup> Note that the term ‘offences which contain a political element’ here has a different meaning than the term ‘political offence’ in discussions on extradition. For the later, see Christine Van den Wijngaert, *The Political Offence Exception to Extradition: The Delicate Problem of Balancing the Rights of the Individual and the International Public Order*, Kluwer, 1980.

<sup>25</sup> Selected during the first phase of the work on the Draft Code of Offences, see Report of the International Law Commission on its Second Session, 5 June to 29 July 1950, document A/CN.4/34, p 379ff.

<sup>26</sup> Second Report on a Draft Code of Offences against the Peace and Security of Mankind, Mr. J. Spiropoulos, Special Rapporteur, A/CN.4/44, found in *YBK of the ILC*, 1951, vol. II, p58. There were also views within the ILC that related crimes such as drug trafficking to political element, through concepts such as ‘narco-terrorism’. See, Switzerland’s observations, in Report of the International Law



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shows that the ‘political element’ that the twelve proposed crimes shared was their tendency to lead to conflict between states. As regards those among the twelve proposed crimes that do not necessarily extend beyond a single state, such as ‘crimes against humanity’, the Special Rapporteur remarked that such acts “...constitute...an international crime only if committed by the private individual at the instigation or with the toleration of the authorities of a State”.<sup>27</sup> Even when the ILC dropped the political element criterion later in the second phase of its work on the Draft Code of Offences,<sup>28</sup> the provisions relating to international terrorism continued to require the involvement of ‘agents and representatives of a state’ as discussed in the previous section.

The debate concerning the scope of the Draft Code of Offences was also premised on the idea that global problems such as terrorism were to be tackled by targeting the conduct of states. The individual international criminal responsibility of agents and representatives of a state, as one avenue towards such goal, was widely agreed upon. The main issue of contention, particularly in the proceedings during the 1980’s, was whether criminal responsibility for terrorism should also apply to the state as such. The prevailing opinion within the ILC, the Special Rapporteur noted in 1983, was that “the criminal responsibility of the state should be recognized and set forth in the Draft Code”.<sup>29</sup> The concept of state criminal responsibility was not adopted at the end, but what was important in this context is that the entire debate focussed on the different modes of controlling state conduct. The choice was confined to holding the ‘agents and representatives’ of a state responsible and extending such responsibility to the state

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Commission on the work of its forty-seventh session, 2 May -21 July 1995, document A/50/10, p29-30.

<sup>27</sup> Third Report relating to a Draft Code of Offences, Yearbook 1954, p150. Crimes against humanity is defined under art. 2(11) of the 1954 draft as ‘Inhuman acts such as murder, extermination, enslavement, deportation or persecutions, committed against any civilian population on social, political, racial, religious or cultural grounds by the authorities of a State or by private individuals acting at the instigation or with the toleration of such authorities.’

<sup>28</sup> The criterion was changed to the ‘special seriousness’ of the crimes, as measured ‘either by the extent of the calamity or by its horrific character, or by both at once’, *see* Report of the International Law Commission on the work of its thirty-fifth session (3 May-22 July 1983), document A/38/10, para. 46-48.

<sup>29</sup> Report of the International Law Commission on the work of its thirty-fifth session (3 May-22 July 1983), document A/38/10, paras. 54, 69(a), and 69(b)(ii).

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itself, rather than, as would be the case later in the 1990's, including the responsibility of private individuals acting on their own.<sup>30</sup>

This idea of tackling global problems by regulating state conduct was also manifest in the work of the ILC on the rules of state responsibility, which was taking place during the same period as the preparation of the Draft Code of Offences. The ILC was debating and formulating the notion of an 'international crime' and 'states' criminal responsibility' in its work on state responsibility.<sup>31</sup> The proposed definition of the notion of an international crime in that context, for the violation of which states were to be held criminally responsible, was as follows:

An internationally wrongful act which results from the *breach by a State* of an international obligation so essential for the protection of fundamental interests of the international community that its breach is recognized as a crime by that community as a whole constitutes an international crime<sup>32</sup> (emphasis added).

The notion of 'fundamental interests of the international community' was construed as consisting of interests relating to the 'maintenance of international peace and security', the 'safeguarding of the right to self-determination of peoples', the 'safeguarding of the human being', and the 'safeguarding and preservation of the human environment'.<sup>33</sup> The criteria that the perpetrator of such acts must be a state actor (see the phrase '*a breach by a state*' in the definition above), however, re-framed these cosmopolitan notions within the prism of inter-state relations.

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<sup>30</sup> See illustrative figure 1 below, page 42.

<sup>31</sup> See, the 'Analytical Guide' section of the website of the ILC for the procedural history of the work on state responsibility, at <http://www.un.org/law/ilc/>. See also, ILC's Draft Articles on Responsibility of States for Internationally Wrongful Acts (hereinafter 'ARSIWA'), 2001 (A/56/10), in *YBK of the ILC*, 2001, vol. II, part two.

<sup>32</sup> Art. 19(2), Eighth Report on State responsibility by Mr. Roberto Ago, Special Rapporteur, Document A/CN.4/318/Add.5-7 in *YBK of the ILC*, 1980, vol. II (1).

<sup>33</sup> Art. 19(3), Eighth Report on State responsibility by Mr. Roberto Ago, Special Rapporteur, Document A/CN.4/318/Add.5-7 in *YBK of the ILC*, 1980, vol. II (1), p 14.

The prism of inter-state relations that characterized the work of the ILC on terrorism discussed above similarly dominated discussions at the plenary sessions and other subsidiary committees of the United Nations General Assembly, discussed below.

### 3.3. United Nations General Assembly

Within the United Nations starting in the early 1970's, the debate on international normative responses to terrorism took place within the Sixth Committee (Legal Committee) of the General Assembly, a body composed of all the member states of the Assembly.<sup>34</sup> During the Sixth Committee's initial deliberations on the topic, three main draft resolutions were proposed for adoption by the General Assembly.<sup>35</sup> The first draft resolution was sponsored by the United States, the second by a group of fourteen states from different geographic regions with relatively higher representation of Western states, and the third by a group of sixteen non-aligned states with heavy African representation (the 'Non-Aligned draft'). The drafts submitted by the US and Western states resembled each other in significant ways and diverged from the Non-Aligned draft.<sup>36</sup> The divergence concerned fundamental issues that would determine the direction of international normative response to terrorism in subsequent years.

The Non-Aligned draft represented the position of the majority of UN member states and was ultimately adopted in 1972 as Resolution 3034 (XXVII) of the General Assembly.<sup>37</sup> Moreover, resolutions of the General Assembly adopted between 1972 and 1984 bearing the term 'international terrorism' in their titles<sup>38</sup> contained essentially

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<sup>34</sup> The General Assembly placed the topic of international terrorism on its agenda in 1972 and assigned the Sixth Committee to consider the matter. See, UN General Assembly Resolution 3034/XXVII of 18 December 1972.

<sup>35</sup> *Yearbook of the United Nations*, 1972, p643ff.

<sup>36</sup> The Western-draft was, despite being described by its sponsors as 'a result of serious and intensive effort' to strike a balance between the two other contrasting drafts, essentially a softened version of the US draft as it resembles the later in the security-oriented overall legal and policy direction it laid out.

<sup>37</sup> Approved by the Sixth Committee by vote of 76 approval, 34 opposition, and 16 abstentions, and adopted by the General Assembly as resolution 3034(XXVII) of 18 December 1972 by vote of 76 approval, 35 opposition, and 17 abstentions.

<sup>38</sup> This study covers the General Assembly resolutions on terrorism adopted between 1972 and 1984. These are Resolution 31/102 of 15 December 1976, Resolution 32/147 of 16 December 1977, Resolution 34/145 of 17 December 1979, Resolution 36/109 of 10 December 1981, Resolution 38/130 of 19 December 1983, and Resolution 39/159 of 17 December 1984. These are resolutions

similar content to that of Resolution 3034 (XXVII). Resolution 3034 (XXVII) and subsequent resolutions reflected an inter-state prism similar to that reflected in the work of the ILC, discussed above. Two specific trends in this regard stand out: the linking of state conduct with the problem of terrorism and embedment of the issue within the discourse on peaceful inter-state relations. The perceived implication of states in the creation of the problem of terrorism led to reluctance to cooperate internationally on counter-terrorism, while the framing of the issue as a question of peaceful inter-state relations meant that counter-terrorism dealt with the conduct of states toward each other. Both trends indicate a conceptualisation of international normative response to terrorism as an exercise in scrutinising the state. The following sections elaborate these two trends.

### 3.3.1. Linking Terrorism with State Conduct

Resolution 3034 (XXVII), which basically replicated the Non-Aligned draft, and subsequent General Assembly resolutions on international terrorism placed emphasis on underlying causes of terrorism<sup>39</sup> and construed counter-terrorism in terms of measures dealing with state conduct. African, Arab, Asian and socialist/communist states from other regions that supported Resolution 3034 (XXVII) stressed that an important measure toward addressing terrorism should be not criminal justice but the resolution of political issues involving states, such as self-determination.<sup>40</sup>

Resolution 3034 (XXVII) and subsequent resolutions specifically mentioned the international acts of states (the establishment of ‘colonial’ and ‘alien’ forms of governance beyond their borders) and the internal policies of states (the existence of ‘racist’ regimes) as the chief underlying cause of terrorism.<sup>41</sup> The concrete cases of Portuguese colonial rule in parts of Africa, Israeli occupation and behaviour in Palestinian territories, and the Apartheid system in South Africa were mentioned as

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that explicitly deal with terrorism, i.e. bearing the term ‘terrorism’ in their titles. This list is consistent with the United Nations’ listing of General Assembly’s resolutions on terrorism. See, website of the United Nations, <http://www.un.org/en/terrorism/resolutions.shtml> (last accessed 6 June 2015).

<sup>39</sup> The phrase ‘underlying causes’ is no longer used in current international governance discourse on terrorism. It is now commonly replaced by the phrase ‘conditions conducive to terrorism’.

<sup>40</sup> Para. 2, the Non-Aligned draft resolution.

<sup>41</sup> Para. 3, UN General Assembly Resolution 3034 (XXVII).

examples in the discussions leading up to the adoption of Resolution 3034 (XXVII).<sup>42</sup> Eradicating terrorism required, the majority of states in this debate argued, the eradication of such policies and behaviour of states.

Flowing from the conceptualisation of the state as being implicated in the problem of terrorism itself, the call for international cooperation in counter-terrorism was met with reluctance at the General Assembly. While the US and the Western drafts emphasized the need for immediate inter-state cooperation and a ruthless suppression of terrorism, the Non-Aligned draft (which became Resolution 3034 (XXVII)) focused on the connection between terrorism and state conduct and rejected unconditional inter-state cooperation. Resolution 3034 (XXVII) called for a further study into the underlying causes of terrorism and the appropriate responses to terrorism, hence postponing specific and immediate counter-terrorism cooperation as was proposed by the US and Western drafts.<sup>43</sup> The resolutions called for the taking of counter-terrorism measures at the national level but did not call for immediate international cooperation in doing so. The resolution only “invite[d] states to consider the subject-matter and submit observations” for consideration by an Ad Hoc committee that would in turn submit “recommendations for *possible* cooperation for the speedy elimination of the problem”<sup>44</sup> (emphasis added).

The rejection of immediate international counter-terrorism cooperation in Resolution 3034 (XXVII) followed from the premise that linked the state with the problem of terrorism. It suggests that a state whose conduct provokes a terrorist response cannot legitimately seek counter-terrorism cooperation from other states. According to this view, for example, Portugal and South Africa’s request for information on and cooperation against African freedom fighters, or Israel’s similar request concerning the Palestinian resistance, should not be automatically granted by other states. States should not be required to automatically join hands against terrorism, but should rather

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<sup>42</sup> USSR, Algeria, Syria, China, Cuba, Senegal, see *Yearbook of the United Nations*, 1972.

<sup>43</sup> Para. 7-10, the Non-Aligned draft resolution. Some states rejected the US call for immediate suppressive measures on terrorism as ‘hasty political decision’ in the shadows of ‘aroused emotions’ after the attack on the Israeli team during the Summer Olympics held in Munich (also known as the ‘Munich massacre’). E.g. Algeria, *Yearbook of the United Nations*, 1972, p642.

<sup>44</sup> Para. 7 and 10, the Non-Aligned draft resolution.

engage in mutual scrutiny to the extent of their respective responsibilities in the creation of the problem itself.

### 3.3.3. Embedment in the Discourse of Peaceful Inter-State Relations

The early General Assembly resolutions on terrorism were embedded within the discourse on the maintenance of peace in international relations. This was visible from the resolutions' intertextual domain, i.e. the web of other texts in which they were embedded. The preambles of the resolutions adopted between 1972 and 1984 drew links with other General Assembly resolutions and international legal instruments. The latter two sets of documents dealt with the conduct of inter-state relations, particularly concerning the use of force, interventions that fall below the threshold of 'armed attack' in the sense of the UN Charter,<sup>45</sup> and international peace and security in general.

The following documents were mentioned frequently in the preambles of the General Assembly resolutions on terrorism: the Declaration on Principles of International Law concerning Friendly Relations and Cooperation among States in accordance with the Charter of the United Nations,<sup>46</sup> the Declaration on the Strengthening of International Security,<sup>47</sup> and the Definition of Aggression.<sup>48</sup> These documents directly and exclusively deal with the conduct of states towards each other, and they commonly deal with the prevention and regulation of violence in international relations.

The Declaration on Friendly Relations elaborates the United Nations Charter's provisions on 'peaceful coexistence of states'<sup>49</sup> by expounding the principles of, *inter alia*, the prohibition of the threat or use of force, the duty to settle disputes peacefully, and the duty not to intervene in the internal affairs of other states.<sup>50</sup> In elaborating the principle of the prohibition of the threat or use of force by states, the Declaration

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<sup>45</sup> Art. 51, UN Charter. For exposition, see Christine Gray, *International Law and the Use of Force*, 3<sup>rd</sup> ed., Oxford University Press, 2008; Bruno Simma, *The Charter of the United Nations: A Commentary*, 2<sup>nd</sup> ed., Oxford University Press, 2002.

<sup>46</sup> UN General Assembly Resolution 2625(XXV), annex.

<sup>47</sup> UN General Assembly Resolution 2734(XXV).

<sup>48</sup> UN General Assembly Resolution 3314(XXIX), annex.

<sup>49</sup> See, Procedural History of the Declaration on Friendly Relations, United Nations Audio-visual Library of International Law, available online at <http://legal.un.org/avl/ha/mdpsid/mdpsid.html> (last accessed 6 June 2015).

<sup>50</sup> Preamble, UN General Assembly Resolution 2625(XXV), annex.

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specifically prohibits states from “organizing, instigating, assisting or participating in acts of civil strife or *terrorist acts* in another state....”<sup>51</sup> In connection with the principle of non-intervention, the Declaration stipulates that states are prohibited from “organizing, assisting, fomenting, financing, inciting or tolerating subversive, *terrorist* or armed activities directed towards the violent overthrow of the regime of another state....”<sup>52</sup> The Declaration on the Strengthening of International Security and the Declaration on the Definition of Aggression both address inter-state conflict: the former specifically promotes processes of ‘relaxation of tensions’, the preservation of self-determination, disarmament and an end to the arms-race; the latter contained a stricter and legal pronouncement against aggressive violence in inter-state relations.

This intertextual domain further supports the argument that the discussion on international terrorism was framed as a matter of peaceful inter-state relations, founded both on the victimization and culpability of the state, and that terrorism was a governmental concern, and countering terrorism primarily required addressing the conduct of states towards each other. This orientation was held on to by the General Assembly in subsequent years, up to 1984. In particular, resolutions adopted after 1977 contained paragraphs urging states to “refrain from organizing, instigating, assisting or participating in...terrorist acts”<sup>53</sup> and called upon the Security Council to take action on the underlying (political) causes of terrorism, including forcible measures against states in accordance with Chapter VII of the UN Charter.<sup>54</sup> Addressing the problem of terrorism through measures that scrutinize state conduct was promoted at the General Assembly even further with the adoption of Resolution 39/159 in 1984, which was entitled “the inadmissibility of the policy of state-terrorism and any actions by states aimed at undermining the socio-political system in other sovereign states”. This resolution described ‘state terrorism’ as “policies and practices of terrorism in relations between states as a method of dealing with other states and peoples”.<sup>55</sup> This was the

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<sup>51</sup> Para. 1(9), UN General Assembly Resolution 2625(XXV), annex.

<sup>52</sup> Para. 3(2), UN General Assembly Resolution 2625(XXV), annex.

<sup>53</sup> Para. 7, UN General Assembly Resolution 34/145 of 17 December 1979; para. 4 UN GA Resolution 38/130 of 19 December 1983.

<sup>54</sup> Para. 13, UN General Assembly Resolution 34/145 of 17 December 1979.

<sup>55</sup> Para. 1, UN General Assembly Resolution 39/159 (1984). The resolution further condemns various actions, ranging from military occupations to interference in people’s right to pursue ‘their political, economic, social and cultural development’, stretching the utility of the notion of ‘state terrorism’ to cover a wide range of state policies and practices.

only resolution the General Assembly adopted that year concerning terrorism, and in that sense epitomized the climax of the state-scrutiny orientation in international governance of terrorism.

### 3.4. The Move Away from Mutual-Scrutiny

General Assembly's resolution 39/159 (1984) on 'state terrorism' represented both the climax and the end of the era when the international legal discourse on terrorism revolved around the scrutiny of state conduct. Both in the General Assembly and the ILC, the lens of peaceful international relations through which the issue of terrorism was conceptualised, and responded-to, began to lose ground since the middle of the 1980's.<sup>56</sup> In subsequent General Assembly resolutions on terrorism the state was substituted by private actors as the primary targets of control and scrutiny. Similarly, the definition of international terrorism in the Draft Code of Offences that was centred on the maintenance of peaceful international relations began to lose support from an increasing number of states that sought the Code to also cover activities of private actors.<sup>57</sup> (See illustrative figure 1 below)

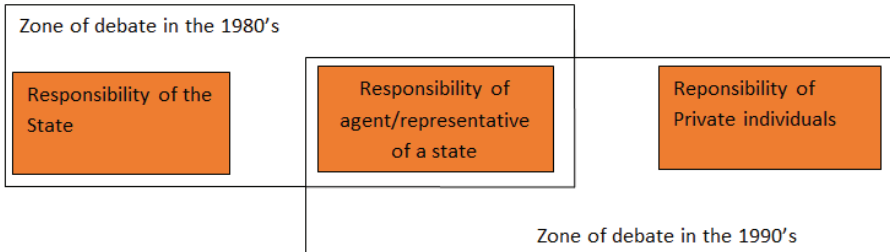
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<sup>56</sup> Some authors distinctly mark the year 1985 as the turning point in this regard. See, e.g., Peter Romanuk, *Multilateral Counter-Terrorism: the Global Politics of Cooperation and Contestation*, Global Institutions Series, Routledge, London/New York, 2010.

<sup>57</sup> E.g., the Netherlands argued that "the concept of 'international terrorism'...could give rise to almost insurmountable problems of definition and interpretation." The United States added, "in fact, many terrorist acts are committed by individuals acting in their private capacity. The United States cannot accept a definition of terrorism that excludes acts committed by persons who are either not acting as agents of a State, or whose affiliation with a State cannot be definitively proved in a court of law". The United States went further in calling the abolition of the entire project of the Draft Code. Comments and observations received from Governments, document A/CN.4/448 and Add.1 in *YBK of the ILC*, 1993, vol. II(1), pp 80-92, 105; Observations of Governments on the report of the Working Group on a draft statute for an international criminal court, document A/CN.4/458 and Add.1-8, in *YBK of the ILC*, 1994, vol. II(1), pp80-92. In response to these criticisms, the ILC removed the item 'international terrorism' from the Code in 1995, *see*, Thirteenth Report on the Draft Code of Crimes Against the Peace and Security of Mankind, by Mr. Doudou Thiam, Special Rapporteur, in *YBK of the ILC*, 1995, vol. II(1).



Figure 1



International governance of terrorism in the form of controlling the activities of private actors, however, has been slowly developing since the 1960's, parallel and as a reaction to the mainstream approach that was rooted in inter-state relations. This splinter development has been taking place within the frameworks of specialized international institutions such as the International Civil Aviation Organization (ICAO) and the International Maritime Organization (IMO). Beginning in the mid-1980s, this approach became mainstream also at the United Nations-based broader multilateral governance of terrorism.

States that sought immediate international cooperation and suppressive counterterrorism against private actors, such as those behind the US and the Western draft proposals, pushed for the development of international conventions that deal with specific acts of terrorism. In doing so, these conventions, also referred to as Sectoral Conventions, represented the side-stepping of the debate on the broader international normative response to terrorism. The Sectoral Conventions address five major forms of terrorist acts and associated offences:<sup>58</sup> attacks on civil aviation

<sup>58</sup> The UNODC uses a resembling categorization: 'Offences related to civil aviation', 'Offences based on the status of the victim', 'Offences related to dangerous materials', 'Offences related to vessels and fixed platforms', 'Offences related to the financing of terrorism'. United Nations Office on Drugs and Crime, 'Legislative Guide to the Universal Legal regime Against Terrorism', New York, 2008. Available at [https://www.unodc.org/pdf/crime/terrorism/explanatory\\_english2.pdf](https://www.unodc.org/pdf/crime/terrorism/explanatory_english2.pdf) (last accessed 6 June 2015). The categories use here are slightly broader than those of the UNODC.

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(covering aircrafts, airports and associated persons),<sup>59</sup> attacks on internationally protected persons,<sup>60</sup> attacks on maritime activity and facilities,<sup>61</sup> rules relating to weapons (criminalization of explosive attacks and the control of weapons),<sup>62</sup> and rules against terrorist financing.<sup>63</sup>

The conventions designate specific acts of terrorism as international offences, impose the ‘extradite or prosecute’ obligation (*aut dedere aut judicare*) upon state parties, specify jurisdictional stipulations for the implementation of the ‘extradite or prosecute’ obligation,<sup>64</sup> and provide for technical and legal cooperation in the prevention and/or prosecution of the offenses so established.<sup>65</sup> State parties to most of the conventions

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<sup>59</sup> Consisting of the 1963 Aircraft Convention; 1970 Unlawful Seizure Convention; 1971 Civil Aviation Convention; 1988 Airport Protocol (extends and supplements the Civil Aviation Convention); 2010 New Civil Aviation Convention; 2010 Protocol to the Unlawful Seizure Convention. For detailed legal commentary see, Abraham Abramovsky, ‘Multilateral Conventions for the Suppression of Unlawful Seizure and Interference with Aircraft Part I: The Hague Convention’, 13 *Columbia Journal of Transnational Law* (1974), 401; Sami Shubber, ‘Aircraft Hijacking Under the Hague Convention 1970- A New Regime?’, 22 *International and Comparative Law Quarterly* (1973), 687; Javid Rehman, *Islamic State Practices, International Law and the Threat from Terrorism*, Hart Publishing, Portland: 2005, 130, footnote 1; S.K Agrawala, *Aircraft Hijacking and International Law*, N.M. Tripathi, 1973.

<sup>60</sup> Consisting of the 1973 Diplomatic Agents Convention and the 1979 Hostages Taking Convention. For general commentary, see Joseph J. Lambert, *Terrorism and Hostages in International Law: A Commentary on the Hostages Convention*, Grotius Publications, Cambridge, 1990. The 1994 UN Personnel Convention is not expressly recognized by concerned UN bodies as constituting part of the international anti-terrorism law. It is, nevertheless, incorporated as such in major academic works that compile international counterterrorism instruments. See, e.g., Ben Saul, *Terrorism, Documents in International Law*, Portland, Hart (2012).

<sup>61</sup> Consisting of the 1988 Maritime Convention, the 1988 Fixed Platform Protocol, the 2005 Protocol to the Fixed Platform Protocol, and the 2005 Protocol to the Maritime Convention.

<sup>62</sup> Consisting of the 1980 Nuclear Materials Convention, the 1991 Plastic Explosives Convention, the 1997 Terrorist Bombing Convention, and the 2005 Nuclear Terrorism Convention.

<sup>63</sup> The 1999 Terrorist Financing Convention.

<sup>64</sup> The conventions establish jurisdictions based on nationality, territoriality, and interests, *see*, e.g., art. 6, Maritime Convention of 1988; art. 5, Montreal Convention 1971. Nationality based jurisdiction is established when the offender or the victim of the offence is a national of the concerned state party to the convention. Territorial jurisdiction is established when the offence is committed within the territory of the concerned state party. A state party also establishes territorial jurisdiction when an offence is committed against or on board aircraft or ships flying the flag of the State. There is a possibility for a state party to establish jurisdiction when the offence committed targets or jeopardized the state’s interests. This is the case, for example, when the offence ‘is committed in an attempt to compel the state to do or abstain from doing any act’ (art. 6(2)(c), Maritime Convention 1992).

<sup>65</sup> Further on the basic structure and principles contained in the international counterterrorism instruments, *see* Ana M Salinas de Friás, Katja LH Samuel, and Nigel D White (eds), *Counter-Terrorism: International Law and Practice*, Oxford University Press, Oxford, 2012.

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are obliged to make the offences (severely) punishable within their domestic legal system.<sup>66</sup> This approach of individual (criminal) responsibility to terrorism is centred on the policing role of the state.<sup>67</sup> In this sense, the conventions were precursors to the more fundamental shift away from the post-war approach in international governance of terrorism that was anchored on the scrutiny of state conduct.

The Sectoral Conventions are discussed extensively in legal literature<sup>68</sup> and considered the *corpus juris* ('body of law') of current international governance of terrorism. The conventions are not discussed in detail here, but are rather presented as constituting the skeleton, and not the entire body, of the current international normative framework on terrorism. By using the traditional normative source (treaty) with respect to several key issue-areas of counter-terrorism, the Sectoral Conventions provided a framework around which a complex normative labyrinth later developed, extending to date.

This new system that developed on the basis of the skeleton of the Sectoral Conventions is underpinned by a shift in the conceptualization of the problem of terrorism and responses thereto, in comparison to both the post-war and the League of Nations periods. Terrorism is now conceptualised not as a threat to governmental interests or as a question of peaceful inter-state relations, but as a global public problem. This view frames terrorism as a self-standing, complex problem to be grappled with, instead of a one-dimensional threat (subversion of governmental power) or a dispute involving distinct parties (a question of inter-state peace). Consequently, the discourse of terrorism has become intertwined with the discourse of cosmopolitan notions such as human rights and public security. The next chapter details this conceptual transformation.

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<sup>66</sup> E.g. art. 2 of the 1970 Unlawful Seizure Convention; Art. 3 of the 1971 Montreal Convention; art. 6 of the 2005 Nuclear Terrorism Convention.

<sup>67</sup> 66<sup>th</sup> Session of the Sixth Committee of the general Assembly, agenda item 109, Oral report of the chairman of the Working Group to continue to carry out the mandate of the Ad Hoc Committee established by General Assembly resolution 51/210, November 2011.

<sup>68</sup> E.g., Ana M Salinas de Friás *et al.*, above note 65; Helen Duffy, *The 'War on Terror' and the Framework of International Law*, Cambridge University Press, 2005. Also, see above, Chapter One, notes 14-17.

## CURRENT INTERNATIONAL COUNTER-TERRORISM AS COSMOPOLITAN GOVERNANCE

### 4.1. Introduction

This chapter posits that the current international normative and institutional framework concerning terrorism, which developed on the skeletal framework of the Sectoral Conventions, is premised on a reconceptualization of the problem of terrorism and the response thereto. The previous conceptions of terrorism as a one dimensional issue of subversive threat to governmental power (in the League of Nations period) or as a question of peaceful inter-state relations (in the post-war period) are replaced with a cosmopolitan conception of the problem.<sup>1</sup> Terrorism is now conceived as global public problem that affects individuals and groups, and one that does so similarly across global society.

The international normative response to terrorism is, similarly, no longer understood as a matter of criminal justice collaboration between sovereigns (League of Nations period) or as a question of disciplining the state and ensuring peaceful inter-state relations (post-war period). The task is now perceived as neither limited to criminal justice only nor anchored on addressing inter-state relations, but rather as involving collaborative regulatory response. Terrorism is understood as a problem that needs to be tackled through the collaborative efforts of all sectors of global society; and hence counter-terrorism as the common good. Consequently, current international governance of terrorism involves detailed, hands-on regulatory measures addressing the activities of various private and governmental actors and thereby repositions the

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<sup>1</sup> On cosmopolitanism in global governance, see David Held, 'Restructuring Global Governance: Cosmopolitanism, Democracy and the Global Order', 37 (3) *Millennium: Journal of International Studies*, 2009, 535-547; Daniele Archibugi, *The Global Commonwealth of Citizens: Toward Cosmopolitan Democracy*, Princeton University Press, 2009.

state as the protector of the common good and engages and affects non-state actors in new ways.<sup>2</sup>

This chapter elaborates these two key traits – terrorism as a global public problem and international governance of terrorism as collaborative regulatory exercise – by surveying an array of current international normative instruments and policy initiatives on terrorism. Two implications that arise from this reconceptualization of terrorism and its response are further highlighted. These are the powerful utility of the cosmopolitan conception of terrorism (i.e. threat to the common good) in buttressing a discourse of global solidarity in counter-terrorism and the repositioning of the state as a protector of the common good.

## 4.2. Terrorism as a Global Public Problem

Current international governance of terrorism characterises terrorism as a public security issue, a concern affecting members of the public and one that is not limited to the integrity of governmental authority or international relations. This reconceptualization of terrorism as a public<sup>3</sup> problem brought private individuals and groups, which are collectively referred to as ‘the public’, to the centre of the discourse on terrorism, alongside and even more prominently than governmental interests and inter-state relationships. Terrorism has become the story of the agency and victimhood of non-state actors, shared globally. As the following sections elaborate further,

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<sup>2</sup> Benedict Kingsbury *et al* identify a similar trend, but at a broader level, of the emergence of international bureaucracy that regulates mundane aspects of life. *See*, Benedict Kingsbury, Nico Krisch and Richard B. Stewart, ‘The Emergence of Global Administrative Law’, 68 (3) *Law and Contemporary Problems*, 2005, 15-62. This trend is a later reflection of a comparable metamorphosis at the domestic level, i.e. the rise of ‘the administrative state’, which began around the middle of the 20<sup>th</sup> century. *See*, Gary Lawson, ‘The Rise and Rise of the Administrative State’, 107 (6) *Harvard Law Review*, 1994.

<sup>3</sup> The notion of the ‘public’ and the analogy of international law with (domestic) public law has recently gained prominence in international law scholarship, particularly in Europe. *See*, e.g., Ellen Hey, *Teaching International Law: State-Consent as Consent to a Process of Normative Development and Ensuing Problems*, Martinus Nijhoff, 2003; Armin von Bogdandy, Philipp Dann, and Matthias Goldmann, ‘Developing the Publicness of Public International Law: Towards a Legal Framework for Global Governance Activities’, in Armin von Bogdandy, Rüdiger Wolfrum, Jochen von Bernstorff, Philipp Dann, and Matthias Goldmann, eds., *The Exercise of Public Authority by International Institutions*, Springer, 2010, 3–32; Benedict Kingsbury, ‘The Concept of ‘Law’ in Global Administrative Law’, 20(1) *European Journal of International Law*, 2009, 23–57.

international counter-terrorism norms primarily seek to tackle the activities of individuals and groups as perpetrators of terrorism. Individual victimhood resulting from terrorism has also become the central concern that animates international counter-terrorism at multilateral forums, such as the United Nations.

#### 4.2.1. The Individual as Perpetrator of Terrorism

As mentioned in the previous chapter, all of the Sectoral Conventions on terrorism exclusively target the activities of individuals and groups. Some of those conventions target the activities of legal entities as well.<sup>4</sup> These conventions designate specific acts of terrorism as international offences to which individual criminal responsibility is attached. The conventions require states to make the offences (severely) punishable within their domestic legal system<sup>5</sup> and ‘extradite or prosecute’ individuals implicated in those offences (*aut dedere aut judicare* principle). Several of these conventions explicitly exclude the core governmental activities – mostly military, police and customs – from their purview.<sup>6</sup> States officials could be held responsible as individuals for acts falling under the Sectoral Conventions. But such individual responsibility does not hinge on state responsibility, which the conventions do not touch upon. The establishment of individual responsibility is, in the words of the former chairman of the General Assembly committee tasked with the drafting of counter-terrorism conventions, the approach ‘consistently followed’ with respect to all the Sectoral Conventions.<sup>7</sup> The exclusive focus of the conventions on individual responsibility entails that inter-state relationships have been removed from the picture. States could engage in acts of terrorism through their agents, but the governmental or international relations linkage

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<sup>4</sup> E.g. The 1999 Terrorism Financing Convention.

<sup>5</sup> E.g. art. 2 of the 1970 Unlawful Seizure Convention; Art. 3 of the 1971 Montreal Convention; art. 6 of the 2005 Nuclear Terrorism Convention.

<sup>6</sup> A common provision found in these conventions states that the terms of the convention are not applicable to the military, customs and police activities of states parties. E.g., art. 3(2) of the 1970 Hague Convention for the Suppression of Unlawful seizure of Aircraft; art. 4(1) of the 1971 Montreal Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation; art. 5 of the 2010 New Civil Aviation Convention, art. 2(1) of the 1988 Maritime Convention, art. 5/4/b of the 2005 Protocol to the 1980 Nuclear Materials Convention, art. 19(2) of the 1997 Terrorist Bombing Convention, and art. III(2) of the 1991 Plastic Explosives Convention.

<sup>7</sup> 66<sup>th</sup> Session of the Sixth Committee of the general Assembly, agenda item 109, Oral report of the chairman of the Working Group to continue to carry out the mandate of the Ad Hoc Committee established by General Assembly resolution 51/210, November 2011.

is not the focus of the conventions. The conventions are rather anchored on the policing role of states, and the bulk of their provisions concern legal-practical issues such as jurisdictional stipulations for the implementation of the ‘extradite or prosecute’ obligation,<sup>8</sup> and technical and legal cooperation between states.<sup>9</sup>

Another illustration of the conception of terrorism as an issue of individual criminality is the fact that it is addressed as part of the broader issue of transnational crimes. Terrorism is treated in the same vein as organised transnational crimes, such as drug and human trafficking, which are dealt with as the cross border activities of individuals and groups. The General Assembly resolutions on terrorism contain statements that refer to “the growing and dangerous links between terrorist groups, drug traffickers and their paramilitary gangs, which have resorted to all types of violence....”<sup>10</sup> Resolutions on the agenda item of transnational crimes, likewise, establish the link between terrorism and trans-national crimes such as human trafficking and illicit manufacturing and trafficking of arms.<sup>11</sup> Recent work by the Security Council and other non-UN entities such as the Financial Action Task Force (FATF) similarly address terrorism, particularly terrorism financing, together with other transnational crime of money laundering.<sup>12</sup>

These developments, excluding the state as perpetrator and treating terrorism as a transnational organised crime, result in a re-conceptualisation of terrorism. Namely,

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<sup>8</sup> The conventions establish jurisdictions based on nationality, territoriality, and interests, *see*, e.g., art. 6, Maritime Convention of 1988; art. 5, Montreal Convention 1971. Nationality based jurisdiction is established when the offender or the victim of the offence is a national of the concerned state party to the convention. Territorial jurisdiction is established when the offence is committed within the territory of the concerned state party. A state party also establishes territorial jurisdiction when an offence is committed against or on board aircraft or ships flying the flag of the State. There is a possibility for a state party to establish jurisdiction when the offence committed targets or jeopardized the state’s interests. This is the case, for example, when the offence ‘is committed in an attempt to compel the state to do or abstain from doing any act’ (art. 6(2)(c), Maritime Convention 1992).

<sup>9</sup> Further on the basic structure and principles contained in the international counterterrorism instruments, *see* Ana M Salinas de Friás *et al.*, above chapter 3, note 65.

<sup>10</sup> E.g. UN General Assembly Resolution 44/29 (1989), para. 9; GA Res 46/51 (1991).

<sup>11</sup> UN GA Resolution 53/111, 9 December 1998; Resolution 55/25, 15 November 2000.

<sup>12</sup> E.g. The Security Council’s partnership with INTERPOL, including the establishment of an INTERPOL-United Nations Special Notice for terrorism financing, *see* Security Council Resolution 1699 of 8 August 2006; *See also*, website of FATF, [www.fatf-gafi.org](http://www.fatf-gafi.org). Both will be discussed further under section 4.3 below.

terrorism is regarded both as a public affair, as opposed to a governmental or inter-governmental one, and as a global phenomenon, hence a cosmopolitan concern.

The primary international legal instrument on transnational crimes, the 2000 UN Convention on Transnational Organised Crime, also deals with terrorism along with several other transnational crimes. The convention calls states “to recognise the links between transnational organised criminal activities and acts of terrorism” and to address both through the convention.<sup>13</sup> In adopting the convention, the UN General Assembly has also underscored that terrorism and other transnational crimes exhibit a “growing link”.<sup>14</sup> Equally telling in this regard is the fact that international counter-crimes bodies such as the United Nations Office on Drugs and Crime (UNODC) and INTERPOL are predominant actors in counter-terrorism as well. The treatment of terrorism as a (transnational) criminal activity detaches it from the prism of inter-state relationships that dominated the debate. The problem is now characterised as individual criminality, affecting all states similarly.

The counterpart to individual criminality that brings individuals and groups to the centre of the debate, and hence shapes counter-terrorism as a cosmopolitan enterprise, is the notion of individual victimhood. The victimization of individual human beings, and not governmental interests or inter-state relationships, is also at the centre of international governance of terrorism. This is reflected in international counter-terrorism law and policy initiatives undertaken both with and without a human rights-based approach, as elaborated below.

#### **4.2.2. The Individual as the Victim of Terrorism: Human Rights-based Approach**

The intertwinement of the discourse of human rights and terrorism is another reflection of the cosmopolitan turn in international governance of terrorism. Human rights has become the starting point both for articulating the essence of terrorism by negation. Terrorism is spoken of as a violation of human rights. The Vienna Declaration and Programme of Action that came out of the 1993 World Conference

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<sup>13</sup> United Nations General Assembly Resolution 55/25 of 15 November 2000, para 6.

<sup>14</sup> *Ibid*, Preamble.



on Human Rights labelled terrorism as a human rights violation and “a serious obstacle to the enjoyment of human rights”.<sup>15</sup> Consequently, the General Assembly adopted a distinct agenda item titled “human rights and terrorism”<sup>16</sup> starting in 1994, alongside the existing agenda item on “measures to prevent international terrorism”. Resolutions adopted under the item “human rights and terrorism” deal with terrorism as a violation of human rights, particularly the rights to “life, liberty, and security”<sup>17</sup> and “right of people to live in freedom from fear”.<sup>18</sup> These resolutions also demand the taking of counter-terrorism measures as a matter of state obligation arising from human rights norms.

Human rights are invoked not only in the general defence of counter-terrorism, but also in emerging directions that international counter-terrorism is developing into. Pertinent examples are the international legal initiatives for a rights-based financing compensation to victims of terrorism.

#### 4.2.2.1. Financial Compensation to Victims of Terrorism

Financial compensation to victims of terrorism is increasingly being asserted as a victims’ right.<sup>19</sup> The UN Special Rapporteur on Human Rights in Counter-terrorism,

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<sup>15</sup> Para. 17 and 30, Vienna Declaration and Programme of Action, General Assembly document A/CONF.157/23, 12 July 1993.

<sup>16</sup> UN General Assembly Resolution 48/122, 14 February 1994; UN General Assembly document A/48/632/Add. 2, p 3.

<sup>17</sup> See, Preambles of UN General Assembly Resolution 48/122, 14 February 1994; Resolution 49/185, 6 March 1995; Resolution 50/186, 6 March 1996; para 2. Resolution 52/133, 27 February 1998; Resolution 54/164, 24 February 2000; Resolution 56/160, 13 February 2002; preamble and para. 1, Resolution 58/174, 22 December 2003. Para. 11 of this resolution takes a step further in stating ‘every person... has a *right to protection* from terrorism and terrorist acts’ (emphasis added); Preamble and para. 1 and 2, Resolution 59/195, 22 March 2005.)

<sup>18</sup> Preambles of UN General Assembly Resolution 48/122, 14 February 1994; Resolution 49/185, 6 March 1995; Resolution 50/186, 6 March 1996; para 2. Resolution 52/133, 27 February 1998; Resolution 54/164, 24 February 2000; Resolution 56/160, 13 February 2002; preamble and para. 1, Resolution 58/174, 22 December 2003. Para. 11 of this resolution takes a step further in stating ‘every person... has a *right to protection* from terrorism and terrorist acts’ (emphasis added); Preamble and para. 1 and 2, Resolution 59/195, 22 March 2005.

<sup>19</sup> Limited practice in this regard exists at the International Criminal Court with regard to crimes other than terrorism. Article 77(2)(b) of the Statute of the International Criminal Court states that the Court may impose on convicted persons a penalty of ‘forfeiture of proceeds, property and assets derived directly or indirectly from that crime, without prejudice to the rights of bona fide third parties.’ And article 75(2) of the Statute states that ‘the Court may make an order directly against a convicted person

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Ben Emmerson, has recently added voice to this assertion by putting forward legal arguments for a rights-based support and compensation to victims of terrorism.<sup>20</sup> The core claim is that, flowing from the fact that acts of terrorism constitute violations of the victims' human rights, states are under an obligation from international human rights norms to compensate the victims. The Special Rapporteur distilled a set of 'Framework Principles' from various international human rights instruments that could be used to secure the rights of victims of terrorism and submitted that states already bear the obligation to compensate victims of terrorism under international law.<sup>21</sup> He further called for the adoption of an international legal instrument that would comprehensively set out the rights of victims of terrorism and states' obligations in this context.<sup>22</sup>

The main legal hurdle for a human rights-based argument for the compensation of victims of terrorism has been that the rules of state responsibility have to be satisfied in order to trigger states' human rights obligations. That is, the terrorist acts that violate the rights of victims have to be attributable to the state that bears a corresponding human rights obligation. Acts of terrorism may not suffice to trigger such responsibility when the act is committed by private individuals and groups, and is not attributable to

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specifying appropriate reparations to, or in respect of, victims, including restitution, compensation and rehabilitation.' The ICC Statute also created a Trust Fund (art. 79) that administers funds, composed also of sources other than those seized of the convicted persons, for the purpose of compensating victims.

<sup>20</sup> The UN Rapporteur on Human Rights in Counter-terrorism has elaborated four categories of victims of terrorism: direct victims, secondary victims (family and dependents of direct victims), indirect victims (persons who suffer physical and psychological injury as a result of emergency response or counter-terrorism operation), and potential victims. UN General Assembly Document A/HRC/20/14, 4 June 2012, para 16.

<sup>21</sup> Special Rapporteur Emmerson also relied on practical arguments, such as the difficulty of demanding compensation from terrorists, to urge states to step up and voluntarily assume the obligation to compensate victims of terrorism across the board, 'whether or not the acts or omissions of a public official caused or contributed to the death', *see* Report of the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism, General Assembly Document A/HRC/20/14, 4 June 2012, para.53.

<sup>22</sup> Report of the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism, General Assembly Document A/HRC/20/14, 4 June 2012, para. 66. *See, e.g.*, one of the proposals being considered at international forums in this regard, the draft Convention on Justice and Support for Victims of Crime and Abuse of Power for Victims, prepared by International Victimology Institute of Tilburg University and the World Society of Victimology, *See*, [https://www.tilburguniversity.edu/upload/f482b949-fb05-4fae-8632-0263d903d6dc\\_convention.pdf](https://www.tilburguniversity.edu/upload/f482b949-fb05-4fae-8632-0263d903d6dc_convention.pdf), last accessed 6 June 2015.

a state.<sup>23</sup> Proponents of the rights-based compensation of victims of terrorism deploy arguments combining soft and hard international legal instruments to surpass this legal challenge. Important soft law instruments used in this respect are the Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law,<sup>24</sup> and the Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power,<sup>25</sup> adopted by the General Assembly. These instruments generally provide for victim compensation in instances of human rights violation, and the Declaration specifically stipulates for compensation and other assistance by states to victims “in the event that the parties liable for the harm suffered are unable or unwilling to meet their obligations.”<sup>26</sup>

A (re)-interpretation of the international human rights treaties (hard law) is also used to argue for a rights-based compensation to victims of terrorism. For example, the United Nations Office on Drugs and Crime (UNODC) developed an interesting legal argument linking the rules of state responsibility with specific types of terrorist acts committed by non-state actors. The UNODC argument posits that in the case of terrorist acts aimed at influencing the behaviour of the state, acting in its own right or through international organizations, the individual victims of such act have made an “involuntary sacrifice on behalf of the state”.<sup>27</sup> Acts of terrorism that are motivated by opposition to the policies of the state, so the argument goes, lead to the responsibility of the state as a function of strict liability, regardless of the validity of the terrorist’s

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<sup>23</sup> State responsibility could be established for acts that its agents did not directly commit, but indirectly associated with through, for example, acknowledgement and adoption of the criminal act or providing effective control over the private actors that commit the terrorist act. Further on rules of state responsibility, *see* ILC’s Draft articles on Responsibility of States for Internationally Wrongful Acts, Official Records of the General Assembly, Fifty-sixth session, Supplement No. 10 (A/56/10), chp.IV.E.1.

<sup>24</sup> UN General Assembly Resolution 60/147, 21 March 2006. For introductory note and procedural history of this document, *see* commentary by Theo van Boven, United Nations Audio Visual Library, available at [http://untreaty.un.org/cod/avl/ha/ga\\_60-147/ga\\_60-147.html](http://untreaty.un.org/cod/avl/ha/ga_60-147/ga_60-147.html), (last accessed 6 June 2015).

<sup>25</sup> UN General Assembly Resolution 40/34, 29 November 1985.

<sup>26</sup> Basic Principles, UN General Assembly Resolution 60/147, para. 16.

<sup>27</sup> ‘The Criminal Justice Response to Support Victims of Terrorism’, United Nations Office on Drugs and Crime, New York, 2011, available at [http://www.un.org/en/terrorism/ctitf/pdfs/victims\\_rights\\_e-book\\_en.pdf](http://www.un.org/en/terrorism/ctitf/pdfs/victims_rights_e-book_en.pdf), (last accessed 6 June 2015).

motivation, and hence the state would be under an obligation to compensate the victims.

The above-discussed emerging legal avenues to financial compensation of victims of terrorism are yet in the making and have not taken root in the international normative framework on terrorism. But they are indicators of the conception of individuals as the central victims of terrorism. Together with the non-rights based legal and policy initiatives, discussed below, the work on financial compensation of victims of terrorism reflects the rising cosmopolitan voice of human victimhood in the discourse of international governance of terrorism.

### **4.2.3. The Individual as the Victim of Terrorism: Non-Rights Based Initiatives**

Humanity as the collective victim of terrorism underpins various international counter-terrorism legal and policy activities. Human victims are not only recognised but are also being brought to the centre of international counter-terrorism. Illustrations of the victim-centred orientation that international counter-terrorism is taking on could be the deployment of human stories in counter-terrorism, the creation of collective victim-compensation funds, and efforts to recognise victims of terrorism in criminal justice systems.

#### **4.2.3.1. The Deployment of Human Stories in Counter-Terrorism**

The United Nations' comprehensive policy document on terrorism – the Global Counter-Terrorism Strategy (GCTS) – establishes a victim-centred approach as a crucial counter-terrorism strategy.<sup>28</sup> In this regard, the deployment of the stories of human victims of terrorism is identified as a key tool for the purpose of de-radicalization and counter-incitement to terrorism works. These are communicative programmes that seek to reverse the “de-humanization of victims of terrorism”.<sup>29</sup> This approach seeks to discredit the (often ideological and religious) motivations of terrorism through counter-narratives of personalized (victimhood) stories. And in

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<sup>28</sup>Jason Rineheart, ‘Counterterrorism and Counterinsurgency’, 4(5) *Perspectives on Terrorism*, 2010, (online <http://www.terrorismanalysts.com/>).

<sup>29</sup> UN Global Counter-terrorism Strategy, para. I(1).

doing so, this approach humanizes not only the victims of terrorism, but the entire discourse on terrorism: it moves the conversation away from positivist abstracts (such as state sovereignty and governmental stability) toward the interests of individual persons. The fact that one of the eight working groups established under the Counter-terrorism Implementation Task Force (CTITF) – the UN body coordinating the implementation of the GCTS – is dedicated to the issue of “supporting and highlighting victims of terrorism”<sup>30</sup> further reflects the importance given to a victim-centred approach.

#### 4.2.3.2. Financial Compensations to Victims of Terrorism

Other manifestations of the push for human victim-centred counter-terrorism include proposals for the establishment of international and national mechanisms to meet the financial and practical needs of the victims of terrorism, such as medical, psychological, and social support.<sup>31</sup> Various international instruments call upon states to institute national systems of legally appropriating finances and assets of convicted terrorists to compensate victims or their families.<sup>32</sup> This call is found, for example, under the 1997 Terrorism Financing Convention,<sup>33</sup> Security Council resolutions,<sup>34</sup> the Financial Action Task Force (FATF)’s Recommendations,<sup>35</sup> and the Council of Europe Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime and on the

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<sup>30</sup> See, CTITF website <http://www.un.org/en/terrorism/ctitf/workinggroups.shtml> (last accessed 6 June 2015).

<sup>31</sup> GCTS, para. 8, 17.

<sup>32</sup> Article 8(4) of the 1997 Convention for the Suppression of the Financing of Terrorism calls states to ‘consider establishing mechanisms whereby the funds derived from the forfeitures referred to in this article are utilized to compensate the victims...or their families.’ Also, UN Security Council Resolution 1566 of 8 October 2004 calls for the establishment of ‘an international fund to compensate victims of terrorist acts and their families, which might be financed through voluntary contributions, which could consist in part of assets seized from terrorist organizations, their members and sponsors...’, para. 10.

<sup>33</sup> Art. 8, Terrorism Financing Convention of 1997.

<sup>34</sup> UN Security Council Resolution 1566 (2004) of 8 October 2004, para 10.

<sup>35</sup> FATF Recommendations 4 and 38, and Special Recommendation 3. FATF recommendations are recognized as the most authoritative international regulatory framework in relation to terrorism-financing and money laundering. The FATF will be discussed in detail in subsequent chapters.

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Financing of Terrorism.<sup>36</sup> This practice is also in place in several national criminal justice systems.<sup>37</sup>

In addition to the national level, similar victim compensation schemes are being set up at the international level. For example, the ICAO recently adopted an international convention<sup>38</sup> that establishes an International Civil Aviation Compensation Fund from which victims of terrorist hijacking would be compensated for death, bodily injury, mental injury, and damage to property<sup>39</sup> to the extent that the total amount of damage exceeds the aircraft operator's liability limit.<sup>40</sup> The contributions to the fund come from mandatory amounts collected by aircraft operators "...in respect of each passenger and each tonne of cargo" that they carry on international commercial flights.<sup>41</sup> In other words, the individual passengers and cargo customers on international flights bear the cost of contribution to the fund. The Security Council endorsed this victim-oriented approach by calling for the establishment of "an international fund to compensate victims of terrorist acts and their families..."<sup>42</sup> These (proposed) collective funding schemes, as mechanisms of globally distributing the financial risk and burden arising

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<sup>36</sup> Art. 2. The convention is adopted in 2005, Council of Europe Treaty Series, Doc No. 198, Warsaw, 16.V.2005.

<sup>37</sup> For an overview of various states' practice in this regard, see UNODC Handbook, *The Criminal Justice Response to Support Victims of Acts of Terrorism*, 2011, prepared in pursuance of General Assembly Resolution 64/168, 18 December 2009.

<sup>38</sup> Convention on Compensation for Damage to Third Parties Resulting from Acts of Unlawful Interference Involving Aircraft, DCCD Doc No. 43, 1/5/09, adopted at a diplomatic conference under the auspices of the ICAO in May 2009 (not in force yet). For a commentary on the convention, see Yaw Otu Mankata Nyampong, *Insuring the Air Transport Industry against Aviation War and Terrorism Risks and Allied Perils: Issues and Options in a Post-September 11, 2001 Environment*, Springer, 2012.

<sup>39</sup> Convention on Compensation for Damage to Third Parties, Resulting from Acts of Unlawful Interference Involving Aircraft, adopted on 2 May 2009, article 3; see further, R. I. R. Abeyratne, *Aviation Security Law*, Springer, 2010, p102.

<sup>40</sup> By this convention, the operator's liability is limited to not exceeding 750,000 USD for the smallest aircraft and 700 million USD for the largest aircraft (based on weight). The ICAO fund compensates victims up to a total amount of 3 billion USD. *Ibid*, article 4 and 18(2).

<sup>41</sup> *Ibid*, art 12.

<sup>42</sup> UN Security Council Resolution 1566 of 8 October 2004, para. 10.

from terrorism, quintessentially reflect the underlying conception of terrorism as a global public problem, i.e. as victimising “...human beings everywhere...”<sup>43</sup>

#### 4.2.3.3. Recognition of Victims of Terrorism in Criminal Justice Systems

Human victimhood is brought to the centre of international governance of terrorism though yet another innovative initiative for the recognition of terrorism victims in criminal justice systems. This mainly takes the form of advocating for the special participation of victims of terrorism in criminal proceedings against their victimizers. The participation of victims of a crime as witnesses in a criminal trial is a generally established practice in most national legal systems, and no specific legal stipulation is needed in the case of terrorism. Recent international initiatives rather concern the participation of victims other than as a witness.<sup>44</sup> This includes legal entitlement for victims of terrorism to be informed of the criminal proceedings, to present their views, and to challenge evidence or procedures during criminal proceedings at national level.

Such participation in a capacity other than as a witness has been experimented with by some international judicial forums, including the International Criminal Court (ICC).<sup>45</sup> At the ICC, for example, this new mode of participation enables victims to present their views to the court at all stages of the proceeding, namely the pre-trial, the trial, and the appeal stages.<sup>46</sup> Several states are also reforming their criminal laws to enable

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<sup>43</sup> Preamble, UN Security Council Resolution 1377 of 13 November 2001, Annex, Ministerial Declaration on Global Effort to Combat Terrorism; Preamble, Resolution 1624 of 14 September 2005, (resolution on prohibition of incitement to commit terrorist acts)

<sup>44</sup> For a compilation of existing initiatives and practices, see UNODC Handbook, *The Criminal Justice Response to Support Victims of Acts of Terrorism*, 2011.

<sup>45</sup> Another example is the Extraordinary Chambers in the Courts of Cambodia (ECCC). Further, see Susana SáCouto, ‘Victim Participation at the International Criminal Court and the Extraordinary Chambers in the Courts of Cambodia: A Feminist Project?’, 18 *Michigan Journal of Gender and Law* 2012, 297-359; Brianne McGonigle Leyh, *Procedural Justice? Victim Participation in International Criminal Proceedings*, vol. 42. School of Human Rights Research Series, Intersentia, 2011.

<sup>46</sup> Art. 68, the Statute of the International Criminal Court. Victim participation at the ICC includes attending hearings, making opening and closing statements during proceedings, presenting views to the judges on whether and what charges would be brought against the accused, and questioning witnesses and the accused during trial. Victims are also entitled to be kept informed about proceedings, to have a legal representative, paid for by the court if necessary, and to request special measures to protect their ‘safety, well-being, dignity and privacy’. See, International Criminal Court, ‘A Guide for the Participation of Victims in the Proceedings of the Court’, available at <http://www.icc->

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the special participation of victims of serious crimes in criminal proceedings.<sup>47</sup> Terrorism, of course, is not recognized as a distinct international crime and does not fall under the subject matter jurisdiction of the ICC or other international criminal tribunals that allow for victim participation.<sup>48</sup> International initiatives in this regard instead promote the adoption of measures that enable the special participation of victims of terrorism in national legal systems, and in states where such measures already exists with regard to serious crimes in general, ensuring terrorism is included as one of such crimes. The United Nations Secretary-General recently organized the first Global Symposium on Supporting Victims of Terrorism.<sup>49</sup> Following such international stimulation, some states are already undertaking legal and policy reform that allows for the participation of terrorism victims in criminal proceedings and others are being urged to follow suit.<sup>50</sup>

The above-mentioned initiatives that highlight human victims in the discourse on terrorism at international governance forums, regardless of the success of each initiative individually, cumulatively reflect what Special Rapporteur Emmerson has called an “emerging international consensus in favour of a victim-centred approach”<sup>51</sup>

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[cpj.int/NR/rdonlyres/8FF91A2C-5274-4DCB-9CCE-37273C5E9AB4/282477/160910VPRSSBookletEnglish.pdf](http://cpj.int/NR/rdonlyres/8FF91A2C-5274-4DCB-9CCE-37273C5E9AB4/282477/160910VPRSSBookletEnglish.pdf), (last accessed 6 June 2015)

<sup>47</sup> For a compilation of state practices, see UNODC Handbook, *The Criminal Justice Response to Support Victims of Acts of Terrorism*, 2009, pp18-32.

<sup>48</sup> See, in this regard, the dissenting opinion of the judges at the Lebanon Tribunal, led by President of the Tribunal, Antonio Cassese, asserting that a distinct crime of international terrorism exists under customary international law: *Interlocutory Decision on the Applicable Law: Terrorism, Conspiracy, Homicide, Perpetration, Cumulative Charging*, Case No. STL-11-01/I (Feb. 16, 2011), available at <http://www.refworld.org/docid/4d6280162.html>, last accessed 6 June 2015.

<sup>49</sup> See, Report of the Secretary-General’s Global Symposium on Supporting Victims of Terrorism, 9 September 2008, New York, available at [http://www.un.org/en/terrorism/ctitf/pdfs/un\\_report\\_supporting\\_victims\\_terrorism.pdf](http://www.un.org/en/terrorism/ctitf/pdfs/un_report_supporting_victims_terrorism.pdf), last accessed 6 June 2015.

<sup>50</sup> For a compilation of national practices and international documents and proposals concerning the legal treatment of victims of terrorism, see, ‘The Criminal Justice Responses to Support Victims of Terrorism’, United Nations Office on Drugs and Crime, 2011, available at [http://www.un.org/en/terrorism/ctitf/pdfs/victims\\_rights\\_e-book\\_en.pdf](http://www.un.org/en/terrorism/ctitf/pdfs/victims_rights_e-book_en.pdf), (last accessed 6 June 2015). The extent of state practice on the participation of terrorism victims in criminal proceedings is not wide enough to indicate the emergence of a general principle of law on the matter, but when taken together with similar practice taking place at international criminal courts with respect to international crimes, it might be seen as a precursors of a development of the law in that direction.

<sup>51</sup> Report of the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism, General Assembly Document A/HRC/20/14, 4 June 2012, para. 61.



in international governance of terrorism.<sup>52</sup> The victims being ordinary individuals across states (i.e. the global public), the move toward victim-centred approach in international counter-terrorism is underpinned by a cosmopolitan sense of common good. That is, it instils the sense that international governance of terrorism is an exercise in the protection of a global common good.

### 4.3. The Common Good and the Role of the State

In connection with the cosmopolitan conceptualisation of the problem of terrorism, the role of the state is transformed from being merely a victim (as in the League of Nations era) or a perpetrator (in the post-war period) into being a protector of the common good, one that bears the burden of solving humanity's problem. As will be shown in more detail in subsequent chapters, the idea of the common good bears a rhetorical force that underwrites international solidarity in counter-terrorism. Inter-state solidarity and solidarity between states and non-state actors is promoted through the invocation of the notion of the common good. That is, state and non-state actors are urged to put their differences aside and stride together in furtherance of the common good.

At the United Nations and other international governance platforms, the rhetoric of solidarity around the common good increasingly overshadows inter-state contestation. Contrary to expectation, adversarial relations between certain states based on mutual allegations of state sponsorship of terrorism, are not carried over to multilateral governance forums. Even states such as the United States, which is said to propagate the notion of state sponsorship of terrorism for the purpose of alienating particular states, seem to carefully avoid confrontational gestures at multilateral forums. Interviews conducted with diplomats from various states' Permanent Missions to the United Nations Headquarters revealed that the issue of state sponsorship of terrorism, and its instrumentality in inter-state discord, is actively repressed.<sup>53</sup> Of the diplomats interviewed on this point, only one was interested in engaging on the topic of state sponsorship of terrorism. All others either dismissed or deemphasized its importance.

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<sup>52</sup> This trend resonates with what Ruti G. Teitel identifies as the the broader rise of human-centred international law, encompassing international criminal law, international humanitarian law and human rights law. *See*, Ruti G. Teitel, *Humanity's Law*, Oxford University Press, 2011.

<sup>53</sup> Interviews by author, conducted in autumn 2011, New York City, USA.

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Importantly, an interviewee diplomatic representative from the United States responded that state sponsorship of terrorism “is not a matter we pursue in these [UN Security Council] forums”.<sup>54</sup> A Russian diplomat responded more directly, stating that Russia was not interested in the debate on state sponsorship of terrorism, and the very term was a non-phenomenon which Russia would certainly not help propagate.<sup>55</sup> Subsequent informal discussions with diplomats affiliated with the Security Council’s Counter-terrorism Committee and observations of meetings of the Counter-terrorism Committee’s Executive Directorate<sup>56</sup> revealed a similar finding: international ‘cooperation’ is the dominant discourse, and discord and confrontation between states is carefully silenced.

Granted, a few states have been subjected to sanctions or other coercion as a function of multilateral counter-terrorism at the UN Security Council. But when put in perspective, these are peripheral instances, the single such case since 9/11 being the sanctions against Eritrea.<sup>57</sup> The unfolding big story is the talk of counter-terrorism cooperation between states. By and large, states, including the United States-led block of counter-terrorism hardliners, are much less focused on the punitively deterrent use of multilateral counter-terrorism vis-à-vis other states. Instead, the focus is on fostering a positive sphere of counter-terrorism solidarity – a sense of shared struggle for a common good.

States are collectively positioned as protectors of the common good. And following the increased realisation of the need for a preventative tackling of the problem, the protection of the common good has come to mean a complex task of management. That is, the problem of terrorism is eradicated not through mere criminal prosecution or the maintenance of peaceful inter-state relations, but rather through a proactive regulatory response. As the following section elaborates, this proactive regulatory

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<sup>54</sup> Interview with Mr. Howard Wachtel, Political Section US Mission to the UN, a US member of the Security Council Sanctions Committee on Al-Qaeda and associates (1267 Committee), 18 October 2011, New York.

<sup>55</sup> Interview with Mr. Alexey Lynov, First Secretary at the Permanent Mission of Russia to the UN, 04 October 2011, New York.

<sup>56</sup> All undertaken in the period 1-21 October, 2011, UN headquarters, New York City.

<sup>57</sup> See, Security Council Resolution 1907 of 23 December 2009 and Resolution 2023 of 5 December 2011.

response, in turn, involves new ways of both engaging and disenfranchising non-state actors.

#### 4.4. Proactive Governance and the Role of Non-State Actors

Currently, international governance of terrorism is not restricted to the adoption of international treaties that criminalise acts of terrorism, but also involves proactive, hands-on regulatory measures that address the activities of various private and governmental actors.<sup>58</sup> The primary examples in this regards are international counter-terrorism regulations with respect to financial transactions (regulating the activities of banks, insurances, funds, charities, and businesses), the control of arms and dangerous materials (regulating the manufacturing, handling, and transfer of arms and dangerous materials), and the cross-border movement of persons and goods (regulating aviation and maritime transport, and immigration and customs).

The Sectoral Conventions address these fields of counter-terrorism, and provide a skeletal framework upon which a complex set of international regulatory instruments is built. In other words, the Sectoral Conventions, which are treated in the legal literature as the core body of international law in relation to terrorism,<sup>59</sup> in fact constitute only one layer of the international normative framework on the subject. The normative framework with respect to these fields of international counter-terrorism is rather a labyrinth of rules, regulations, standards, and recommendations, extending far beyond the Sectoral Conventions.

This proactive regulatory approach to international governance of terrorism, in turn, both engages and negatively affects non-state actors in new ways. Proactively addressing the problem of terrorism requires a problem management orientation of counter-terrorism, which led to the realisation that states cannot do it alone. Instead, non-state actors, such as businesses, are being drawn into the framework of

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<sup>58</sup> This trend is reflective of a broader advent of ‘risk society’ identified in social theories and security studies. The advent of risk society is the transformation of societal understanding of problems, including security threats, as risks that need to be responded to through precautionary risk management. See, Ulrich Beck, *Risk Society: Towards a New Modernity*. London: Sage, 1992; Claudia Aradau and Rens van Munster, ‘Governing Terrorism through Risk: Taking Precautions, (un)Knowing the Future, 13(1) *European Journal of International Relations*, 2007, 89-115.

<sup>59</sup> Above, chapter 1, note 9.

international governance of terrorism as semi-autonomous enforcers of norms. Simultaneously, as the reach of counter-terrorism goes beyond criminal prosecution and into proactive regulation, the actors that are negatively affected by international governance of terrorism diversify and multiply. These observations are illustrated below with a discussion of international governance of terrorism in the fields of terrorism financing, the control of arms and dangerous materials, and cross-border movement of persons and goods.

#### 4.4.1. Terrorism Financing

The 1999 Terrorist Financing Convention<sup>60</sup> and Resolution 1373 (2001)<sup>61</sup> of the Security Council set the more general international norms on the prohibition and criminalization of the financing of terrorism. The Convention obliges states to undertake the necessary national legislative and practical measures, and to cooperate with other states and international actors, for the suppression and prohibition financial support to terrorism from individuals and legal entities. Resolution 1373 underscores these broad obligations, and obliges states to freeze the “funds and other financial assets or economic resources” of terrorists and the persons and entities associated with them.<sup>62</sup> While the Convention and Resolution 1373 provide the more general norms, instruments adopted by other international financial, banking, and insurance regulatory bodies further translate the general norms into detailed standards for action.

These standards on counter-terrorism financing install, among others, financial institutions as front-line enforcers of international norms alongside state organs. One consequence of this re-positioning is that financial bodies bear greater counter-terrorism financing responsibility, which requires them to allocate resource and skilled personnel to proactively monitor the integrity of their business. Such requirements, which diffuse regulatory cost into the private sector by installing the later as front-line semi-regulatory bodies,<sup>63</sup> empower big financial institutions over smaller ones, which

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<sup>60</sup> International Convention for the Suppression of the Financing of Terrorism, adopted on 9 December 1999.

<sup>61</sup> Adopted on 28 September 2001.

<sup>62</sup> UN Security Council Resolution 1373, para. 1(c).

<sup>63</sup> Which reflects the underlying notion of common good and the universal distribution of accompanying burden, discussed above under section 4.3.

would be rendered less competitive due to the added running cost they have to bear. Examples of this consequence could be found in the standards of the Financial Action Task Force (FATF), the International Organization of Securities Commissions (IOSC), and the International Association of Insurance Supervisors (IAIS).

The most important international regulative instruments on terrorist financing come from the Financial Action Task Force (FATF), an intergovernmental standard setting body established by sixteen developed states during the G-7 Summit in 1989.<sup>64</sup> The FATF has since expanded to include thirty-six member jurisdictions.<sup>65</sup> The FATF has adopted a set of Recommendations relating to money laundering in general (40 Recommendations) and terrorist financing in particular (9 Special Recommendations), together referred to as the 40+9 Recommendations. These Recommendations, particularly the Special Recommendations, are the most widely used and specialized regulatory tools to “detect, prevent, and suppress the financing of terrorism and terrorist acts.”<sup>66</sup> Various organs of the United Nations have endorsed the FATF Recommendations as the crucial international standards with respect to terrorism financing.<sup>67</sup> Other international regulatory institutions in the area of finance, discussed below, have also endorsed the FATF Recommendations similarly.

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<sup>64</sup> See FATF website, <http://www.fatf-gafi.org/>.

<sup>65</sup> ‘Member jurisdictions’ is the term used by FATF as its membership consists of 34 states and 3 non-state entities. The member states are: Argentina, Australia, Austria, Belgium, Brazil, Canada, China, Denmark, Finland, France, Germany, Greece, Hong Kong, Iceland, India, Ireland, Italy, Japan, Republic of Korea, Luxembourg, Mexico, Netherlands, New Zealand, Norway, Portugal, Russian Federation, Singapore, South Africa, Spain, Sweden, Switzerland, Turkey, United Kingdom, and United States. The other member entities are the European Commission and the Gulf Cooperation Council.

<sup>66</sup> Preamble, FATF IX Special Recommendations, October 2011. Richard Barrett, the former coordinator of the UN Security Council’s Al-Qaeda and Taliban Monitoring Team and founding member of the UN Counter-Terrorism Implementation Task Force (CTITF), Richard Barrett, says ‘FATF recommendations on terrorist financing are universally accepted as the standard for states to reach’, see, Richard Barrett, ‘Preventing the Financing of Terrorism’, 44 *Case Western Reserve Journal of Int’l Law* 2012, 719-736, p727.

<sup>67</sup> The Global Counter-terrorism Strategy (GCTS) adopted by the UN General Assembly in 2006 endorsed the 40+9 FATF Recommendations as ‘comprehensive international standards’ and requested states to implement them, see UN General Assembly Resolution 60/288, Annex, para.10. Subsequently, the UN office that coordinates and oversees the implementation of the GCTS – the Counter-terrorism Implementation Task Force (CTITF) – has endorsed the FATF Recommendations as one of the three core international standards regarding the financing of terrorism, the other two being Security Council resolutions (Resolution 1373 and others specifically dealing with the financial

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The FATF Special Recommendations on terrorism financing and their Interpretive Notes<sup>68</sup> particularly address in detail the activities of various financial institutions and other businesses. The targeted financial institutions include banks, cash couriers, money payment processors,<sup>69</sup> currency exchange bureaus, and money services businesses. The FATF instruments also address non-profit organisations and designated non-financial institutions such as casinos, real estate agents, dealers in precious materials, lawyers, accountants and other professionals, trusts and company service providers.<sup>70</sup>

The FATF instruments require both national authorities and the above-mentioned legal entities themselves to institutionalise regulatory and business processes that help mitigate the risk of exposure to terrorism financing. With respect to money service businesses that facilitate remittance payments, for example, national authorities are required to implement a system of registration and licensing. This requirement also applies with respect to alternative remittance systems, i.e. remittance money systems using informal money or equivalent value transfer, such as mobile phone-based money transfer<sup>71</sup> and digital currency.<sup>72</sup> The money service businesses themselves are also required to put in place institutional risk management mechanisms to mitigate exposure to terrorist financing. This typically involves the institution of administrative paperwork and personnel and resource allocation for compliance monitoring.

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measures against Al-Qaeda and affiliates, such as Resolution 1267 (1999), Resolution 1456 (2003), Resolution 1617(2005)) and the 1997 Terrorist Financing Convention. *See*, CTITF Working Group Report, Tackling the Financing of Terrorism, 2009, available at [http://www.un.org/en/terrorism/ctitf/pdfs/ctitf\\_financing\\_eng\\_final.pdf](http://www.un.org/en/terrorism/ctitf/pdfs/ctitf_financing_eng_final.pdf) (last accessed 6 June 2015). The Security Council has also endorsed the 40+9 FATF Recommendations as ‘comprehensive international standards’ and urges states – including through its binding resolutions adopted under Chapter VII of the UN Charter – to implement the Recommendations, *see* UN Security Council Resolution 1617 (2005), para. 7.

<sup>68</sup> The FATF Recommendations, February 2012, pp31-107, available at [http://www.fatf-gafi.org/media/fatf/documents/recommendations/pdfs/FATF\\_Recommendations.pdf](http://www.fatf-gafi.org/media/fatf/documents/recommendations/pdfs/FATF_Recommendations.pdf) (last accessed 6 June 2015).

<sup>69</sup> Such as businesses that process traveller’s cheques and credit cards payments.

<sup>70</sup> Trusts and company service providers are businesses that provide the services relating to the incorporation and operation of legal entities. These are services such as acting as a formation agent, as a partner of a partnership, and providing a registered office. *See*, FATF Recommendations, February 2012, Glossary, p112.

<sup>71</sup> E.g. a system called M-PESA which is currently in use in parts of East Africa.

<sup>72</sup> E.g. the digital currency currently in use known as Bitcoin.

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The International Organization of Securities Commissions, the global standard-setter in the securities sector which is composed of national securities authorities and self-regulation bodies,<sup>73</sup> has adopted similar standards particularly with regard to the operation of collective investment schemes (CISs). These standards are contained in the 2004 Principles on Client Identification and Beneficial Ownership for the Securities Industry, and a further guidance document adopted in 2005, the Anti-Money Laundering Guidance for CISs. The later instrument is specifically adopted as a detailed guidance for collective investment schemes and their national regulatory bodies in the application of the counter-terrorism financing and anti-money laundering Recommendations of the FATF. The key standard these instruments establish is the client due diligence process: that CISs should institute processes that ensure their services are not exposed to terrorism financing (and money laundering). In particular, CISs are required to adopt written policies and procedures of due diligence, allocate personnel and resources for this purpose, undertake independent auditing of the implementation and effectiveness of those policies and procedures, and conduct employee training in this regard.<sup>74</sup>

International regulatory standards concerning insurance activities are adopted mainly by the International Association of Insurance Supervisors (IAIS), a global association of insurance regulators and supervisors.<sup>75</sup> The IAIS's 2003 Insurance Core Principles and Methodology, a key standard instrument, recognises the FATF Recommendations as applicable to the insurance sector.<sup>76</sup> Another document adopted in 2004, the Guidance Paper on Anti-Money Laundering and Combating the Financing of Terrorism, specifically translates the anti-terrorism financing principles contained in the FATF 9 Special Recommendations and Security Council Resolution 1373 for the insurance sector. The key regulatory mechanisms the IAIS instruments establish are the customer due diligence process, similar to the one in the securities sector, the reporting of suspicious transactions and circumstances, and the allocation of personnel and resource for these purposes. Insurers are expected to adopt a graded approach to

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<sup>73</sup> See IOSC website <http://www.iosco.org/>.

<sup>74</sup> The 2005 Anti-Money Laundering Guidance for CISs, IOSC, p7-9.

<sup>75</sup> See IAIS website <http://www.iaisweb.org/>.

<sup>76</sup> The 2003 Insurance Core Principles and Methodology, IAIS, core principle 28.

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risk assessment whereby higher scrutiny would be applied with respect to high-risk customers.

In the above cases, the installation of financial institutions as front-line enforcers of international counter-terrorism financing standards create market competitiveness disparity between big and small businesses in the banking, securities and insurance sectors. Another consequence of the installation of financial institutions as front-line enforcers is the direct power disparity it creates between businesses. Financial institutions are given wider room of discretion to adapt and execute the broader international counter-terrorism financing standards in ways that they see fit, including by taking risk avoidance measures against their clients. Consequently, clients of those financial institutions – individuals, businesses and smaller financial institutions – become subjected to adverse effects such as the termination of services taken as a risk avoidance measure, without having to be criminally liable for terrorism financing. An example in this regard is found in the banking sector.

Important international counter-terrorism financing standards relating to the banking sector are adopted by the Basel Committee on Banking Supervision, a global banking standard-setting body composed of national banking authorities.<sup>77</sup> The Basel Committee is composed of central banks of twenty-seven developed economies,<sup>78</sup> but the standards it sets are implemented worldwide, similar to the case of the FATF Recommendations. Of particular relevance to terrorist financing are, the 1988 Statement of Principles on Prevention of Criminal Use of Banking System for the Purpose of Money Laundering, the 1997 Core Principles for Effective Banking Supervision, the 1999 Core Principles Methodology, the 2001 Customer Due Diligence Standards for Banks, and the attached General Guide to Account Opening and Customer Identification.<sup>79</sup> The key regulatory mechanism these inter-related instruments an industry standard known as the Know Your Customer (KYC) principle that requires banks to properly identify their customers and transactions, continuously

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<sup>77</sup> See, Basel Committee on Banking Supervision Charter, see also website <http://www.bis.org/bcbs/about.htm>

<sup>78</sup> These are, Argentina, Australia, Belgium, Brazil, Canada, China, France, Germany, Hong Kong, India, Indonesia, Italy, Japan, Korea, Luxembourg, Mexico, Netherlands, Russia, Saudi Arabia, Singapore, South Africa, Spain, Sweden, Switzerland, Turkey, United Kingdom, and United States.

<sup>79</sup> All publications available at Committee's website, <http://www.bis.org/bcbs/publications.htm>.



monitor the soundness of accounts and transactions, and proactively report and take measures on suspicious accounts and transactions. These documents specifically encourage banks to deny assistance to transactions, sever relations with customers, and close or freeze accounts where the banks “have good reason to suppose” the money in question derives from or is intended for criminal activity.<sup>80</sup> In doing do, banks are required to adopt a graded approach to risk assessment where “more extensive due diligence” is undertaken before and when conducting business with “high risk customers”.<sup>81</sup> In making the determination of high risk customers, banks are required to consider “factors such as customer’s background, country of origin, public or high profile position, linked accounts, business activities or other risk indicators...”.<sup>82</sup> This shows the broad discretion banks are given in making decisions that could severely affect their customers, which include other, small financial institutions such as money service businesses – effectively subjugating the latter to bigger financial institutions.

#### 4.4.2. Control of arms and Dangerous Materials

The control of arms and dangerous materials, i.e. materials that can be used for the making of weapons, including weapons of mass destruction, is another emerging field of counter-terrorism activity. This field is governed by resolutions of the Security Council,<sup>83</sup> the Sectoral Conventions that criminalize terrorist bombings and the illegal use of nuclear weapon materials by individuals and groups,<sup>84</sup> and standards adopted by international bodies. These instruments regulate the manufacture, labelling, transport, and transfer of arms and dangerous materials, with a particular attention to counter-terrorism. In this regard, these regulatory instruments subject businesses such as manufacturers, transporters, and traders of arms and dangerous materials to control and accreditation regimes, hence affecting them in non-criminal justice dimensions.

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<sup>80</sup> The 1988 Statement of Principles, BIS, para III and IV.

<sup>81</sup> The 2001 Customer Due Diligence Standards for Banks, BIS, Para 20. Banks are also expected to allocate resources and effort to formulate coherent policies and procedures based on which they undertake risk assessment

<sup>82</sup> *Ibid.* The risk of disproportionate impact that such discretionary profiling by banks gives rise to will be discussed later on in chapter 5 of this thesis.

<sup>83</sup> UN Security Council Resolutions 1373(2001) and 1540 (2004).

<sup>84</sup> The 1997 International Convention for the Suppression of Terrorist Bombings, and the 2005 International Convention for the Suppression of Acts of Nuclear Terrorism.

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The 1991 Plastic Explosives Convention and its Technical Annex<sup>85</sup> provide for the marking of all explosive devices with specific chemical agents that can be detected on inspection – for example at airports – and stipulate the suppression of the manufacturing and transfer, and the destruction of explosive materials that are not marked accordingly. The 1980 Nuclear Materials Convention and its 2005 supplement set out the international rules for the physical protection of nuclear materials, covering the processes of manufacturing, handling, storage and transport, with the objective of preventing the transfer of nuclear materials to non-state actors. Similarly, detailed international standards relating to the management of other radioactive materials are found in other instruments adopted by the International Atomic Energy Agency (IAEA), to which a vast majority of states commit by depositing an expression of endorsement and support at the secretariat of the IAEA.<sup>86</sup> Notable among these instruments are the 2003 Code of Conduct on the Safety and Security of Radioactive Sources,<sup>87</sup> and the 2004 supplementary Guidance on the Import and Export of Radioactive Sources.<sup>88</sup> These instruments require national authorities to put in place legislative and institutional mechanisms to control the production, management, and import-export of radioactive materials. Specifically, national authorities are required among others, to establish a process of issuing, amending, revoking and suspending authorisations as necessary for those who handle radioactive materials.<sup>89</sup>

The manufacture and transfer (through trade or otherwise) of small arms and light weapons (SALW) is another dimension of the control of arms and dangerous materials that is regulated by a combination of legally binding and non-binding international instruments. A UN treaty adopted in 2001 provides for the criminalization and suppression of illicit manufacturing and trafficking in SALW.<sup>90</sup> Equally important instrument in this international normative framework on SALW is the United Nations'

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<sup>85</sup> Convention on the Marking of Plastic Explosives for the Purpose of Detection, 1 March 1991.

<sup>86</sup> Until now, 119 and 84 states have deposited their expression of endorsement and support of the Code of Conduct and the supplementary Guidance, respectively.

<sup>87</sup> Approved by IAEA Board of Governors and adopted by the IAEA General Conference on 19 September 2003, IAEA GC(47)/RES/.7

<sup>88</sup> Approved by IAEA Board of Governors and adopted by IAEA General Conference, on 24 September 2004.

<sup>89</sup> The 2003 Code of Conduct on the Safety and Security of Radioactive Sources, IAEA, para 20-29.

<sup>90</sup> The United Nations Protocol against the Illicit Manufacturing of and Trafficking in Firearms, their Parts, Components and Ammunitions, adopted by General Assembly resolution 55/255 of 31 May 2001.

Programme of Action on SALW, which also addresses counter-terrorism purposes.<sup>91</sup> This Programme of Action provides an extensive arms control process that contains legal and policy guidance and parameters regarding, *inter alia*, the criminalization, control, marking, record-keeping, export and import, brokering, management and security of government authorized stockpiles of SALW.

The international regulation of arms export is yet another area that involves counter-terrorism standards. A relevant international legal instrument in this regard is the Wassenaar Arrangement, a framework treaty providing for mechanisms of standard-setting and regulation with respect to the manufacture and export of arms by major arms manufacturing states.<sup>92</sup> Under this framework treaty, several instruments of technical standards (known as 'Elements') and best practice guides are adopted, which apply for counter-terrorism in their generic counter-crime provisions. And some of these instruments regulate the flow of both SALW and man-portable air defence systems (the kind of which was used in the terrorist attack against an Israeli charter plane in Mombasa in 2002) with the specific aim of preventing their acquisition by terrorist groups.<sup>93</sup>

#### 4.4.3. Cross-border Movement of Goods and Persons

Another important field of international governance of terrorism is the cross-border movement of persons and goods. International standards in this respect provide technical and administrative requirements for routine processes involving, *inter alia*, commercial transactions, transport systems, immigration and customs. These requirements cover the activities of various actors, namely individuals (such as

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<sup>91</sup> UN Program of Action to Prevent, Combat and Eradicate the Illicit Trade in Small Arms and Light Weapons in All Its Aspects UN Document A/CONF.192/BMS/2005/1.

<sup>92</sup> The Wassenaar Arrangement on Export Controls for Conventional Arms and Dual-Use Goods and Technologies, of 12 July 1992. Participation in the Arrangement, by way of signing the treaty, is open only to arms manufacturers and/or exporter states. However, the instruments of the Wassenaar Arrangement are also intended and promoted for adoption by non-Wassenaar Arrangement states as well. See, e.g. Para. 6 of Elements for Export Controls of Man-Portable Air Defence Systems states that 'Participating States agree to promote the application of the principles defined in these Elements to non-Participating State.'

<sup>93</sup> Elements for Effective Legislation on Arms Brokering, 2003; Elements for Export Controls of Man-Portable Air Defence Systems, 2003; Best Practice Guidelines for Exports of Small Arms and Light Weapons, 2003, all agreed at the 2003 plenary of the Participating States of the Wassenaar Arrangement.

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individuals travellers, and relevant government and corporate personnel), businesses (such as airline, shipping, port management, security and technology companies), and governmental bodies (such as border control and port administration authorities). The non-state actors, particularly businesses, in addition to being subjected to regulatory control and accreditation regimes, are also given responsibilities in the enforcement of international counter-terrorism norms.

The most widely applicable international regulatory standards in these fields come from specialized standard setting organizations such as the World Customs Organization (WCO), the International Maritime Organization (IMO), and International Civil Aviation Organization (ICAO). The WCO, the chief intergovernmental customs standard setting body, has adopted various standards<sup>94</sup> and recommendations<sup>95</sup> that establish detailed processes and formalities concerning the harmonization of information requirements for international shipment of goods, identification and management of security risks posed by international shipment of goods, and incentive mechanisms to establish partnership with the private sector for, among others, the enhancement of the security of international supply-chain (the chain of activities linking manufacturing with end consumers).

The IMO, the UN specialized agency under the auspices of which two of the eighteen Sectoral Conventions<sup>96</sup> were prepared, has further adopted another convention<sup>97</sup> and more than twenty five Maritime Security Circulars containing international standards and recommendations concerning maritime security, which also encompass counter-

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<sup>94</sup> These instruments include, the WCO Safe Framework of Standards of 2007, the WCO Integrated Supply Chain Management (ISCM) Guidelines of 2005, the International Convention on the Simplification and Harmonization of Customs procedures (Kyoto Convention) revised in 1999.

<sup>95</sup> E.g., WCO Recommendation on the Insertion in National Statistical Nomenclatures of Subheadings to Facilitate the Monitoring and Control of Products Specified in the Protocol Concerning Firearms covered by the UN Convention against Transnational Organized Crime (29 June 2002); WCO Recommendation concerning the Protocol against the Illicit Manufacturing of and Trafficking in Firearms, their parts and components and ammunition, supplementing the United Nations Convention against Transnational Organized Crime (29 June 2002); and WCO Recommendation concerning action against illicit cross-border movement of nuclear and hazardous material (including their wastes) 19 June 1997.

<sup>96</sup> The Convention for the Prevention of Unlawful Acts against the Safety of Maritime Navigation, 1988; and the Protocol for the Suppression of Unlawful Acts against the Safety of Fixed Platforms Located on the Continental Shelf.

<sup>97</sup> Safety of Life at Sea (SOLAS) Convention, of 1974/1988.

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terrorism measures.<sup>98</sup> These conventions and circulars regulate the security aspects of passenger and cargo ships, port facilities, and mobile off-shore drilling units by allocating respective responsibilities to ship and port facility personnel, shipping and other companies (such as security or port management companies), and relevant governmental authorities.

In addition to these generic instruments, the IMO has also adopted an international security standard applicable to ships and port facilities, known as the International Ship and Port Facility Security Code, specifically as a response to the terrorist attacks of 9/11.<sup>99</sup> This Code requires port state officials to institute an International Ship Security Certificate whereby ships have to undergo inspection for compliance with the security stipulations contained under the Code and the International Convention for the Safety of Life at Sea.<sup>100</sup> The Code also requires shipping companies to, among others, appoint security officers for each ship and the company as a whole. And similar to the terrorism financing international measures discussed in the previous section, the IMO instruments, particularly the Code, adopt a risk management approach whereby governmental departments and businesses are left to develop a further nuanced policy and execution depending on facts on the ground.

Similarly, the ICAO's standards and recommendations ('SARPs', to use ICAO's abbreviation) provide for counter-terrorism tools in the field of international civil aviation, alongside the relevant Sectoral Conventions adopted under the auspices of the same organization.<sup>101</sup> An important instrument among these SARPs is the ICAO Annex 9 to the Convention on International Civil Aviation,<sup>102</sup> which contains detailed formalities regarding, *inter alia*, the customs and immigration clearance of passengers,

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<sup>98</sup> See, all Maritime Security Circulars at IMO website, at [http://www.imo.org/blast/mainframe.asp?topic\\_id=327](http://www.imo.org/blast/mainframe.asp?topic_id=327) (last accessed 6 June 2015).

<sup>99</sup> The International Ship and Port Facility Security (ISPS) Code of 2002.

<sup>100</sup> Specifically Chapter XI-2 of SOLAS.

<sup>101</sup> Convention on Offences and Certain other acts Committed on Board aircraft, 1963; Convention for the Suppression of Unlawful seizure of aircraft, 1970; Convention for the Suppression of Unlawful Acts Against the Safety of Civil aviation, 1971; Protocol for the Suppression of Unlawful acts of Violence at Airports Serving International Civil Aviation, supplementary to the 1971 Convention for the suppression of Unlawful acts against the safety of Civil aviation, 1988; (New) Convention on the Suppression of Unlawful Acts Relating to International Civil Aviation 2010; and Protocol Supplementary to the Convention for the Suppression of Unlawful Seizure of Aircraft 2010.

<sup>102</sup> Annex 9 (Facilitation), the Convention on International Civil Aviation.

goods, and aircraft. These formalities provide for internationally harmonized (minimum) procedures to be applied by aircraft carriers and civil aviation authorities for the detection of (suspected) terrorists and instruments that could be used for terrorist attack.

Another ICAO document provides for the now widely operational standardisation of machine-readable travel documents, which enables the electronic detection of terrorism suspects using, among others, INTERPOL's dedicated database for (suspected) terrorists known as Fusion Task Force database.<sup>103</sup> As a particular response to terrorism in the post-9/11 period, the ICAO is also undertaking work, in cooperation with the World Customs Organisation (WCO) and the International Air Transport Association (IATA), to streamline and universalise the use of Advance Passenger Information (API) procedure and Personal Name Record (PNR) system that several states are already using.<sup>104</sup> API and PNR are systems of capturing, storing, exchanging and analysing passengers' biographic data and related flight details between the airline companies and the border control, security and intelligence bodies of governments. API data is used for screening and detection of persons of interest, such as persons under terrorism sanctions lists, watch lists, or persons wanted for criminal prosecution or extradition. The PNR system, on the other hand, is a data system that maintains a track record of the travel history of each passenger under personally identifiable files. PNR data is more extensive and analytical: it details each passenger's flight booking history, including bookings that are cancelled or flights that are missed, how and by whom payment for flights was made, special requests placed during booking such as meal preferences, information about accompanying travellers and so on.<sup>105</sup> Similar to the case of financial institutions, the front-line actors that are

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<sup>103</sup> Specifications for Machine-Readable Travel Documents (MRTDs), ICAO, Document 9303, Parts I, II, III, 1996 (2008, third edition).

<sup>104</sup> API and PNR exchange is currently required for passengers flying to or from the United States, the European Union and European Economic Area, Australia, Russia, South Africa, and some parts of Latin America and Asia, including in Brazil, Colombia, Mexico, China, Japan, India, Indonesia, South Korea, and Saudi Arabia. See, Guidelines on Advanced Passenger Information, ICAO/WCO/IATA, March 2003, para. 3.8.

<sup>105</sup> Travel agents are also feeders of PNR data, and consequently not only flight-related information, but also information connected to hotel, car rental, tour and other bookings done at travel agencies are also channelled to PNR systems, thus enabling the construction of a more comprehensive personal history about individual travellers. See, *Edward Hasbrouck v. US Customs and Border Protection*, C10-03793 RS [2012], US District Court, Northern District of California.

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responsible for, and incur the administrative costs of collecting, storing and disseminating such data are airline companies. And individual passengers of international flights are exposed to potential violations of their data privacy rights when airlines share API and PNR data with states that do not have satisfactory data protection laws.<sup>106</sup>

The above illustrations of international normative instruments in the fields of terrorism financing, the control of arms and weapons, and the cross-border movement of persons and goods collectively reflect a trend of responding to terrorism through a web of general norms and detailed regulations. The regulatory counter-terrorism instruments have a proactive orientation in that they tackle the problem of terrorism through a risk management approach – whether it is the exposure of banks to terrorism financing, or the usurpation of nuclear and radioactive materials by terrorists, or the vulnerability of ships and ports to terrorist acts. Governmental bodies and also businesses that operate at the front-line of the activity in question are given a wide discretion in the implementation of the international counter-terrorism standards on a case-by-case basis; in a sense, to manage the problem as they see fit. The essential component of such problem management approach to governance is the taking of proactive, risk-reduction measures, which involve the taking of measures not only on identified terrorists or suspects, but on a wider range of actors that are deemed to carry a high risk of vulnerability to terrorism.

International regulatory standards require states and non-state actors alike to take such counter-terrorism measures that affect individuals and businesses. These effects take less visible, routine forms than military action or criminal prosecution: ranging from the termination of financial services, to denial of business accreditation or certification, to exposure to added administrative costs of counter-terrorism measures to mention some. The implementation of some of these international counter-terrorism standards further disenfranchises some non-state actors over others. For example, the added

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<sup>106</sup> The EU and US PNR sharing agreement has come under criticism due to the fact that US data protection laws provide a much lower level of protection than the EU counterparts, particularly with regard to the length of duration that data can be held in storage. *See*, Agreement Between the European Union and the United States of America on the Processing and Transfer of Passenger Name Record (PNR) Data by Air Carriers to the United States Department of Homeland Security, of 14 December 2011, (OJ L 215, 11.8.2012, p. 5–14)

administrative costs to businesses arising from mandatory counter-terrorism requirements of new business practices, equipment and personnel put smaller businesses at a disadvantage in terms of market competitiveness.

#### **4.5. Problematizing Cosmopolitan Governance of Terrorism**

The foregoing discussion highlighted that current international governance of terrorism is underpinned by a cosmopolitan conceptualisation of the problem and the normative response thereto. In distinction from the earlier focus on the victimisation of the state (in the League of Nations era) or that of peaceful inter-state relations (in the post-war period), the current conception of the problem puts the individual at the centre, in both perpetration and victimhood. That is, individuals and groups across borders as both the primary perpetrators and victims of terrorism. This is reflected in the Sectoral Conventions, United Nations resolutions and other documents that focus on individual criminality for terrorism, as well as in the various victim-centred international legal and policy initiatives that seek to put the individual at the centre of the discourse on international governance of terrorism. What is at the centre of the discourse is a cosmopolitan idea of the common good: that international counter-terrorism is a project in pursuance of a shared interest of human beings everywhere.

This conceptualisation repositions the state in relation to the problem: the state is chiefly portrayed as an external intervener, a protector of the common good, and not as the perpetrator nor the victim. The rhetoric force of the idea of the pursuit of the common good is also used to foster solidarity not only between states but also between states and non-state actors. The task of international governance of terrorism is framed as a global problem that is to be tackled through shared struggle. In other words, counter-terrorism governance is conceptualised as a shared responsibility of the global community.

This collaborative arrangement of international governance has led to new ways of engagement with non-state actors, particularly businesses. These non-state actors are both empowered as they are given more autonomy as enforcers of international counter-terrorism norms, and also adversely affected by various routine regulatory mechanisms. The adverse effects range from being subjected to new control and accreditation regimes, the denial of financial and other services, the added



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administrative costs of installing counter-terrorism features to their business practices, and exposure to violations of data privacy. These effects are less visible as they take place in routine processes, as opposed to the more visible military actions or criminal prosecutions, but nonetheless severe in their effects.

The following chapters show that the adverse effects that non-state actors are subjected to are both created and entrenched by a particularly novel form of governance that current international governance of terrorism is evolving into. This is a form of governance referred to here as *dynamism*, which allows for more functional robustness and less accountability, all in the name of a collaborative pursuit of the common good. Chapter 5 draws out the distinctive elements of dynamism in international governance of terrorism. Chapter 6 expositis the ways in which this form of governance also suppresses the accountability of states for measures they take in the implementation of international counter-terrorism norms.

## DYNAMISM IN INTERNATIONAL GOVERNANCE OF TERRORISM

### 5.1. Introduction

This chapter posits that corollary to the conceptualisation of terrorism as a complex global public problem, current international governance of terrorism exhibits trends that, taken together, constitute a distinct mode of governance. This distinct form of governance is referred to in this thesis as dynamic governance, or simply *dynamism*. Dynamism is a form of governance that allows for a functionally robust normative response to global problems through de-formalisation, i.e. setting aside the formal elements of classical international law. It is further argued that this form of governance systematically gives rise to adverse effects that reproduce existing patterns of global injustice. These points are illustrated through a legal and institutional analysis of various apparently disparate international regulatory instruments and institutional practices in the previously discussed areas of counter-terrorism financing, the control of arms and dangerous materials, and the cross border movement of persons and goods.

The following discussion begins with brief introductions of dynamism in international governance of terrorism and the specific formal elements of international law from which this mode of governance retreats away. Next, the manifestations of dynamism in international governance of terrorism are illustrated in detail. Subsequently, the rising utility of dynamic governance in other issue-areas and sites of governance is briefly highlighted. The last section points out the mechanisms through which dynamism systematically reproduces global injustice.

### 5.2. Dynamic Governance and De-formalisation

Dynamism is a form of governance that responds to a technically sophisticated and constantly evolving problem through a constantly transforming and malleable, i.e. de-formalised, normative framework and substance. Framework here refers to the process

of delimiting the set of norms, actors, and issue-areas that a particular field of governance involves; substance refers to the nature and content of the normative measures involved. This chapter distils four distinct elements of dynamism in the international governance of terrorism. The first element is a *multi-faceted* framework that accommodates a wide variety of norms, actors, and issue-areas. The second is the *absorptive* character, i.e. constant expansion, of this framework over time. These two elements together reflect openness of the framework of governance. The third element of dynamism is a *trial-and-error* approach to governance whereby normative measures are designed to expediently address a technically sophisticated and constantly evolving problem. The fourth element is the constant revision and improvement of normative measures, referred to as an *adaptive* approach to governance. The third and fourth elements together reflect flexibility with regard to the substantive normative measures that are taken. These trends – openness in framework and flexibility in substance – collectively constitute a system of governance that allows for a functionally robust problem management.

The driving focus of dynamism in governance is functional robustness. That is, the need for legal norms that effectively address, or that do not easily lose their vitality, problems under various and continually changing circumstances. In the dynamic international governance of terrorism, the pursuit for functional robustness is enabled by a simultaneous “retreat away” from the restraints of the formal elements of classical international law.<sup>1</sup> In other words, the above-mentioned trends of dynamic governance blur certain formal principles of international law. These are in particular the principles of state consent and legal certainty. State consent is a fundamental principle of international law which stipulates that states bear only those international legal

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<sup>1</sup> Jean D’Aspremont speaks of the ‘retreat away’ from formal concepts of international, specifically in connection with issue of law-ascertainment. See, Jean D’Aspremont, *Formalism and the Sources of International Law: A Theory for the Ascertainment of Legal Rules*, Oxford University Press, 2011. Generally on formalism and positivism in international law see Jean D’Aspremont, ‘The Foundations of the International Legal Order’, 18 *Finnish Yearbook of Int’l Law* 2007, 219-255; ‘The Politics of Deformalization in International Law’, 3(2) *Goettingen Journal of Int’l Law*, 2011, 503-550; *Formalism and the Sources of International Law: A Theory of the Ascertainment of Legal Rules*, Oxford Monographs in International Law, Oxford University Press, 2011; Koskenniemi’s call for a ‘culture of formalism’ in e.g., Martti Koskenniemi, *The Gentle Civilizer of Nations: The Rise and Fall of International Law 1870-1960*, Cambridge University Press, 2004.

obligations to which they have consented.<sup>2</sup> This principle holds that international norms, whether in the form of treaties or decisions of international institutions,<sup>3</sup> should be developed through processes whereby the vote of each of the states that would come to bear the normative obligations would equally matter. This means that treaties would be applicable only among their state parties and the decision making of international institutions needs to reflect the equal voting rights of members, typically a one-state-one-vote process. The principle of state consent is deemed to be the provider of legitimacy in classical international law.<sup>4</sup> Under a dynamic mode of international governance, normative stipulations arising from treaties and decisions of international institutions are made to apply beyond their formal reach. Treaties are rendered applicable to non-state parties, formally or substantively, through the decisions of international bodies. The decisions of international bodies are also made applicable to non-member states of the bodies adopting the decisions. Both trends are enabled through a discourse and practice that de-emphasises the legal character and emphasises only the functional dimension of the normative measures in question.

The other international legal principle that dynamic governance retreats away from is legal certainty. The principle of legal certainty, which is a general principle of law, requires the predictability of the legal consequences of actions.<sup>5</sup> Two aspects of legal

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<sup>2</sup> James Crawford, *Brownlie's Principles of Public International Law*, Oxford University Press, 8<sup>th</sup> ed., 2012, pp20-47.

<sup>3</sup> For the purposes of this discussion, these two are the relevant sources of international norms. Customary international law does not provide much content for the debate on counter-terrorism. A particular exception is the debate on whether terrorism has achieved the status of a distinct international crime through custom. On this debate, see, e.g., Kai Ambos and Anina Timmermann, 'Terrorism and Customary International Law' in Ben Saul (ed.), *Research Handbook on International Law and Terrorism*, Edward Elgar 2014; Ben Saul, *Defining Terrorism in International Law*, Oxford Monographs in International Law, Oxford University Press, 2006; Ben Saul, 'Legislating from a Radical Hague: The United Nations Special Tribunal for Lebanon Invents an International Crime of Terrorism', 24 (3) *Leiden Journal of International Law*, 2011, 677-700.

<sup>4</sup> Ellen Hey, *Teaching International Law: State-Consent as Consent to a Process of Normative Development and Ensuing Problems*, Martinus Nijhoff, 2003; Daniel Bodansky, 'The Legitimacy of International Governance: A Coming Challenge for International Environmental Law?', 93 (3) *American Journal of International Law*, 1999, 596-624.

<sup>5</sup> General principles of law are accepted sources of international law, see the Statute of the International Court of Justice, art. 38(1)(c): 'The Court, whose function is to decide in accordance with international law such disputes as are submitted to it, shall apply ... (c) the general principles of law recognized by civilized nations'. ON legal certainty, see James R. Maxeiner 'Legal Certainty: A European Alternative to American Legal Indeterminacy', 15 *Tulane Journal of Int'l & Comparative Law*, 2006-007, 546.

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certainty are particularly undermined in dynamic governance. These are the relative specificity and permanence of legal rules. Legal certainty requires relatively specific rules, from which rights and obligations can be “ascertained”.<sup>6</sup> Legal rules are also expected to have relative permanence in order to create a reasonable expectation of the consequences of one’s conduct. The combination of these two elements poses a paradoxical challenge: the specificity of legal rules hinders their long-term viability, whereas the need for permanence tends to lead to the over-abstraction of legal rules. Legal rules, therefore, need to be designed in such a way so as to strike a balance between these two tendencies: broad enough so as to create stable expectations, and specific enough to ascertain the content of those expectations. This helps in the invocation of the legal concepts of obligations and responsibility.

As will be illustrated in the discussion below, the dynamic international governance of terrorism blurs the principle of legal certainty, and hence the concepts of obligations and responsibility, by moving away from the use of precise legal rules. Instead, broad principles and standards of counter-terrorism are used in combination with practical tools and best practices of governance. Broad principles and standards are formulated as framework stipulations that could be implemented in as many varied concrete manners as possible, hence being too vague to derive specific obligations from. Practical tools and best practices of governance are inherently too specific and varied to distil general rules from, hence unhelpful to create reasonable expectations and consequently invoke responsibility in the case of transgressions. In addition, international counter-terrorism norms are developed and implemented in such a flexible manner that their actual content varies between sites and over time. This element of flexibility also undermines the requirement of permanence in that international counter-terrorism norms are constantly changed in response to the constantly evolving problem of terrorism.

Dynamism operates by oscillating between broad principles and standards and practical tools and best practices, remaining ever elusive for generalisation while also tackling problems in a hands-on manner. This is a mode of international governance that enables a functionally robust, i.e. continually effective, pursuit of normative

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<sup>6</sup> Term borrowed from Jean D’Aspremont, *Formalism and the Sources of International Law: A Theory of the Ascertainment of Legal Rules*, Oxford Monographs in International Law, Oxford University Press, 2011.

responses to global problems through the erosion of the formal international law elements of state consent and legal certainty. The following sections illustrate each of the four elements of dynamism in international governance of terrorism mentioned above – multi-faceted, absorptive, trial-and-error, and adaptive governance.

### 5.3. Openness of the Framework of Governance

Arising from the complexity of the problem of terrorism, its international governance has become a *multi-faceted* endeavour, i.e. consisting of a wide variety of normative instruments, actors, and policy fields. Not only is international governance of terrorism executed by way of a diverse set of norms, actors and policy fields, the scope of this set is also *absorptive* in that it constantly expands over time in an impulsive fashion. What collectively emerges is an image of an area of governance that is seemingly beset with chaos, involving a miscellaneous assemblage of ideas and actors, and continually expanding in apparently random directions. However, the various (*multi-faceted*) and constantly expanding (*absorptive*) set of norms, actors and policy fields of international counter-terrorism collectively signify openness in terms of the framework of governance. The following sections illustrate this observation in detail.

#### 5.3.1. Multi-faceted Framework: Illustration

As illustrated in the previous chapter, international governance of terrorism touches upon multiple fields – among others, finance, the control of arms and dangerous materials, and cross-border movement of persons and goods – which in turn consist of various sub-fields. The international normative framework on terrorism comprises treaties, binding and non-binding decisions of international organisations, and best practices. The actors involved are also diverse: businesses, civil society, national governments, and international institutions of formal and informal, global and regional, and intergovernmental and hybrid nature. This assemblage of norms and actors from various fields is bound together through managerial cohesion instead of well-defined international legal structure. The most pertinent illustrations of multi-faceted governance come from the area of cross-border movement of persons and goods, while the other two fields also exhibit this trend to a certain extent. The latter two fields will be discussed first, followed by an analysis of international counter-terrorism governance in the field of cross-border movement of persons and goods.

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International governance in the field of counter-terrorism financing involves an assemblage of various normative instruments, actors, and issue-areas. The 1997 Terrorism Financing Convention and Security Council's Resolutions<sup>7</sup> are complemented by international standards and recommendations adopted by, among others, the Financial Action Task Force (FATF), the Basel Committee on Banking Supervision, the International Organization of Securities Commissions, and the International Association of Insurance Supervisors.<sup>8</sup> The latter three institutions are composed of not only governmental bodies but also national industry associations, i.e. self-regulatory bodies. This field of governance also involves the participation of businesses and specific governmental agencies. Under the FATF Recommendations, financial institutions (e.g. banks, money service businesses, collective investment schemes) and other businesses that are exposed to financial flows (e.g. casinos, real estate agents, dealers in precious metals) operate as horizontal enforcers of international counter-terrorism financing standards. These financial institutions and businesses, as was mentioned in the previous chapter, are empowered to undertake their own assessment of the terrorism financing risk that their clients pose and to take commensurate measures, including a proactive termination of services to high-risk customers. FATF Recommendations also envisage the establishment of a governmental body called Financial Intelligence Unit in each state that centrally analyses financial transaction data for the purposes of screening terrorism financing and maintains a direct operational relationship with the FATF.

International governance of counter-terrorism financing, therefore, involves treaties and various decisions of international organisations, national, intergovernmental and self-regulatory bodies drawn from the issue-areas of banking, securities, insurance, and other businesses. These various normative instruments and actors are not interlinked by a legal framework that regulates their relationship, but function as a complementary, if at times overlapping, constellation. The international institutions which develop the bulk of counter-terrorism financing standards have limited and varied membership. The two most important governance institutions in counter-terrorism financing, the UN Security Council and the FATF, are composed of fifteen and thirty-six member

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<sup>7</sup> UN Security Council Resolution 1373 (2001) that addresses counter-terrorism financing broadly and Resolutions 1267 (1999), 1989 (2011), 1988 (2011), 1844 (2008), 1907 (2009) and 1636 (2005), which establish assets-freeze sanctions regimes on specific individuals and entities.

<sup>8</sup> A survey of relevant instruments adopted by these bodies found above, chapter 4, section 4.5.

states respectively.<sup>9</sup> The Basel Committee consists of national banking authorities from twenty-seven states, the IOSC consists of national securities authorities from one-hundred-twenty-four states, and the IAIS consists of four international organisations and insurance supervisors and (self) regulators from one-hundred-thirty-five states. The membership of these various institutions also does not fully overlap due to the obvious numeric disparity and the fact that there are only a handful of states that have membership in all of these institutions.<sup>10</sup>

Counter-terrorism financing standards adopted by the above-mentioned international bodies, including those with very limited membership, are equally promoted for universal applicability. The Security Council, which acts as the overall coordinating body of international counter-terrorism,<sup>11</sup> acknowledges and endorses standards adopted by the other international bodies, particularly the FATF.<sup>12</sup> The Counter-Terrorism Committee of the Security Council, and its Executive Directorate, also compile international counter-terrorism financing standards adopted by the above-mentioned institutions and maintain a directory of international “best practices, codes and standards”.<sup>13</sup> They invite states to utilise standards and best practices as a measure of implementing resolutions of the Security Council.<sup>14</sup> This mix of various international standards of counter-terrorism financing is treated as a pool of equally relevant governance tools whose implementation by states is determined not by formal consideration, i.e. whether the state is a member of the relevant international institution, but by the practical relevance of the instruments in question. Therefore, for example, the recommendations adopted by the FATF or principles adopted by the

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<sup>9</sup> The FATF also consists of two regional organizations: the European Commission and the Gulf Cooperation Council. Although the United Nations, which the Security Council is an organ of, has a wide global membership, the decisions of the Security Council involve only its fifteen member states, five of whom are permanent members with veto powers.

<sup>10</sup> These handful states are mostly the developed and/or bigger economies of the world, such as the European Union, the United States, China, Australia, Mexico, Brazil, and Russia.

<sup>11</sup> Arising from its UN Charter-based primacy of mandate in matters of international peace and security. UN Charter, art. 24: ‘In order to ensure prompt and effective action by the United Nations, its Members confer on the Security Council primary responsibility for the maintenance of international peace and security, and agree that in carrying out its duties under this responsibility the Security Council acts on their behalf.’

<sup>12</sup> E.g., UN Security Council Resolution 1699 (2006), 1810 (2008), 2129 (2003).

<sup>13</sup> See, e.g., ‘Technical Guide for the Implementation of Resolution 1373 (2001)’, the Security Council Counter-Terrorism Committee Executive Directorate, 2009;

<sup>14</sup> Available online at <http://www.un.org/en/sc/ctc/bptable.html> (last accessed 6 June 2015)



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Basel Committee, both of which derive from processes involving a few states, are to be implemented by members and non-members of these institutions equally.

In the less institutionalised field of the control of arms and dangerous materials, the core participating international governance bodies include the United Nations Office on Drugs and Crime (UNODC), INTERPOL, the Security Council's 1540 Committee,<sup>15</sup> and the International Atomic Energy Agency (IAEA). The combination of treaties,<sup>16</sup> UN Program of Action,<sup>17</sup> Security Council resolutions and IAEA standards<sup>18</sup> build regulatory mechanisms in the areas of arms-control and the proliferation of chemical, biological, radioactive, and nuclear weapons and their means of delivery. INTERPOL is active with respect to establishing practical and technological platforms of governance that are used, among others, for the identification, tracking and management of arms and weapons, and the exchange of information between states in this regard. Examples of these platforms of governance could be the Red Notice for hidden weapons, parcel bombs and other dangerous materials, the Weapons Electronic Tracking System (IWeTS), the Illicit Arms Records and Tracing Management System (iARMS), elaborated further on.<sup>19</sup> International counter-terrorism in this field, therefore, consists of treaties, policy documents, binding decisions of international organisations; the areas of small arms, light weapons, weapons of mass destruction among others; and multiple international organisations. Although these international bodies have broad-based membership unlike those mentioned in connection with counter-terrorism financing, their mode of operation is similarly managerial in that their activities reach out beyond their member states. As in the case of counter-terrorism financing, these various governance tools – whether the

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<sup>15</sup> Committee established pursuant to Security Council Resolution 1540 (2004) concerning the proliferation of nuclear, chemical and biological weapons and their means of delivery to non-state actors.

<sup>16</sup> In addition to the relevant Sectoral Conventions adopted under the auspices of the IAEA (see, above chapter 4, notes 83-86), there is also the International Instrument to Enable States to Identify and Trace, in a Timely and Reliable Manner, Illicit Small Arms and Light Weapons (known as International Tracking Instrument, ITI).

<sup>17</sup> UN Program of Action to Prevent, Combat and Eradicate the Illicit Trade in Small Arms and Light Weapons in All Its Aspects.

<sup>18</sup> The 2003 Code of Conduct on the Safety and Security of Radioactive Sources, and the 2004 Supplementary Guidance on the Import and Export of Radioactive Sources.

<sup>19</sup> See below, section 5.4.1.

IAEA registry of technological tools or INTERPOL platforms – are utilised by states in various combinations as deemed appropriate.

International counter-terrorism with respect to cross-border movement of persons and goods – by land, air, and water – provides even more salient illustrations of multi-faceted governance. This field involves the regulation of the activities of a wide range of private and governmental actors, such as commercial aviation and maritime carriers, aviation and maritime authorities, logistics providers, insurers, transportation security providers, border management authorities, and immigration and customs authorities. The international institutional framework that brings together these various areas of activities is a loosely integrated set of intergovernmental bodies, principally the International Maritime Organization (IMO), the World Customs Organization (WCO), the United Nations Office on Drugs and Crime (UNODC), the UN Counter-terrorism Committee (CTC), and INTERPOL. Some of these institutions have a central counter-terrorism mandate (e.g. the CTC, UNODC, and INTERPOL); the other, more technically specialised bodies undertake counter-terrorism as a peripheral activity (e.g. the ICAO, IMO, and WCO) as they are principally tasked with the overall governance of their respective technical fields.

Each sub-field of activity under the cross-border movement of persons and goods is itself regulated by a diverse mix of treaties, international standards, recommendations, and institutional mechanisms. To take the case of international aviation as an illustration, the international rules and standards relating to counter-terrorism in aviation emanate from international treaties (treaties relating to aircraft safety and security,<sup>20</sup> unlawful interference,<sup>21</sup> and the safety of civil aviation and airports<sup>22</sup>) and standards and recommended practices (SARPs) adopted by the International Civil Aviation Organization (ICAO),<sup>23</sup> which constitute Annexes to the convention

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<sup>20</sup> The 1963 Convention on Offences and Certain Other Acts Committed On Board Aircraft.

<sup>21</sup> The 1970 Convention for the Suppression of Unlawful Seizure of Aircraft, and its 2010 Protocol.

<sup>22</sup> The 2010 Convention on the Suppression of Unlawful Acts Relating to Civil Aviation, its 1988 Protocol, and the 2010 New Civil Aviation Convention.

<sup>23</sup> See above, chapter 4, notes 102-105. The ICAO itself states, ‘the most important legislative function performed by ICAO is the formulation and adoption of SARPs’. *See*, <http://www.icao.int/Security/SFP/Pages/Annex17.aspx>.

establishing the ICAO (the Chicago Convention of 1944).<sup>24</sup> The international normative approach in the area is diverse: from criminal prosecution and suppression of acts of aviation terrorism,<sup>25</sup> to detailed technical standards concerning passenger information management, travel documents interoperability, cargo and personal screening procedures, and airport safety measures to mention some.<sup>26</sup>

International counter-terrorism governance with respect to the cross-border movement of persons and goods also involves the participation of businesses and governmental bodies, mainly as enforcement agents of international standards. With regard to businesses, airlines, shipping companies and other accessory businesses such as security, logistics, and information technology providers take part. Likewise, governmental immigration, customs, port administration, aviation and maritime authorities take part in further defining and enforcing international regulatory standards. To use the example mentioned in the previous chapter, airlines and travel agents exercise the task of collecting, storing and disseminating passenger data through the Advanced Passenger Information (API) and the Personal Name Record (PNR) systems.<sup>27</sup> Governmental intelligence bodies and immigration authorities analyse and further exchange data obtained through the API and PNR systems. To use another example, the IMO's International Ship and Port Facility Security Code provides shipping companies discretionary enforcement power to devise graduated counter-terrorism measures and to deploy these as they see fit. The Code also authorises governments to administer a certification program called International Ship Security Certificate, whereby ships have to undergo inspection for compliance with the security stipulations contained under the Code and the International Convention for the Safety of Life at Sea.<sup>28</sup>

International governance in other sub-fields of cross-border movement of persons and goods – importantly maritime transport and immigration and customs control – also exhibit a similarly multifaceted, albeit less developed, international governance

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<sup>24</sup> Based on ICAO mandate under Annex 9 (Facilitation) to the Chicago Convention, as amended in 2008 (amendment 21) concerning API systems.

<sup>25</sup> Found under the Sectoral Conventions, above notes 21-23.

<sup>26</sup> Found, among others, under Annexes 17 and 19 of the Chicago Convention.

<sup>27</sup> Elaborated below, section 5.4.1.; *see* also above, chapter 4, section 4.4.3.

<sup>28</sup> Specifically Chapter XI-2 of SOLAS.

framework. The normative approach consists of criminal prosecution and suppression (of maritime violence, forgery of travel and identity documents, for example),<sup>29</sup> and detailed technical standards. These technical standards regulate, among others, maritime safety procedures, the role of private maritime transporters and security contractors, immigration and border screening and background checks, and inter-state data exchange and cooperation.<sup>30</sup>

These various instruments and actors from multiple regulatory fields of counter-terrorism operate in an interlinked manner through their functional, and not formal, linkage. The functional imperative of counter-terrorism is a connecting thread that runs through the multiple regulatory fields. Again, take the international air traveller for example. The entire journey from the starting point of the international flight up until the entrance into the destination state consists of activities falling under at least three separate fields of activity: aviation transport, customs, and immigration regimes. Matters relating to the international flight concern the ICAO, matters relating to the entrance of the belongings of the traveller into the destination state concern the WCO, and matters relating to the admittance of the traveller into the destination state concern not a single but various international bodies, such as the International Organization for Migration (IOM) and the UNHCR. In addition, other international governance bodies that have a more supportive and comprehensive counter-crime/terrorism mandate, such as the UN Office on Disarmament Affairs, also participate. Each of these international governance bodies address the security imperative to the extent it relates to their activities. And because from a cross-border security perspective the entire travel process constitutes an integrated single episode, the activities of these

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<sup>29</sup> Found under the 1988 Convention for the Prevention of Unlawful Acts against the Safety of Maritime Navigation, the 1988 Protocol for the Suppression of Unlawful Acts against the Safety of Fixed Platforms Located on the Continental Shelf; UN Security Council Resolution 1989 of 17 June 2011, para 47.

<sup>30</sup> See, e.g., IMO's International Ship and Port Facility Security Code (ISPS Code) of 2002; SUA Convention of 1974. For an introduction to counter-terrorism vis-à-vis general international migration law, see Andrew I Schoenholtz, 'Anti-Terrorism Laws and the Legal Framework for International Migration', in Ryszard Cholewinski, Richard Perruchoud, Euan MacDonald, eds., *International Migration Law :Developing Paradigms and Key Challenges*, T.M.C. Asser, The Hague, 2007, p3-27. On the role of private carriers, see Sophie Scholten and Paul Minderhoud, 'Regulating Immigration Control: Carrier Sanctions in the Netherlands', 10(2) *European Journal of Migration and Law*, 2008, 123-147; Ashley Terlouw and Sophie Scholten, 'Private Carriers as Experts in Immigration Control' in Monika Ambrus, Karin Arts, Ellen Hey, and Helena Raulus (eds.), *The Role of 'Experts' in International and European Decision-Making Processes*, Cambridge University Press, 2014, p288-312.

varied international bodies are coordinated under a counter-terrorism framework.<sup>31</sup> Consequently, the various standards that these bodies adopt are treated as a menu, as a pool of governance resources, from which states are encouraged to draw and utilise. States are encouraged to do so without a strict regard to their representation in the processes that produce these standards or the legal status of the standards.

In sum, the involvement of multi-faceted set of norms, actors and policy domains in international governance of terrorism is a trend.<sup>32</sup> And it is a trend of openness in terms of the framework of governance which sets aside the formal contours of state consent under international law. Instruments of varying degrees of normativity, and national, intergovernmental, private and hybrid actors from multiple fields are brought to bear on international governance of terrorism. This multi-faceted approach is driven by a *wisdom of the crowd* logic: garnering the best possible cumulative result by diversifying and maximizing voices and participants. In this system of governance, although the state remains the central pillar, the participation of international and private actors is also remarkable. States diffuse governance roles, and hence responsibility, not only upwards by acting through international organisations, but also downwards by deputising businesses as front-line governance actors in counter-terrorism. The

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<sup>31</sup> Currently, these multiple international bodies liaise with each other under the coordinating framework of the UN Counter-Terrorism Implementation Task Force (CTITF) and the Security Council Counter-terrorism Committee (CTC). The operation of the CTC is discussed further in chapter 6 below.

<sup>32</sup> The operation of the CTC is discussed further in chapter 6 below. The multi-faceted institutional framework is similar under national systems as well –even in the least resourceful and institutionally less developed states such as in the Horn of Africa. Ethiopia’s counter-terrorism mobilizes the Ministries of Finance & Development Cooperation, Infrastructure Development, Revenue, Justice, and Federal Affairs; the National Bank, Ethiopian Civil Aviation, Customs Authority, Immigration, Security, and Refuges Authority, and the Federal Police Commission – and this is only a figure from 2001 (*see*, Supplementary report of the Federal Democratic Republic of Ethiopia pursuant to paragraph 6 of Security Council resolution 1373 (2001), document S/2002/1234). A single counter-terrorism task force in Kenya – the National Anti-Money Laundering Task Force – is composed of the following governmental departments: Central Bank of Kenya, Ministry of Finance, Police Headquarters, National Security Intelligence Services, Attorney General’s Chambers, Kenya Revenue Authority, Kenya’s Bankers’ Association, Commissioner of Insurance, Immigration Department, and Ministry of Trade and Industry (*see*, Kenya’s report to the Security Council’s Counter-terrorism Committee, March 2003, document S/2003/384, pp. 3–4). Similar institutional congregation is also found at the Horn of Africa sub-region – the major governance institutions operating at that level are the IGAD (through its Capacity Building Program Against Terrorism - ICPAT), *see* [www.icpat.org](http://www.icpat.org), the Eastern Africa Police Chiefs’ Cooperation Organization (EAPCCO), the Eastern and Southern African Anti-Money Laundering Organization (ESAAMLG), *see* [www.esaamlg.org](http://www.esaamlg.org).

diffusion of responsibility is also furthered by the diversity of the sources of norms and processes for norm development: the making of international counter-terrorism rules and standards is not restricted to the traditional sources or processes of law-making (i.e. treaties and multilateral diplomacy) but consists of soft law (i.e. standards, recommendations, best practices developed through expert bodies or institutions of limited and varied membership)

### 5.3.2. Absorptive Framework: Illustration

The framework of international governance of terrorism is not only multi-faceted, i.e. involving multiple instruments, actors and regulatory fields, but also absorptive, i.e. continually expands to incorporate new ideas and actors. In other words, the assemblage of international counter-terrorism norms and actors outlined in the preceding section is not a static set. There is a tendency of receptiveness toward new ideas and actors as a response to the evolving character of the problem itself. Extending counter-terrorism into new fields of international governance, incorporating new norms into existing fields of governance, and involving new actors in doing so is a prevalent tendency.

This continual expansion is driven by functional consideration – all ideas and actors that contribute to an effective counter-terrorism are tacked-onto. Even critical norms and actors that scrutinise counter-terrorism activities, such as human rights norms and organisations, are increasingly becoming integral parts of the discourse and practice in international governance of terrorism following the same functional consideration. That is, a human rights compliant counter-terrorism governance is considered as a more effective counter-terrorism as it garners legitimacy, and thereby greater counter-terrorism cooperation from all corners of global society.<sup>33</sup>

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<sup>33</sup> See a major report undertaken by the Kroch Institute at the University of Notre Dame, the Fourth Freedom Forum (a US non-profit organization), and CORDAID (the Netherlands development agency). The report has been in discussion at the UN Counter-Terrorism Committee Executive Directorate, see David Cortright, Alistair Millar, Linda Gerber-Stellingwerf, and George A. Lopez, 'Friend, Not Foe: The Role of Civil Society in Preventing Violent Extremism', 2(2) *Notre Dame Journal of International & Comparative Law*, 2012, 238-256. See, generally on substantive-driven legitimacy in international law, Thomas M. Frank, *The Power of Legitimacy Among Nations*, Oxford University Press, 1990.

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In the field of counter-terrorism financing, a continuous expansion of areas of governance, and hence that of norms and actors, is visible. The discussion at the FATF has over time moved beyond the regulation of traditional financial institutions, businesses and methods of payment. New issue-areas, such as alternative currencies, so-called “new payment methods”, and illicit trade, have become subject to FATF’s normative work. Currency used as alternative to money, such as the Bitcoins virtual currency,<sup>34</sup> is believed to be the new channel of terrorist financial flow. New payment methods include methods such as prepaid bank cards, internet payment systems, and mobile payment systems. These new methods of executing financial transfers are considered to pose a particular risk of being abused for terrorism purposes risk as they, similar to alternative currencies, do not involve face-to-face interaction with financial institutions.<sup>35</sup> Illicit trade, particularly trade in diamonds and charcoal, was recently identified as a new source of revenue for terrorist groups.<sup>36</sup>

The process of developing counter-terrorism standards by the FATF to address these new issue-areas also involves the participation of new actors, particularly private actors and civil society representatives. The FATF invites international associations of financial institutions, new payment method processors, and non-profit organisations to provide input for the development of guidance materials that adapt and specify the general FATF recommendations to the relevant issue-areas.<sup>37</sup> This interaction between the FATF and private and civil society representatives has recently taken a regular form with the establishment of the FATF Private Sector Consultative Forum. The forum, held annually, brings together various private sector and civil society representatives, and is usually hosted by the private sector representative institutions.<sup>38</sup>

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<sup>34</sup> ‘Virtual Currencies: Key Definitions and Potential AML/CTF Risks’, FATF Report, June 2014.

<sup>35</sup> ‘Money Laundering Using New Payment Methods’, FATF Report, October 2010.

<sup>36</sup> ‘Money Laundering and Terrorist Financing through Trade in Diamonds’, FATF Report, October 2013; Security Council Resolution 2036 of 22 February 2012. ‘The UN estimated in its 2012 [Somalia-Eritrea Sanctions] Monitoring Group that Al-Shabaab earned an income of 25 million USD per annum from charcoal [trade]...’ *see*, Tom Keatinge, ‘Is the Nexus Between the Illegal Wildlife and Forestry Trade and Transnational Security Finally Being Taken Seriously?’, Royal United Services Institute, 15 July 2014.

<sup>37</sup> Reports of such meetings available at FATF website [www.fatf-gafi.org](http://www.fatf-gafi.org)

<sup>38</sup> The 2013 forum was hosted by the International Banking Federation, a representative body for national banking associations; the 2014 forum was hosted by the European Banking Federation, an association of European banks; the 2015 forum was hosted by the European Payment Institutions



Counter-terrorism financing measures of the UN Security Council also reveal similar expansion in terms of norms and actors. The Council's counter-terrorism sanctions, particularly assets-freeze measures, against individuals and entities constantly expand to cover new sources and methods of terrorism financing. The assets-freeze established by Resolution 1267 (1999) has since been expanded on several occasions to cover new areas such as terrorist recruitment,<sup>39</sup> and the provision of internet hosting services,<sup>40</sup> and the issue of the lowering of evidentiary standard of proof for such measures to "reasonable grounds".<sup>41</sup> The involvement of new actors, particularly human rights actors, is observable at the Security Council's broader counter-terrorism framework. The Security Council's Counter-terrorism Committee (CTC), which comprehensively oversees the Council's counter-terrorism measures, extensively collaborates with UN human rights bodies in developing and implementing counter-terrorism norms and guidance.<sup>42</sup> More recently there is discussion regarding involving civil society actors in the work of the CTC and its Executive Directorate (the CTED).<sup>43</sup>

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Federation, an association of more than 250 non-bank payment operators. See, FATF website [www.fatf-gafi.org](http://www.fatf-gafi.org)

<sup>39</sup> UN Security Council Resolution 1617 (2005).

<sup>40</sup> UN Security Council Resolution 1822 (2008).

<sup>41</sup> UN Security Council resolution 2161 (2014).

<sup>42</sup> Particularly the UN Office of High Commissioner for Human Rights (OHCHR). Security Council Resolution 1535 (2004) authorized the CTED to liaise with 'the Office of the Un High Commissioner for Human Rights and other human rights organizations' (para. 16/c). More recently, the CTC has instructed its Executive Directorate to 'liaise with the Office of the High Commissioner for Human Rights and, as appropriate, with other human rights organizations in matters related to counter-terrorism', *see*, 'Conclusions for Policy Guidance Regarding Human Rights and the CTC', Policy Guidance PG2 of the Security Council Committee Established Pursuant to Resolution 1373 (2001) Concerning Counter-Terrorism, S/AC.40/2006/PG.2.

<sup>43</sup> Bibi van Ginkel, 'The Role of Civil Society in Implementing the Global UN Counter-Terrorism Strategy', Clingendael Institute and CORDAID, September 2010, available at [http://www.clingendael.nl/sites/default/files/20100909\\_cscp\\_paper\\_ginkel.pdf](http://www.clingendael.nl/sites/default/files/20100909_cscp_paper_ginkel.pdf) (last accessed 6 June 2015); 'Engaging Civil Society in Countering Violent Extremism: Experiences with the Un Global Counter Terrorism Strategy', International Centre for Counter Terrorism (ICCT) Research Paper, August 2012, available at <http://www.icct.nl/download/file/ICCT-Van-Ginkel-Civil-Society-in-CVE-August-2012.pdf> (last accessed 6 June 2015); Eric Rosand, Alistair Millar, and Jason Ipe, 'Civil Society and the UN Global Counter-Terrorism Strategy: Opportunities and Challenges', Centre on Global Counter-Terrorism Cooperation, September 2008, available at <http://www.icnl.org/research/library/files/Transnational/civil.pdf> (last accessed 6 June 2015).



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Furthermore, the Executive Directorate in particular, being an expert body, liaises with think tanks and experts.<sup>44</sup>

The involvement of human rights norms and actors in the Security Council-based counter-terrorism governance is a particularly remarkable manifestation of the absorptive tendency at play. This is because the initial mandate of the CTC, provided under Resolution 1373(2001), did not involve human rights issues. However, the practice of the CTC gradually evolved in such a way that currently human rights has become part of its regular work program.<sup>45</sup> This reflects that even when a particular counter-terrorism governance process is initially designed to steer clear of particular relevant areas (in this case, human rights), the absorptive tendency at play results in engagement with such areas eventually.

Although less developed, the field of control of arms and dangerous materials also shows some expansion particularly into new areas of governance. Examples of recently introduced areas of international counter-terrorism governance include the issue of ammunition control, advanced improvised explosive devices and their means of delivery. The control of ammunition (bullets), as a further step from the control of firearms, has become a new counter-terrorism concern. The international regulatory measures that are being discussed and developed in this area include the creation of standards for the categorisation, labelling and record keeping of ammunition and the introduction of systems of security and stockpile management.<sup>46</sup> The terrorist use of advanced improvised explosive devices, particularly waterproof and non-metallic

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<sup>44</sup> Examples are think tanks such as International Center for Counter-Terrorism (ICCT, [www.icct.nl](http://www.icct.nl)), and the Global Center on Counter-terrorism (now renamed Global Center on Cooperative Security, [www.globalcenter.org](http://www.globalcenter.org)).

<sup>45</sup> This has been endorsed by Security Council resolutions 1456 (2003), 1535 (2004), 1624 (2005), and 1805 (2008). Resolution 1624 expressly included oversight of states' compliance with 'international human rights law, refugee law, and humanitarian law' in counter-terrorism under the CTC's mandate (para. 4). See also comments by Edward Flynn, the Senior Human Rights Officer of the CTED, Edward J. Flynn, 'The Security Council's Counter-Terrorism Committee and Human Rights', 7(2) *Human Rights Law Review*, 2007, 371-384; 'Thematic discussion of the Counter-Terrorism Committee on the human rights aspects of counter-terrorism in the context of resolution 1373 (2001)', CTED Background Paper, available at [http://www.un.org/en/sc/ctc/docs/2010/2010\\_10\\_07\\_thematic-humanrights.pdf](http://www.un.org/en/sc/ctc/docs/2010/2010_10_07_thematic-humanrights.pdf), last accessed 6 June 2015; Rosemary Foot, 'The United Nations, Counter Terrorism and Human Rights: Institutional Adaptation and Embedded Ideas', 29(2) *Human Rights Quarterly*, 2007, 489-514.

<sup>46</sup> The 2011 UN International Ammunition Technical Guidelines.

devices which evade existing tools of detection, and their advanced delivery means, such as drones, are currently subjects of discussion at the United Nations Security Council.<sup>47</sup>

Within the field of cross-border movement of persons and goods, standards developed in non-traditional forums, such as within informal networks of states, are easily absorbed into international regulatory frameworks. The group of eight industrialized countries (the G8<sup>48</sup>), which is a key catalyst in the development of international counter-terrorism rules and standards in relation to air transportation security, is illustrative in this regard.<sup>49</sup> The G8 established an initiative called Secure and Facilitated International Travel Initiative (SAFTI) under which international standards were developed concerning the manufacturing and issuance of travel documents, international exchange of information, analysis of passenger data, control regimes for the civilian aviation sector, and in-flight security protocols among others.<sup>50</sup> The G8 standards on travel documents – primarily the requirement of the use of machine readable passports, visas, and other forms of travel documents – were first applied within the G8 membership. This standardization is aimed at ensuring the interoperability of travel documents worldwide. That is, states would be able “to exchange ...process...and to utilize that [from travel documents] data in inspection operations in their respective state.”<sup>51</sup> The International Civil Aviation Organization (ICAO) later adopted the requirement of machine readable travel documents as an international standard and outlined detailed specifications on the design,

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<sup>47</sup> Report of the Analytical Support and Sanctions Monitoring Team of the Al-Qaeda sanctions committee, Security Council document S/2014/770, Para 70.

<sup>48</sup> These states are the United Kingdom, the US, Germany, France, Italy, Canada, Japan and Russia. Russia has been excluded from this forum since March 2014, and consequently the G8 is currently also referred to as the as G7/8 or G7. For the purpose of consistency, the acronym ‘G8’ will be used throughout this thesis.

<sup>49</sup> Broadly on the role of the G8 in counter-terrorism governance, see Andre Bebelieu, ‘The G8 and Terrorism: What Role Can the G8 Play in the 21st Century?’, 8 *G8 Governance*, 2012, available online at <http://www.g8.utoronto.ca/governance/> (last accessed 6 June 2015); Eric Rosand, ‘The G8’s Counterterrorism Action Group’, Center on Global Counterterrorism Cooperation, Policy brief, May 2009.

<sup>50</sup> ‘Secure and Facilitated International Travel Initiative: A G8 Action Plan’, June 2009, available at <http://2001-2009.state.gov/e/eeb/rls/fs/33384.htm>, last accessed 6 June 2015.

<sup>51</sup> ‘Machine Readable Travel Documents’, Part 1, Volume 1, Doc 9303, International Civil Aviation Organization, sixth edition, 2006, piii.

manufacturing, issuance, and inspection of such documents to be met by travel document issuing authorities and manufacturers worldwide.<sup>52</sup>

In terms of the continuous expansion of fields of governance, current discussion at the ICAO has evolved to include the issue of counter-terrorism in the use of e-Passports and Automated Border Control systems.<sup>53</sup> E-Passports, which are passports carrying electronic chips that contain and transmit biometric information about the bearer, are currently being issued by several states, including all member states of the European Union and the United States.<sup>54</sup> In connection with the introduction of e-Passports, passport control at national ports of entry and exit are increasingly being carried out with automated border control systems whereby the traveller directly interacts with screening equipment. The introduction of e-Passports and automated border control systems contribute to counter-terrorism by enhancing identity verification but they also exacerbate the risk of terrorism vulnerability through cyber interference. Consequently, current efforts at the ICAO concern the international standardisation of these technological tools in a way that enhances their counter-terrorism utility while reducing their vulnerability to abuse.

In further illustration of this absorptive trend, the counter-terrorism standardisation of travel documents has led to a new discussion on the standardisation of other types

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<sup>52</sup> These specifications are contained in the six-volume ICAO Document 9303, and a supplement to Document 9303I, both available at <http://www.icao.int/Security/mrtd/Pages/Document9303.aspx>, last accessed 6 June 2015. Other G8 bodies – the Lyon-Roma Anti-Crime and Terrorism Group, and the Counter-terrorism Action Group (CTAG)– have also similarly played role in the development and promotion of international counter-terrorism rules and standards concerning, among others, radicalization and recruitment, transportation security, weapons of mass destruction, cyber-crime, and migration. The Lyon-Roma group, composed mainly of experts and foreign and interior ministry representatives of the G8 member states, develops counter-terrorism ‘standards and best practices’ on the above subjects (*See*, [http://www.g8italia2009.it/G8/Home/News/G8-G8\\_Layout\\_locale-1199882116809\\_AppGiustizia.htm](http://www.g8italia2009.it/G8/Home/News/G8-G8_Layout_locale-1199882116809_AppGiustizia.htm), last accessed 6 June 2015). CTAG, on the other hand, focuses on the dissemination of these ‘standards and best practices’, and its work influences international counter-terrorism governance more directly by collaborating with multilateral counter-terrorism institutions, primarily the Security Council’s Counter-terrorism Committee, whose Executive Committee (CTED) is represented in the regular meetings of CTAG itself. More on this, *see*, Eric Rosand, ‘The G8’s Counter-terrorism Action Group’, Center on Global Counter-terrorism Cooperation, Policy Brief, May 2009. (CTAG has since expanded beyond the G8 to include Spain, Switzerland, and Austria, and the European Commission).

<sup>53</sup> ‘Machine Readable Travel Documents’, ICAO Document 9303, 2004; ‘Public Key Infrastructure for machine readable travel documents offering ICC read-only access’, ICAO, version 1.1, October 2004.

<sup>54</sup> According to the ICAO, more than 100 states currently issue e-Passports.

of documents. The standardization of travel documents, particularly the requirement of electronically readable passports, has largely succeeded internationally. The requirement of electronically readable passports, however, has not in itself solved the risk of abuse of such documents by terrorists. Terrorists could still forge other national identity documents that are required for the issuance of passports or acquire such documents under disguised identity. They can then legitimately acquire electronically readable passports, thereby circumventing the counter-terrorism relevance of such passports. Consequently, discussion at the ICAO has recently shifted toward standardizing the issuance of local government-issued documents, such as national identity cards, citizenship documents, voter registration, driver's licenses, birth and death records, and marriage and divorce certificates.<sup>55</sup>

In sum, the framework of governance in international counter-terrorism is absorptive in that it consists of a continually expanding set of norms and actors. Even critical ideas and actors such as human rights norms and organisations are absorbed into the international normative framework on terrorism. This dynamic is enabled by the malleability of the framework of governance. This framework is held together not by a well-defined legal relationship among the various governance bodies or normative instruments, but rather by the overriding functional imperative of counter-terrorism. The idea is to build, with the cumulative contributions of all relevant ideas and actors, a rich pool of governance tools that addresses the evolving problem of terrorism adequately. Less attention is given to the formal issues of equal representation in the processes of norm development or the precise legal status or interrelationship of the norms.

As was pointed out in the previous section, most of the institutional platforms that produce international counter-terrorism norms have very limited and variegated membership of states. These institutional platforms themselves operate through less

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<sup>55</sup> See, 'Towards Better Practice in National Identification Management: Guidance for Passport Issuing Authorities and National Civil Registration', ICAO Technical Advisory Group on Machine Readable Travel Documents, Doc TAG/MRTD/21-WP/4, December 2012. The ICAO documents also emerging national and regional practices of standardizing and regulating national document issuance, management and verification processes. Examples are those adopted by the New Zealand government (*see*, [www.dia.govt.nz](http://www.dia.govt.nz)) and Austrian government (*see*, [www.ag.gov.au](http://www.ag.gov.au)), the Asia-Pacific Economic Cooperation (APEC) Framework for Assuring Identity in the Issuance of Biometric Machine Readable Travel Documents.

formal processes, through consultative forums and expert meetings, allowing groups of a few states and private actors to influence the direction of international counter-terrorism norm development. Whether with regard to the role of the G8 at the ICAO, or that of bank associations at the FATF, or think tanks at the CTED, the essential consideration is functional relevance for counter-terrorism, with the formal attributes of the institutional processes or their normative outputs being disregarded. In tandem with the multi-faceted character of the framework of governance discussed in the previous section, therefore, this absorptive tendency depicts a picture of openness. That is, there seems to be a sort of *laissez-faire* platform, where any idea or any actor could drive the direction of international governance of terrorism, subject only to the caveat of functional relevance to counter-terrorism.

The above-discussed elements of *multi-faceted* and *absorptive* approaches, in combination reflecting openness in terms of the framework of international governance of terrorism, are complemented by two other elements of dynamism discussed below: *trial-and-error* and *adaptive* approaches, together reflecting flexibility in terms of substantive normative measures. Openness enables a functionally robust pursuit of international governance of terrorism by blurring the formal international law element of state consent. The substantive flexibility also helps attain the same objective of functional robustness by blurring legal certainty, and thereby undercutting processes of retrospective accountability and offering a forward-looking responsiveness in lieu.

#### **5.4. Flexibility of the Substantive Normative Measures**

In connection with the conception of terrorism as a continually evolving and technically sophisticated public problem, international governance of terrorism increasingly takes a trial-and-error and adaptive approach. A trial-and-error approach is one where innovative international rules and standards are developed as geographically and/or temporally limited experiments, continually subjected to improvements to enhance their effectiveness, and gradually disseminated worldwide. Technically and technologically advanced tools of governance are experimented with; what ‘works’ on the ground, at the airports, shipping ports and border stations will be compiled into international standard and guidance books for states to choose from and experiment with, at times without the need to develop uniform, general rules and

principles. Adaptation, on the other hand, is a process of taking a step back, re-evaluating and rectifying the various governance tools that are being experimented with as a response to grievances that they give rise to. This entails a process of constant revision and improvement from the point of view of affected stakeholders, while trial-and-error involves revisions and improvement from the point of view of counter-terrorism effectiveness. The forward-leaning approach of trial-and-error in pursuit of functional success is mitigated and complemented by the occasional responsiveness of adaptation. And both trends underwrite the development of a functionally robust, but accountability-wise deficient international governance of terrorism. The trial-and-error approach erodes legal certainty, and the adaptive approach subverts accountability by a lesser substitute in the form of promise of future rectification. Both approaches are elaborated below.

#### **5.4.1. Trial-and-Error Governance: Illustration**

A trial-and-error experimentation in governance entails a shift away from generalised law-making into temporally or scope-wise limited, technical, and flexible tools of governance. International counter-terrorism normative measures often consist of techno-managerial<sup>56</sup> tools – swift, real-time responses to a technically sophisticated and continually evolving problem. The elements of practicality and tentativeness engrained in this trial-and-error approach promote functional robustness at the expense of legal certainty.

The various regulatory fields of counter-terrorism concern sophisticated subject matters as each transaction involves complex interaction between multiple actors. For example, the case of international air travel involves travel agents, airlines, aviation authorities, police and intelligence bodies, and businesses that provide support service to the industry, such as IT companies. Furthermore, counter-terrorism in these fields is technology-intensive and constantly evolving. Devices and techniques of screening at airports are examples of technological areas of counter-terrorism. Another example of scientific and technological counter-terrorism is the use of behavioural analysis for

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<sup>56</sup> Term borrowed from Pieternel A. Luninga and Willem J. Marcelis, 'A Techno-Managerial Approach in Food Quality Management Research', 17(7), *Trends in Food Science & Technology*, 2006, 377-385.

profiling individuals, which relies on cutting edge behavioural science<sup>57</sup> and technology that utilize pattern identifying algorithms.<sup>58</sup> All of these technological tools constantly evolve along with general technological advancement. Responding to this technically sophisticated and constantly evolving issue of governance comes in the form of a trial-and-error experimentation.

In the area of counter-terrorism financing, examples of experimental international governance initiatives carried out with a trial-and-error approach include the establishment of so-called Financial Intelligence Units (FIUs) in states, the devolvement of counter-terrorism powers to businesses, and the Security Council smart-sanctions regimes. The FATF requires states to establish FIUs as central financial intelligence bodies that collect, analyse, and disseminate suspicious transaction reports and cash transaction reports. FIUs also exchange data and information with their counterparts in other states and with the FATF. The devolvement of enforcement powers of international counter-terrorism norms to businesses is also a recent innovation. Banks in particular are at the centre of this experimentation. The FATF guidelines encourage banks to enact their own proactive counter-terrorism policies, with powers including the denial of service to customers as a terrorism financing risk-avoidance measure.<sup>59</sup> The exercise of such enforcement powers by financial institutions involves, among others, the development of ‘blacklists’ by the financial institutions themselves in addition to the use of existing governmental and international listings.<sup>60</sup> It is said that governments are in some cases reliant on

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<sup>57</sup> In recent years, for example, airports are adopting a passive observation system (‘Rovers’), in response to scientific recommendation for the observation of the behaviour of subjects in more natural and passive settings (such as by walking around baggage claim issue-areas) instead of only in direct interrogative setups. See, e.g., ‘Protecting America: U.S. Customs and Border Protection 2005–2010 Strategic Plan’, US Customs and Border Protection, available at <https://www.hsdl.org/?view&did=470246> (last accessed 6 June 2015).

<sup>58</sup> For example, entries under passenger name records (PNR) and advance passenger information (API) databases are used by intelligence agencies in mapping out personalized and aggregated observations that are relevant to determine, for the purposes of immigration decisions, the security risk individuals pose. *See*, a European Parliament Civil Liberties, Justice and Home Affairs Committee hearing on the matter, ‘Protection of Personal Data in Transatlantic Security Cooperation SWIFT, PNR, etc.’, on 8 April 2010.

<sup>59</sup> The FATF Special Recommendations on terrorism financing and their Interpretive Notes, *see* above, chapter 4, section 4.3.1.

<sup>60</sup> These are lists made by national governments, regional bodies (e.g. the EU), and the UN Security Council sanctions list.

banks to furnish such counter-terrorism information; banks are being experimented with as front-line enforcers of international counter-terrorism financing rules.<sup>61</sup>

The FATF does not require counter-terrorism governance through the deployment of both FIUs and banks to be implemented automatically and uniformly by all states. These governance tools are technically advanced and are expected to be implemented with variation depending on the factual contexts of each state. The FIUs are technology-reliant as they need advanced software particularly for their analytic function.<sup>62</sup> Several states have already established FIUs, some have yet to establish or have yet to acquire the necessary software and skilled personnel for the operation of FIUs. The counter-terrorism role of banks also involves technical measures that require progressive and variegated realisation among states. To enforce the Security Council's assets freeze against Al-Qaeda and associates, for example, banks need to undertake a form of financial intelligence in order to determine which of their customers pose a high-risk of being 'associates' of Al-Qaeda or being linked with associates of Al-Qaeda. In addition, detecting suspicious transactions throughout the domestic and international branches of a bank requires the use of advanced software.<sup>63</sup> Consequently, the FATF standards are geared toward guiding states toward a contextually-sensitive utilisation of FIUs and banks in counter-terrorism financing. Fittingly, the FATF addresses these requirements through a series of guidance materials developed through periodic consultation with stakeholders, and not through general legal stipulations for automatic and universal implementation.

The Security Council's assets-freeze measures against individuals and entities is also an innovative measure pursued with a degree of tentativeness. As the often-used name 'smart sanctions' suggests, these measures are deployed as innovative attempts of curbing terrorism financing. Due to the fact that the sanctions regime is a new

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<sup>61</sup> Tom Keatinge, 'Breaking the Banks: The Financial Consequences of Counterterrorism', *Foreign Affairs*, 26 June 2014; Richard Barrett, 'Preventing the Financing of Terrorism', 44 *Case Western Reserve Journal of Int'l Law* 2012, 719-736.

<sup>62</sup> Liat Shetret, Tracey Durner, Danielle Cotter, and Patrick Tobin, 'Anti-Money Laundering and Countering the Financing of Terrorism in East Africa and the Greater Horn of Africa', Report of the Global Center on Cooperative Security, March 2015, available at <http://www.globalcenter.org/wp-content/uploads/2015/03/Tracking-Progress-low-res.pdf> (last accessed 6 June 2015).

<sup>63</sup> Example of such software on the market is *Surveillant*, an anti-money laundering and anti-terrorism financing software produced by Strategic Information Technology Ltd., a Canadian company.



mechanism of governance, the Security Council established expert bodies that support the work of the committees that oversee the implementation of sanctions.<sup>64</sup> These expert bodies analyse the implementation of the sanctions regimes in light of facts and developments on the ground, draw lessons and recommend adjustments of the system accordingly,<sup>65</sup> directly reflecting a trial-and-error approach.<sup>66</sup>

In the area of control of arms and weapons as well there are some examples of innovative governance tools adopted with a trial-and-error approach. These are technological governance tools developed by INTERPOL, pursuant to the 2005 International Tracing Instrument (ITI),<sup>67</sup> for the purposes of collection, analysis and exchange of data on illicit movement of arms and dangerous materials, Examples are the INTERPOL Weapons Electronic Tracking System (IWeTS), Project Geijer, and the Illicit Arms Records and Tracing Management System (iARMS). IWeTS is an international database system for stolen and recovered weapons. Project Geijer is a project for the collection and analysis of data on methods, trends and vulnerability of nuclear and radiological materials to theft by terrorists for the use in the manufacture of 'dirty bombs'. And iARMS is a computer application through which states exchange information pertaining to firearms for the purposes of, among others, intercepting the

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<sup>64</sup> The expert body with respect to the Al-Qaeda sanctions committee is called the Analytical Support and Sanctions Monitoring Team, and with respect to the Somalia-Eritrea (Al-Shabaab) sanctions committee is it called the Monitoring Group. There was also another expert body called the Panel of Experts established by the Secretary General, in pursuance of Security Council Resolution 1474 (2003), to support the work of this committee.

<sup>65</sup> Example of such contributions of the expert body could be the identification of ransom kidnapping as a means of terrorism financing by Al Qaeda and the taking of appropriate governance measures in that regard, including addressing the complexities that arise with the emergence of kidnap ransom insurance legitimately provided by insurance companies, *see* Twelfth report of the Analytical Support and Sanctions Implementation Monitoring Team, submitted pursuant to resolution 1989 (2011), S/2012/729. Another example could be recommendations concerning the effectiveness of the sanctions regime in light of new payment methods (prepaid cards, internet and mobile payment systems, mentioned above, page 84), *see*, Eleventh report of the Analytical Support and Sanctions Implementation Monitoring Team established pursuant to Security Council resolution 1526 (2004), S/2011/245.

<sup>66</sup> See the reports of the Al-Qaeda Analytical Support and Sanctions Monitoring Team at <http://www.un.org/sc/committees/1267/monitoringteam.shtml> and those of the Somalia-Eritrea (Al-Shabaab) Monitoring Group and Panel of Experts at <http://www.un.org/sc/committees/751/mongroup.shtml> (both last accessed 6 June 2015).

<sup>67</sup> The International Instrument to Enable States to Identify and Trace, in a Timely and Reliable Manner, Illicit Small Arms and Light Weapons, above, note 40.

transfer of arms to terrorist groups.<sup>68</sup> These tools of regulatory control are not utilised by all member states of INTERPOL. Integrating national regulatory infrastructure with INTERPOL systems requires technological investment. For example, border control needs to be computerised and equipped with the necessary software and skilled personnel to utilise INTERPOL databases on a real-time basis. National police, intelligence, and financial intelligence databases also need to be integrated with INTERPOL data systems. Consequently, the utilisation of these regulatory tools is differentiated among INTERPOL member states. And there is no expectation of uniform utilisation: the idea is to develop various international practical regulatory tools that would be tested in the various factual contexts of states, and those that are most useful and feasible ('best practices') are gradually disseminated worldwide.

More illustrative examples of a trial-and-error approach are found, again, in the field of the cross-border movement of persons and goods. This field is a constantly-evolving and technically sophisticated area regulating systems of aviation, maritime, land transportation, and border control/management. In this field, counter-terrorism governance tools are deployed for the purposes of detecting, among others, convicted individuals, individuals and goods under counter-terrorism sanctions, illicit weapons and dangerous materials, forged identity and travel documents. These tools are also used for the proactive identification of individual terrorism susceptibility ('profiling') for the purposes of, for example, immigration decision making.

The previously discussed systems of Advanced Passenger Information (API) and Passenger Name Record (PNR) that are being developed and standardised by the ICAO, the WCO and the IATA are cases in point. As mentioned, information filtered from API and PNR data are used for pre-emptive 'risk assessment' analysis regarding the propensity of individuals for committing terrorist acts for the purposes of, for example, immigration decisions.<sup>69</sup> The API and PNR systems arise from the experiences of a few states, and are at their trial stages and not yet globally

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<sup>68</sup> Further on these programs, see INTERPOL website, <http://www.interpol.int/Crime-areas/Firearms/Firearms>.

<sup>69</sup> Example is the computerized system that is used by the United States Department of Homeland Security, known as the 'Automated Targeting System', which is a multi-use system deriving authority for its particular counter-terrorism functionality from the US Intelligence Reform and Terrorism Prevention Act of 2004 (Pub. L. 108-458).

operational,<sup>70</sup> and what the ICAO, WCO, and IATA do is standardise these systems and urge for their gradual adoption as industry requirements. Part of the unsettled question at this trial stage – and what the international regulatory bodies are working to standardise – is the determination of the precise set of data entries these systems should collect and how such data should be stored, managed, and exchanged.<sup>71</sup> Furthermore, standards concerning the storage, management, and exchange of such data are constantly revised, updated, and expanded. Tellingly, each successive document containing API and PNR standards and guidelines is assigned a version number, and the front pages usually contain a list of amendments or a disclaimer that the documents are “considered to be living documents”, and that users must confirm they are in possession of the latest version.<sup>72</sup>

A similar patchwork of innovative trial-and-error programs of counter-terrorism regulation exists in the other sub-areas of the management of cross-border movement of persons and goods. These are international standards and institutional frameworks addressing maritime transport, border security, and customs. Examples are mandatory information disclosure and pre-departure inspection processes for international

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<sup>70</sup> API and PNR exchange is currently required for passengers flying to or from the United States, the European Union and European Economic Area, Australia, Russia, South Africa, and some parts of Latin America and Asia, including in Brazil, Colombia, Mexico, China, Japan, India, Indonesia, South Korea, and Saudi Arabia.

<sup>71</sup> The ICAO/WCO/IATA standards and guidelines for API and PNR systems are found in the following documents: ‘Guidelines on Passenger Name Record (PNR)’, ICAO Doc 9944, 2010; ‘Guidelines on Advance Passenger Information (API)’, WCO/IATA/ICAO, 2010; ‘Passenger List Message (PAXLST) Implementation Guide’, WCO/IATA/ICAO API Guidelines Appendix I, Version 3.0, October 2013; ‘API Response Message (CUSRES) Implementation Guide’, WCO/IATA/ICAO API Guidelines Appendix IIB, April 2013; ‘PNRGOV Principles, Functional and Business Requirements’, WCO/IATA/ICAO, Version 12.1, October 2012; ‘Passenger and Airport Data Interchange Standards’, WCO/IATA/ICAO, Version 12.1, November 2012; ‘Message Modifications: Approved Revision Process’, WCO/IATA/ICAO, Version 12.1, August 2012. The ICAO conducts outreaches in various regions for the promotion of API and PNR systems. A series of ‘API-PNR days’ are organized regionally and in various languages by the ICAO, *see*, Executive Committee 39, ICAO Assembly 38<sup>th</sup> Session, Agenda Item 16: Facilitation and Machine Readable Travel Documents, ICAO Working Paper A38-WP/94, para 3(3.1)(b).

<sup>72</sup> ‘Guidelines on Passenger Name Record (PNR)’, ICAO Doc 9944, 2010; ‘Guidelines on Advance Passenger Information (API)’, WCO/IATA/ICAO, 2010; ‘API Response Message (CUSRES) Implementation Guide’, WCO/IATA/ICAO API Guidelines Appendix IIB, April 2013; ‘PNRGOV Principles, Functional and Business Requirements’, WCO/IATA/ICAO, Version 12.1, October 2012; ‘Passenger and Airport Data Interchange Standards’, WCO/IATA/ICAO, Version 12.1, November 2012; ‘Message Modifications: Approved Revision Process’, WCO/IATA/ICAO, Version 12.1, August 2012.

shipment of goods, accreditation and mutual recognition systems for security clearance in international shipment of goods, and inter-state information exchange and early warning systems for customs and border control.

INTERPOL maintains an information exchange platform and a database of Stolen and Lost Travel Documents (SLTD) and a Fusion database of (suspected) terrorists that the national authorities of its member states feed into and access for border screening of individuals.<sup>73</sup> These tools are still being promoted for worldwide applicability, and the challenges of computerising border management in all states and integrating them with the INTEPOL system are yet to be addressed. Alternative solutions to address this problem, such as creating regional databases shared between a small numbers of states, are being explored as part of the experimentation.<sup>74</sup>

The WCO similarly maintains a computerized platform – consisting of a database and web-based communication tool – of information gathering and exchange between states known as the Customs Enforcement Network (CEN)<sup>75</sup> for customs intelligence and law enforcement purposes, including counter-terrorism. The computer-based CEN system is buttressed by an institutional wing in the form of a network of regional customs information and intelligence centres known as Regional Intelligence Liaison Offices (RILO),<sup>76</sup> which operate as interlinking nodes between national focal points. Similar technical and institutional challenges as with the case of the INTERPOL exist here and are continually being addressed.

The IMO has also standardized information gathering processes known as Automatic Identification System (AIS) and Long Range Identification and Tracking of Ships

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<sup>73</sup> Both available at INTERPOL website, [www.interpol.int](http://www.interpol.int).

<sup>74</sup> E.g. in the Horn of Africa, IGAD's initiative to establish a regional terrorism database. See, 'Draft Implementation Plan to Counter Terrorism in the IGAD Region', Appendix A to the Report on IGAD Conference on the Prevention and Combating of Terrorism, Addis Ababa, 24-27 June, para 5, available at <https://www.issafrika.org/pubs/CReports/CombatTerror03/AppendA.pdf> (last accessed 7 June 2015).

<sup>75</sup> See, 'CEN: A Global Customs Enforcement System', WCO brochure, 2012. Further, *see* [www.wcoomd.org](http://www.wcoomd.org).

<sup>76</sup> See, 'RILO: A Global Customs Intelligence Network', WCO brochure, 2012. Further, *see* [www.wcoomd.org](http://www.wcoomd.org).

(LRIT) for counter-crime purposes in general.<sup>77</sup> These processes, now adapted for counter-terrorism as well, require the utilization of devices and protocols for the identification of ships and transmission of information to coastal state authorities and to other ships. The Authorized Economic Operator (AEO) accreditation program is another new counter-terrorism regulatory process being enacted by states. The AEO is an accreditation program for security-compliance verification of companies that provide security, logistics and other support services in international maritime transport. The WCO has now internationally standardized the AEO program.<sup>78</sup> The worldwide applicability of the AEO program particularly requires mutual-recognition agreement between states, as each state is embarking on its own AEO accreditation program. There are examples of such agreements,<sup>79</sup> and further worldwide dissemination requires harmonisation and adjustment between state's AEO programmes, based on lessons learned from the existing pioneer mutual recognition schemes.

Some issue-areas of regulation are entirely technologically experimental and the task of the respective international governance body becomes only compiling and disseminating technological tools of regulation, without having to make generalized or rule-like parameters for the use of such regulatory tools. This is for example true with regard to counter-terrorism in border management. In this area, the WCO maintains a databank of selected advanced technological tools that can be used for tracking the movement of persons and goods and securing the international trade supply chain.<sup>80</sup>

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<sup>77</sup> See, for AIS, 'Guidelines for the Installation of a Ship-borne Automatic Identification System (AIS)', IMO, SN/Circ. 227, 6 January 2003; broadly based on Regulation 19(2), Chapter V of the 1974 International Convention for the Safety of Life at Sea (SOLAS); for LRIT, Regulation 19(1), Chapter V of the 1974 International Convention for the Safety of Life at Sea (SOLAS), and for a list of LRIT technical regulations, visit, <http://www.imo.org/OurWork/Safety/Navigation/Pages/LRIT.aspx>, last accessed 6 June 2015.

<sup>78</sup> SAFE Framework of Standards to Secure and Facilitate Global Trade (SAFE Framework), WCO, 2007 (current edition 2012); 'AEO Implementation Guidance', WCO, May 2010, Document D/2010/0048/10; 'Model AEO Appeal Procedures', WCO 2010. For compilation of national AEO programs, see 'Compendium of Authorized Economic Operator Programmes', 2014 edition, WCO Compliance and Facilitation Directorate.

<sup>79</sup> E.g. between the EU and the US, see Decision of the US-EU Joint Customs Cooperation Committee of 4 May 2012 regarding mutual recognition of the Customs-Trade Partnership Against Terrorism program in the United States and the Authorised Economic Operators Programme of the European Union, of 4 May 2012, *OJ L 144, 05/06/2012, p. 44–47*.

<sup>80</sup> Accessible online (only with WCO-approved credentials), at [www.wcoomd.org](http://www.wcoomd.org)

States draw technological tools of governance from this databank. Private technology companies apply to the WCO to be selected for inclusion into this databank, and the WCO reviews each application and selects those it deems fit. For the private technology companies, selection into this databank provides a gateway to market access; and conversely, rejection inhibits their market access. The process of selection of technological tools for inclusion in the databank, therefore, serves as a form of regulatory accreditation.

The above-discussed illustrations point to a trend of addressing the technically sophisticated and continuously evolving problem that terrorism embodies through a substantively flexible international normative response that is constantly up to the challenge. This means, international governance of terrorism operates in such a way that leaves room for practical contingency and technical innovation; hence a trial-and-error approach to governance. This approach is reliant on innovative, flexible and technological tools of governance, often adopted as pilot projects and gradually disseminated globally. This is a techno-managerial approach to governance that capitalises on swift, technical and flexible response to terrorism instead of general and formally binding legal stipulations. The elements of practicality and tentativeness engrained in these normative measures enable the taking of robust response to the technically sophisticated and constantly evolving problem of terrorism at the expense of legal certainty.

#### **5.4.2. Adaptive Governance: Illustration**

The fourth element of dynamism in international governance of terrorism is its continual adaptation in response to grievances. As experimental responses to constantly evolving and technically sophisticated issue-areas of governance, the above discussed regulatory activities are characterised by constant adaptation. Adaptation refers to a process of constant revision and improvement to address systemic grievances that arise from the implementation of those tools. While the element of revision in trial-and-error addresses effectiveness issues, adaptation deals with grievances by stakeholders. However, such grievances are not dealt with as questions of accountability but only as that of performance quality; not as complaints, but as feedback. And hence, they are not redressed, but responded to in the form of the promise of future rectification.

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The field of counter-terrorism financing contains the most pertinent illustrations of adaptation in governance. The FATF work on counter-terrorism financing regulation and the UN Security Council's regime of terrorist asset freeze – the two preeminent tools in international counter-terrorism financing – both undergo constant revision and improvement. The FATF periodically undertakes a review of its standards and a public consultation of the review. In recent years, major reviews and public consultations were undertaken in 2009 and 2011.<sup>81</sup> The guidance papers and interpretive notes that elaborate FATF recommendations are prepared and revised continually. In this process of revision, not only challenges to the effective implementation of the counter-terrorism financing standards are discussed, but also unintended consequences and negative effects (collateral damage) that are produced in the implementation of these standards. A prominent collateral damage issue that is being dealt with by the FATF, for example, is the issue of financial inclusion.<sup>82</sup> This is the issue of highly restrictive risk-avoidance banking policies resulting in the exclusion of legitimate individuals and businesses from formal financial systems. Discussion is underway at the FATF on ways to incorporate financial inclusion considerations in FATF standards. The FATF also urges states and private actors to strive to mitigate unwarranted financial exclusion in their implementation of FATF standards.<sup>83</sup> What is not being discussed is, however, mechanisms of protecting and compensating those who are unduly excluded from access to financial services.

The UN Security Council's sanctions regime is itself an adaptive project, evolving over time. The prominent sanctions regime, the Al-Qaeda sanctions regime,<sup>84</sup> began as an innovative preventative measure subjecting targeted individuals and entities to assets freeze measure. The process through which such individuals and entities become listed on and delisted from the sanctions list was heavily criticised at the beginning for lacking

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<sup>81</sup> See, 'FATF Response to the Public Consultation on the Revision of the FATF Recommendations', FATF Report, 2012.

<sup>82</sup> James Cockayne and Liat Shetret, 'Capitalising on Trust: Harnessing Somali remittances for Counterterrorism, Human Rights and State Building', Center on Global Counterterrorism Cooperation, March 2012; 'Strengthening Financial Integrity through Financial Inclusion', H.M. Queen Maxima of the Netherlands, UN Secretary General's Special Advocate for Inclusive Finance for Development, Address to FATF plenary meeting, June 2013.

<sup>83</sup> See, 'Anti-Money Laundering and Terrorist Financing Measures and Financial Inclusion', FATF Guidance, June 2011, revised February 2013;

<sup>84</sup> Established by UN Security Council Resolution 1267 (1999).



transparency and respect for due process rights.<sup>85</sup> Listed individuals and entities were not given proper notification, the reasons for the listings, or a chance to challenge the decision before the Sanctions Committee. Step-by-step, improvements were introduced that require notifications to be given to listed individuals and entities promptly after the listing decision is made, narrative summary of reasons for the listings to be made public.<sup>86</sup> The improvements also expanded the grounds of exemption from the application of the sanctions<sup>87</sup> and enabled listed parties to appeal for de-listing through the recently established office of the ombudsperson, instead of relying on their states of nationality.<sup>88</sup> In addition, the Security Council has recently required the 1267 Committee to undertake a general review of all listings on a yearly basis.<sup>89</sup> Important criticisms regarding the sanctions regime still remain unaddressed,<sup>90</sup> but the key point here is that the sanctions regime has been undergoing constant, albeit slow and inadequate improvements over time from the point of view of affected individuals and entities.<sup>91</sup>

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<sup>85</sup> See, e.g., Erika De Wet, 'Human Rights Considerations and the Enforcement of Targeted Sanctions in Europe: The Emergence of Core Standards of Judicial Protection', in Bardo Fassbender, ed., *Securing Human Rights? Securing Human Rights?: Achievements and Challenges of the UN Security Council*, Oxford University Press, 2011, 141-171; Johannes Reich, 'Due Process and Sanctions Targeted against Individuals Pursuant to Resolution 1267 (1999)', 33 *Yale Journal of Int'l Law*, 2008, 505; Gavin Sullivan and Ben Hayes, 'Blacklisted: Targeted Sanctions, Preemptive Security and Fundamental Rights', Report of European Center for Constitutional and Human Rights, 2010, available online at [www.ecchr.de](http://www.ecchr.de).

<sup>86</sup> These changes are introduced in UN Security Council Resolutions 1333 (2000), 1390 (2002), 1455 (2003), 1526 (2004), 1617 (2005), 1735 (2006), 1904 (2009), 1989 (2011), 2083 (2012) and 2161 (2014).

<sup>87</sup> E.g. UN Security Council Resolutions 1844 (2008), para 4, 1972 (2011), para 4, and 1452 (2002).

<sup>88</sup> The ombudsperson established by UN Security Council Resolution 1904 (2009)

<sup>89</sup> UN Security Council Resolution 1822 (2008), para 22.

<sup>90</sup> There are calls for the establishment of formal burden of proof on the part of the Security Council for listing individuals and entities, and for judicial or quasi-judicial oversight of the sanctions regime. See, Sixteenth report of the Analytical Support and Sanctions Monitoring Team of the Committee established Pursuant to Resolution 1267, S/2014/770; David Cortright, George A. Lopez, Linda Gerber-Stellingwerf, Eliot Fackler, Sarah Persinger, and Joshua Weaver, 'Human Rights and Targeted Sanctions: An Action Agenda for Strengthening Due Process Procedures', Kroc Institute for International Peace Studies and the Fourth Freedom Forum, Policy Brief SSRP0911-01, November 2009.

<sup>91</sup> See, Bianchi, Andrea, 'Security Council's Anti-Terror Resolutions and Their Implementation by Member States', 4(5) *Journal of International Criminal Justice*, 2006, 1044-1073; William Diaz, 'Dualist, but not Divergent: Evaluating United States Implementation of the 1267 Sanctions Regime', 5 (3) *Liberty University Law Review*, 2011, pp. 333-378; Dire Tladi and Gillian Taylor, 'On the Al Qaeda/Taliban Sanctions Regime: Due Process and Sunsetting', 10 (4) *Chinese Journal of Int'l Law*, 2011, 771-78.



Adaptation, as illustrated in the above examples, serves as a safety valve for a dynamic governance, ensuring that frustrations do not build up to such an extent that they give urgency to calls for access to accountability mechanisms and the more robust constraints that they impose on policy-makers. In this sense, adaptation facilitates free experimentation in governance as it helps sidestep the formal constraints of accountability mechanisms by offering the promise of continuous rectification *en lieu*; by replacing accountability with a lesser substitute that serves as a safety valve to alleviate frustrations.

In sum, the preceding sections outlined dynamism as a defining *modus operandi* of current international governance of terrorism. International governance of terrorism is normatively and institutionally multi-faceted and absorptive (i.e. openness of framework), and has a trial-and-error and adaptive (i.e. substantive flexibility) approach. It is multi-faceted in that it brings together a diverse array of norms, institutional actors and policy fields. And it is absorptive in that the set of norms, actors and policy fields of counter-terrorism constantly expands as long as the drive for functional success requires it. International governance of terrorism is undertaken with a trial-and-error approach in that it responds to the constantly evolving and technically sophisticated subject matter by de-emphasizing generalized law making and by utilizing flexible, practical and innovative tools of governance. And lastly, it has an adaptive character in that governance measures are subject to constant revision and improvement.

## **5.5. The Rising Utility of Dynamic Governance and its Adverse Consequences**

The utility of dynamic governance as functionally robust governance for addressing sophisticated and evolving problems is rising in recent years. The elements of dynamic governance outlined in the foregoing discussion have also been identified in other areas of governance, particularly in the areas of common goods such as natural resources and food safety. The theory of experimentalist governance, recently developed in political science literature, is the closest conceptual framework that captures some of the trends of dynamism discussed above. This literature that identifies elements of dynamism in other areas of governance, however, largely overlooks the distinct adverse

consequences that systematically arise from this mode of governance. In what follows, a brief overview of literature on experimentalist governance is provided. This overview will show that although the concept of experimentalist governance has certain dissimilarities with the concept of dynamism discussed in this chapter, both essentially reflect a mode of governance that caters for functional robustness by setting aside legal formal considerations. This similarity highlights the rising utility of such mode of governance in different areas of governance beyond counter-terrorism. Subsequently, the discussion turns to the adverse consequences of dynamism and posits that this mode of governance systematically gives rise to global injustice.

### 5.5.1. Trends of Dynamism Elsewhere: Experimentalist Governance

Dynamism in governance outlined here resonates with the broader trend of experimentalism in governance identified in recent literature from political and legal studies.<sup>92</sup> The European Union legal system is the main transnational governance site that the literature of experimental governance is grounded on.<sup>93</sup> The policy domains that are identified in the literature as exhibiting experimental governance trends are

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<sup>92</sup> Mark Nance and Patrick Cottrell, 'A Turn toward Experimentalism? Rethinking Security and Governance in the Twenty-First Century', 40 (2) *Review of International Studies*, 2013, 277-301; Sabel, Charles and Jonathan Zeitlin, 'Learning from Difference: the New Architecture of Experimentalist Governance in the European Union', 14 (3) *European Law Journal*, May 2008, 271-327; Charles Sabel and Jonathan Zeitlin, eds., *Experimentalist Governance in the European Union*, Oxford: Oxford University Press, 2010; Christine Overdevest and Jonathan Zeitlin, 'Assembling an Experimentalist Regime: Transnational Governance Interactions in the Forest Sector Revisited', in L. Bruszt and G. McDermott (eds.), *Leveling the Playing Field: Transnational Regulation and Development*, Oxford: Oxford University Press, 2014, 235-70; Gráinne de Búrca, Robert O. Keohane, and Charles Sabel, 'New Modes of Pluralist Global Governance', 45 *NYU J. Int'l Law & Politics* (2013), 723-786; Grainne de Burca, 'New Governance and Experimentalism: An Introduction', 2 *Wisconsin Law Review*, 2010, 227-238; Neil Walker and Grainne de Burca, 'Reconceiving Law & New Governance', 13 (3) *Columbia Journal of European Law*, 2006-2007, 519-537; Gráinne De Búrca and Joanne Scott, eds., *Law and New Governance in the EU and US*, Hart, 2006.

<sup>93</sup> The literature on experimental governance is in general concentrated on a study of the European Union and the United States, see, Michael C. Dorf and Charles F. Sabel, 'A Constitution of Democratic Experimentalism', 98(2) *Columbia Law Review*, 1998, 267-473; Charles F. Sabel and William H. Simon, 'Minimalism and Experimentalism in the Administrative State', Columbia Public Law Research Paper No. 10-283, available at SSRN <http://dx.doi.org/10.2139/ssrn.1600898>. There is a light discussion of experimental governance in the context of some low-politics international policy areas such as fisheries, the protection of the rights of persons with disabilities, and ozone layer depletion, see, Gráinne de Búrca, Robert O. Keohane, and Charles Sabel, 'New Modes of Pluralist Global Governance', 45 *NYU J. Int'l Law & Politics* (2013), 723-786

mainly low-politics areas, such as food safety, forestry, drug authorisation, health care, occupational safety, and competition policy.<sup>94</sup> The discussion of dynamism in this thesis, on the other hand, concerns governance at the global level in a high-politics area of counter-terrorism. Arising from their dissimilarity in terms of the governance site and the nature of the issue-areas they deal with, the concept of experimentalist governance and that of dynamism proposed here differ to a certain extent. Regardless of such differences, however, they similarly point at important shared trends.

There are some elements of the concept of experimentalist governance with which international governance of terrorism does not fully resonate; and there are trends in international governance of terrorism that are not adequately captured or emphasised upon by the concept of experimentalist governance. Whereas the experimentalist governance literature is developed in relation to the well-developed institutional framework of the European Union, there is no single cohesive institutional architecture with respect to international governance of terrorism. The institutional framework of international governance of terrorism rather is a patchwork,<sup>95</sup> with some counter-terrorism fields having more developed instructional infrastructure over others. And within the existing institutional framework, interaction between the various (levels of) governance actors takes place under less definitive terms than that taking place within the European Union legal order, which is regulated by the Treaty on European Union,<sup>96</sup> the treaty on the Functioning of the European Union,<sup>97</sup> and framework directives of the European Parliament and the Council.<sup>98</sup> In fact, to borrow Grainne de Burca's term, international governance actors on terrorism could be said to have "stumbled into" experimentalism, rather than designed an elaborate

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<sup>94</sup> See above, note 92.

<sup>95</sup> There are over seventy multilateral institutions involved in non-military counter-terrorism governance, see Eric Rosand and Sebastian von Einsiedel, '9/11, the War on Terror, and the Evolution of Multilateral Institutions', in Bruce D. Jones, Shepard Forman, and Richard Gowan, eds., *Cooperating for Peace and Security: Evolving Institutions and Arrangements in a Context of Changing U.S. Security Policy*, Cambridge University Press, 2012, 143-165, at 144.

<sup>96</sup> Consolidated Version of the Treaty on European Union, *O.J. C 83/01, 2010*.

<sup>97</sup> Consolidated Version of the Treaty on the Functioning of the European Union, *O.J. C 115/47, 2008*.

<sup>98</sup> E.g. The EU water framework directive, Directive 2000/60/EC of the European Parliament and of the Council of 23 October 2000 Establishing a Framework for Community Action in the Field of Water Policy, *O.J. L 327, 2000, p. 1-73*.

experimentalist architecture.<sup>99</sup> Furthermore, the trend of openness in international governance of terrorism, particularly the absorptive tendency of the framework of governance is not adequately captured by existing conceptualisations of experimentalist governance.

Despite the above mentioned dissimilarities, the concepts of experimentalist governance and dynamism similarly point at some important trends. In particular, three key elements of the concept of experimentalist governance resonate with the elements of dynamism discussed in the above sections. These three elements are iteration between multi-level actors, the use of flexible governance tools, and revisability.<sup>100</sup> First, experimentalist governance architectures involve a peer-like engagement between multiple actors, ranging from those situated at the international level to those at the frontlines of governance on the ground. The engagement between these actors is iterative in the sense these that governance actors interact with and learn from each other's experiences on a constant basis.<sup>101</sup>

Secondly, under experimentalist mode of governance, the normative tools that find key relevance are those that provide room for flexibility in their application across contextual and temporal spectrums. These are normative tools that provide only framework mechanisms that allow for the taking of concrete measures by taking into account the contextual difference between sites (e.g. developed economies v. under-developed economies; formal banking systems v. informal baking systems) and the changes that arise over time (e.g. technological advancement). This flexibility takes place within a broader cohesive institutional architecture – not necessarily a constitutional order – wherein multi-level actors interact, such as in the European Union legal system which brings together supranational, national, and local governance actors. Within such institutional architecture, framework policy goals and metrics are adopted at the highest institutional levels (i.e. at the EU level) in consultation with actors from lower levels as well; and actors at the lower institutional levels (e.g.

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<sup>99</sup> Gráinne de Búrca, 'Stumbling into Experimentalism: the EU Anti-Discrimination Regime', in Charles F. Sabel and Jonathan Zeitlin, eds., *Experimentalist governance in the European Union: Towards a New Architecture*, Oxford University Press, 2010, pp 215-235.

<sup>100</sup> Term used by Gráinne de Búrca, *see* Gráinne de Búrca, 'Stumbling into Experimentalism: the EU Anti-Discrimination Regime', in Charles F. Sabel and Jonathan Zeitlin, eds., *Experimentalist governance in the European Union: Towards a New Architecture*, Oxford University Press, 2010, pp 215-235, at 217.

<sup>101</sup> *Ibid.*

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ministries in EU member states) are given discretionary implementation power to advance the framework goals in ways that they see fit.<sup>102</sup>

Thirdly, experimental governance systematically instils a sense of revisability or tentativeness in governance. That is, experimentalist governance processes “systematically provoke doubt about their own assumptions and practices; treat all solutions as incomplete and corrigible; and produce an ongoing, reciprocal readjustment of ends and means.”<sup>103</sup> Arising from the fact that the problems being dealt with are complex and constantly evolving, the corresponding governance measures are adopted with “strategic uncertainty”,<sup>104</sup> i.e. with a caveat of revision and improvement on-the-go.

The above elements of experimentalist governance, which resonate with trends in international governance of terrorism, show that a dynamic mode of governance is in use in various issue-areas of governance beyond counter-terrorism. The appeal of this mode of governance rests in its utility for addressing technically sophisticated and continually evolving problems in a robust yet self-sustaining manner. The loosening of legal formality in both the framework and substance of governance enables a less restrained pursuit of normative response to problems. At the same time, constant revision and improvement of the system serves as a safety valve to alleviate frustrations that arises as a result of the absence of formal complaint mechanisms. The overall image that dynamism in international governance of terrorism depicts is one of a problem-solving exercise which at times stumbles, but by and large a self-correcting, steadily improving system. This image, however, hides the adverse consequences that systematically arise from this mode of governance. The following section specifically posits that one such adverse consequence that arises from this mode of governance is global injustice.

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<sup>102</sup> Charles Sabel and Jonathan Zeitlen, eds., *Experimentalist Governance in the European Union*, Oxford: Oxford University Press, 2010, p2.

<sup>103</sup> Jonathan Zeitlin, *Extending Experimental Governance? The European Union and Transnational Governance*, Oxford University Press, 2015 p14.

<sup>104</sup> *Idem*.

### 5.5.2. The Adverse Consequences of Dynamic Governance and Global Injustice

The dynamic pursuit of functional robustness in the various fields of international governance of terrorism entails adverse effects, both intended and unintended, on various non-state actors, particularly individuals and businesses. Individuals suspected of engaging in financially or otherwise supporting terrorism are directly affected by financial sanctions, international travel and immigration restrictions. A broader set of individuals that are not suspected of specific terrorist acts, but are profiled as posing a risk of engaging in the above-mentioned activities are subjected to financial monitoring and proactive measures of financial restriction, stringent international travel and immigration screening, and surveillance measures affecting their data protection and privacy rights, to mention a few. Similarly, businesses suspected of financially or otherwise supporting terrorism are subjected to, among others, assets-freeze and revocation of license. And all businesses are subjected to proactive counter-terrorism measures such as new accreditation regimes and requirements to install business policies and institutional capabilities for counter-terrorism, entailing added administrative and financial burden on businesses. Furthermore, some of the international counter-terrorism measures also affect a wider circle of actors than the above-mentioned immediate addressees of the measures. This is the case, for example, with respect to assets freezing measures against money service businesses, which affects millions of households in developing states that are reliant on remittance money.<sup>105</sup>

The dynamic mode of governance at play disproportionately skews these adverse consequences towards non-state actors and societies in the Global South. This global injustice arises by default in that it is a systematic by-product of dynamic governance. Specifically, the openness of the framework of governance and the flexibility of the substantive norms create an environment whereby the interests of the Global North

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<sup>105</sup> A case in point here is the money service business called Al-Barakaat (the co-applicant in the Kadi case) that had a near-monopoly in the business of remittance money transfer to Somalia prior to 2001. The listing of Al-Barakaat under the Security Council's 1267 sanctions regime froze all its assets, including remittance that was en route to Somalia, thereby affecting several households in Somalia that were reliant on the remittance money for subsistence and economic activities. See, Cockayne and Liat Shetret, 'Capitalizing on Trust: Harnessing Somali Remittances for Counterterrorism, Human Rights and State Building', Center on Global Counterterrorism Cooperation, March 2012.

dictate the development of international counter-terrorism norms. By lifting the constraints of legal formality, dynamic governance enables the deployment of the material and institutional powers of the Global North – economic superiority and privileged vote in international organisations – to great effect in determining the international normative response to terrorism. In other words, to use Thomas Franck's thesis, this mode of global governance yields distributive injustice, that is, unfair distribution of benefits and burdens in global society.<sup>106</sup>

The openness of the framework of governance detaches international counter-terrorism governance activities from the exclusive ambit of multilateral institutions with a membership of equal voting rights. Instead, the playing field becomes open for all, and actors with better material or institutional power are able to dominate the process. Powerful states mobilizing the economic powers wielded by institutions such as the FATF and the G8, or the institutional powers of bodies such as the UN Security Council, dictate the direction of international governance of terrorism.

In the area of international aviation counter-terrorism, for example, the role of the G8 is prominent, as discussed earlier.<sup>107</sup> The G8, which consists of eight states, played a key role, through its SAFTI program, in steering the work of the ICAO, which has global membership and one-state-one-vote system, on standardisation of travel documents and new passenger data systems (API and PNR). The data systems of API and PNR in particular attend to the concerns of the Global North that the G8 embodies. As discussed earlier, these data systems are used not only to detect already blacklisted terrorists at border control, but also to construct rough biographic information (profiling) on international travellers. Such biographic information is used to help the work of counter-terrorism intelligence even after the travellers have entered their destination state. Intelligence bodies analyse API and PNR data, together with other data, in determining which travellers pose a risk of terrorism and therefore should be either extensively interrogated at border control and/or monitored during their stay in the destination state. Such decisions are infused with a degree of profiling

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<sup>106</sup> See, further Thomas M. Franck, *Fairness in International Law and Institutions*, Oxford University Press, 1995. But see also, Martti Koskenniemi, 'Legal Cosmopolitanism: Tom Franck's Messianic World', 35 *N.Y.U. Journal of Int'l Law and Politics*, 2002-2003, 471-486.

<sup>107</sup> Above, page 94.

‘usual suspects’, i.e. travellers originating from particular locations, usually in the Global South.

Similarly, in the area of the control of arms and dangerous materials, the five permanent members (the P5) of the Security Council have mobilised the legal powers of the Council to addressing the issue of nuclear-terrorism as a priority.<sup>108</sup> The Council has established an anti-nuclear terrorism (and non-proliferation) regime, which is the only thematic regime established under Chapter VII powers of the Council,<sup>109</sup> with its own monitoring committee and an expert body, called Group of Experts. The issue of nuclear-terrorism is a priority issue for the permanent members (the P5) and is therefore a distinct item on the agenda of the Security Council. Whereas the issue of counter-terrorism with respect to small arms and light weapons (SALW), which is the chief source of terrorism threat in the developing and conflict-ridden states, although mentioned in some resolutions, is not dealt with seriously and as a distinct agenda item.<sup>110</sup>

In connection with the openness of the framework of governance in international counter-terrorism, the role of private actors in influencing normative development is also negotiated by material power. Although the various governance platforms are in principle open to the participation of businesses, civil society, think tanks and so on, their participation is proportional to their material capability. Involving in the consultation forums of the FATF or informal meetings with the CTED is a viable route of engagement only to those private actors that can afford the significant costs involved, such as costs of frequent travel to and maintaining constant presence in European capitals and New York. For small businesses or non-profit organisations from the Global South, travelling to these destination is also not only prohibitively costly, but also procedurally cumbersome, not least due to the difficulty of securing a visa. Therefore, even in terms of private actors, it is actors based in the Global North

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<sup>108</sup> UN Security Council Resolution 1540 (2004), has an independent monitoring committee and an expert body called Group of Experts. This regime, operating alongside the regime on Resolution 1373 and the various specific sanctions regime, is the only thematic regime on counter-terrorism.

<sup>109</sup> This is the power of the Security Council to take coercive and binding enforcement measures for the maintenance of international peace and security, *see* UN Charter, arts. 39-51.

<sup>110</sup> SALW is discussed at the Security Council mainly in the context of conflicts in Africa, and not counter-terrorism. Few exceptions when SALW-related counter-terrorism was debated at the Security Council include Resolution 2117 (2013) and 2220 (2015).



that have ease of access to make meaningful contribution to the development of international counter-terrorism norms.

The other component of dynamism, the reliance on substantive flexibility in governance, particularly the prominence of a techno-managerial approach, also reinforces the privilege that technically advanced states enjoy over others. In this regard, international governance of terrorism has become a venue through which technically advanced states both impose their products upon less technically advanced societies and also lawfully maintain control over how much technology would be transferred to these societies.

In the areas of counter-terrorism financing, for example, the main international regulatory requirements concern the standardisation of the financial services industry. This requires technical and personnel qualifications, and installing the institutional capacity required to manage the system involved. Standardisation thus requires substantive investment. Standardisation thereby pushes certain private actors out of the international financial market and not others. The demands regarding standardisation also result in informality being associated with criminality.<sup>111</sup> In practice this means that bona fide financial actors who are active in the informal international financial sector and who come predominantly from the Global South are not only denied access to the financial market but also criminalised. As a result, financial actors, banks in particular, able to meet the standardisation requirements attain a dominant position on the international financial markets. Relevant financial actors that are able to meet standardisation requirements typically are those originating from the Global North. This creates a scenario whereby banks from the Global North could decide to either enter markets in marginal areas with uncompetitive pricing or abandon those markets. Consequently, individuals and groups in society who cannot afford or do not

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<sup>111</sup> E.g. One of the actors immediately targetted with banks and assets-freeze in the post-9/11 counter-terrorism financing measures are remittance money operators in the Horn of Africa, particularly Somalia. These operators use a system called *hawalla*, which is an adaptation of the 'long-standing Somali tradition of trust-based financial transfers over large distances through family networks.' See, James Cockayne and Liat Shetret, 'Capitalising on Trust: Harnessing Somali remittances for Counterterrorism, Human Rights and State Building', Center on Global Counterterrorism Cooperation, March 2012, p12. On *hawalla*, see Edwina Thompson, 'Introduction to the Concept and Origins of Hawala,' 10 *Journal of the History of International Law* 2008, 83-118.

have access to their services, because banks do not extend their operations to marginal areas, remain devoid of financial services.

Similar global injustice follows in the above-mentioned prominence of nuclear-terrorism over SALW-based terrorism in international governance of terrorism. The international normative response to nuclear-terrorism is geared toward ensuring non-proliferation of nuclear beyond the existing nuclear power states. Whereas, the limited regulatory frameworks on SALW, which exist mainly outside of the Security Council, are geared toward ensuring the integrity of the market on SALW. In other words, the proliferation of SALW, which benefits arms manufacturers in the Global North, is not regarded as a problem to be eliminated, but as an ordinary commerce that only needs careful protection from being abused by terrorist actors.<sup>112</sup> This disparity of approach maintains the existing power dominance of nuclear states and prominent arms manufacturers from the Global North over societies in the Global South. And this global injustice arises, to reiterate, from the techno-managerial approach to international governance of terrorism.

In conclusion, dynamism in international governance of terrorism represents a new mode of governance that sets aside the formal elements of classical international law, particularly state consent and legal certainty, in order to address a technically sophisticated and constantly evolving global problem through a functionally robust normative system. This mode of governance results in adverse consequences for individuals and businesses in various regulatory areas. More importantly, these adverse consequences are disproportionately skewed against non-state actors in the Global South as a systematic by-product of dynamic governance. The following chapter illustrates that this mode of governance sets aside the providers of legitimacy and accountability in classical international law, state consent and legal certainty, without offering meaningful procedural alternatives. While remaining receptive to substantive norms that protect the rights and interests of non-state actors, the dynamic international governance of terrorism renders those substantive norms futile by systematically resisting procedural safeguards. It is posited that international

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<sup>112</sup> This indeed resonates with the broader approach to the governance of the two issue-areas broadly: there is a nuclear 'non-proliferation' treaty, whereas there is an 'arms trade' treaty. *See*, The 1968 Treaty on the Non-Proliferation of Nuclear Weapons; the 2013 Arms trade Treaty.

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monitoring in counter-terrorism is transforming in such a way that it serves not as a platform of scrutinizing and contesting states' implementation of international norms but only as a consultative platform for empowering the state. The following chapter will outline in detail the manifestations of this trend by analysing the working processes of prominent international counter-terrorism monitoring bodies.

## THE EROSION OF PROCEDURAL SAFEGUARDS IN INTERNATIONAL COUNTER-TERRORISM MONITORING

### 6.1. Introduction

The manifestations of dynamism identified in the previous chapter – multi-faceted, absorptive, trial-and-error, and adaptation – collectively signal receptiveness and malleability in the development<sup>1</sup> of the international normative framework on terrorism, including towards norms that constrain states' counter-terrorism activities. In fact, at a substantive level, current international governance of terrorism has recognizable receptiveness towards safeguard norms – norms such as the protection of human rights that ensure the pursuit of the functional objectives of the normative framework does not take place in a manner that unjustifiably encroaches upon the rights and interests of stakeholders. In the various domains of counter-terrorism regulation, the international normative framework is infused with safeguard norms such as human rights.<sup>2</sup> Due consideration for the rights and interests of individuals and businesses in the application of international counter-terrorism norms is stipulated by international governance bodies as both a matter of policy and law. Criticisms on the adequacy of such stipulations and their uneven coverage across the various domains of counter-terrorism admittedly exist; but it is generally the case that substantive stipulations that safeguard the rights and interests of affected non-state actors are provided for in the international normative framework on counter-terrorism. Almost all international counter-terrorism standard setting bodies instruct states to implement the counter-terrorism norms in question with due regard to the rights and interests of affected stakeholders, including individuals and businesses.

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<sup>1</sup> Note the preference for the term 'norm-development' to the commonly used term 'norm-making', arising from the dynamic conceptualization of international governance presented in the previous chapter wherein norms are not 'made' instantaneously but rather developed, innovated, and adapted in a continuous manner.

<sup>2</sup> E.g. the Security Council's resolutions on terrorism frequently urge states to ensure that measures they take in implementing the Council's counter-terrorism resolutions '... comply with all of their obligations under international law, in particular international human rights law, refugee law, and humanitarian law'. see, UN Security Council Resolution 1624 (2005), para 4.

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The monitoring of the implementation of this otherwise receptive and malleable process of international governance of terrorism is, however, resistant to the language and processes that safeguard the rights and interests of non-state actors (individuals and businesses) that are subject to governance. These are legal notions and mechanisms, referred to here as ‘procedural safeguards’, which enable non-state actors that are adversely affected by the implementation of international norms on terrorism to contest and seek redress for their grievances. Even as dynamism allows for increased integration of substantive safeguard norms such as human rights into the international normative framework of counter-terrorism, those norms are being disconnected from their critical potential through the erosion of procedural safeguards, i.e. the processes by which substantive safeguard norms could be accounted for. The erosion of procedural safeguards further entrenches the adverse effects that individuals and businesses experience arising from the dynamic mode of international governance of terrorism. In other words, the dynamic mode of international governance of terrorism not only produces new ways of adversely affecting individuals and businesses as discussed in previous chapters, but it also leaves them unable to contest these adverse consequences of the system.

This chapter highlights two important trends in the monitoring of international norms on terrorism that manifest the erosion of procedural safeguards. The first is de-legalisation of the international monitoring of norms in counter-terrorism, which takes away the discursive power of safeguard norms. The second is the rise of an approach to international monitoring that is centred on state empowerment. Together, these two closely linked trends reflect that the relevant international monitoring bodies systematically refrain from using language and processes that are geared toward scrutinising and holding states answerable for their implementation of those norms. This results in the erosion of the role of monitoring bodies as safeguard mechanisms for the protection of the rights and interests of non-state actors, i.e. processes through which the grievances of non-state subjects of international governance of terrorism (particularly individuals and businesses) can be contested and redressed. The erosion of the role of monitoring bodies as safeguard mechanisms result in the further entrenchment of the adverse effects that non-state actors bear as a result of international governance of terrorism, and disproportionately so toward individuals

and businesses in developing states that do not have adequate judicial protection internally.

This chapter begins with a conceptual elaboration of the two trends of de-legalisation and state-empowerment in international norm monitoring. These trends are then unpacked through the use of critical legal and discourse analysis of documents stipulating the working methods of two key international bodies enforcing counter-terrorism norms: the United Nations Security Council and the Financial Action Task Force (FATF). The two bodies are selected here for illustration due to their spearheading role in international counter-terrorism regulation<sup>3</sup> and as representative samples of the two types of mandates of international governance bodies on terrorism: those with comprehensive counter-terrorism mandate (represented by the Security Council) and those with a specialised mandate concerning a particular sector of counter-terrorism (represented by the FATF). Subsequently, the contextual significance of the erosion of the role of international monitoring as a safeguard process is discussed. This is illustrated by briefly highlighting the limitations of existing procedural avenues that could be utilised to contest and seek redress for harm to non-state actors that results from states' implementation of international counter-terrorism regulation.

## 6.2. De-legalisation and State-Empowerment in International Monitoring

De-legalisation and state-empowerment are trends in the discourse and practice of international monitoring of counter-terrorism norms that untangle substantive (safeguard) norms from two interrelated legal formal features: the notion of international obligations and the tradition of retrospective scrutiny, respectively. De-legalisation here refers to the disentanglement of the substantive stipulations of legal norms from the discursive and institutional legal formality they are embedded in. In terms of discourse, the legal formal notion of international obligations is underemphasized, and international normative stipulations are treated as statements of common policy objectives. This emanates from the underlying conception of

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<sup>3</sup> Kathryn L. Gardner, 'Fighting Terrorism the FATF Way', 13(3) *Global Governance: A Review of Multilateralism and International Organizations*, July-September 2007, pp. 325-345.

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counter-terrorism as collective problem management; a shared problem and thus entailing a shared burden in finding solutions. From this managerial perspective of problem management, the notions of rights and obligations appear too backward-looking<sup>4</sup> and accusatory, and so are re-framed into the forward-looking and cooperative notion of ‘objectives’. Rights and obligations, including those arising from human rights norms, are diluted into policy objectives; enforced not as standards of scrutiny but as yardsticks of managerial performance assessment. In connection, processes of retrospective monitoring of compliance or accountability and the application of coercive enforcement measures are avoided or deliberately disused. Only solidarity is expected among states and between states and non-state actors; contestation is shunned as an obstacle to such solidarity.

In terms of the institutional manifestation of de-legalisation, the monitoring of international counter-terrorism norms is increasingly being undertaken by political and administrative (non-judicial) institutions whose main function is serving as resource and expertise centres and facilitative platforms. These bodies have neither ‘policing’ roles to coerce states into compliance nor adjudicative mandates to receive and deal with inter-state disputes or complaints from non-state actors as regards the interpretation or application of international rules and standards on terrorism. The Security Council and the Financial Action Task Force (FATF) stand out from these international institutions as these two institutions are the notable exceptions that have clear coercive mandates and/or clout to enforce international counter-terrorism norms. What is interesting is that even in the case of the Security Council and the FATF, which possess coercive authority over states, in practice such authority is rarely exercised in deference to the fostering of an atmosphere of partnership and solidarity – a form of strategic socialisation of states for the purpose of ensuring compliance.<sup>5</sup> These bodies, which oversee the implementation of legal norms and possess authority for coercive action, strategically refrain from exerting such authority.

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<sup>4</sup> For similar observation with respect to the broad spectrum of international governance, see, Martti Koskeniemi, ‘Miserable Comforters: International Relations as New Natural Law’, 15(3) *European Journal of International Relations*, 2009, 395–422, p406.

<sup>5</sup> On socialization of states for the purpose of ensuring compliance with international norms, see, e.g., Ryan Goodman and Derek Jinks, ‘How to Influence States: Socialisation and International Human Rights Law’, 54(3) *Duke Law Journal*, 2004, 621-703.

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A closely related trend that suppresses considerations of procedural safeguards in international governance of terrorism is the rise of state empowerment as a preferred monitoring tool by international monitoring bodies. This development corresponds with the increasing regard given to creating enduring capability of governance to deal with complex and evolving problems, instead of ensuring mere compliance to the bare minimum of international normative requirements. Capability of states' and non-state enforcers of international norms, such as businesses, not only to implement international counter-terrorism rules and regulations, but also to do so in keeping with the technical sophistication and evolving pace of the problem has become a central concern. Both in a normative sense and institutional practice, there is focus on strengthening institutional, material, and procedural capability of governance in order to ensure efficient absorption of governance best practices into national legal systems, the practices of businesses and other arenas of implementation.

In normative terms, international governance of terrorism has evolved in such a way that capability itself has become an object of regulation. Criminal prosecution of acts of terrorism has become but only one of the several dimensions of counter-terrorism governance. As was illustrated in the previous chapters, international governance of terrorism now concerns a wide range of routine commercial and administrative activities in an attempt to address the problem from a preventative angle. Correspondingly, international counter-terrorism rules and standards increasingly require detailed technical and institutional capabilities of governance, such the installation of specific equipment (e.g. Automatic Identification System and Long Range Identification and Tracking on ships,<sup>6</sup> arms and ammunition tracking technology, machine-readable passports), software (e.g. Financial Intelligence Unit's counter-terrorism financing software,<sup>7</sup> WCO's Customs Enforcement Network<sup>8</sup>), processes (e.g. FATF's 'Know Your Customer' and 'Customer Due Diligence' processes for financial institutions), and offices (e.g. FATF-style national Financial Intelligence Units, National Focal Points for inter-state cooperation).

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<sup>6</sup> See above, chapter 5, note 77.

<sup>7</sup> See above, chapter 5, section 5.4.1.

<sup>8</sup> See above, chapter 5, note 75.



In terms of institutional practice, the focus on capability has meant the prominence of the empowerment of states as a preferred method of international monitoring of counter-terrorism norms. It is now commonplace that international institutions focus on assisting and enabling states to implement international rules and standards, instead of only scrutinising states' compliance from a critical distance. International counter-terrorism bodies have become more engaged in the detailed processes of national implementation of international rules and standards. This includes engagement in the incorporation of international rules and standards into national legal systems, the setting up of national institutional enforcement mechanisms, the continued provision of technical assistance and expertise, and evaluation of implementation. After evaluation of implementation, the process is repeated as needed: filling gaps in national legislation in light of the requirements of international rules and standards, developing enforcement institutions as necessary, technical assistance and expertise, another round of evaluation of implementation, and so on.

The following sections discuss in detail the working methods of the Security Council and the FATF to illustrate the prevalence of the trends of de-legalisation and state-empowerment approach in international monitoring of counter-terrorism norms. The discussion will show that in their counter-terrorism monitoring exercises, contrary to existing perception, the Security Council and the FATF deliberately suppress their state-scrutinising role and coercive powers, exerting those only as a very last recourse. Consequently, although both the Security Council and the FATF urge states to protect the rights and interests of non-state actors (individuals and businesses) in counter-terrorism, neither provides a mechanism for retrospective accountability of states or redress for grievances. They at times attend to grievances from non-state actors as part of their monitoring exercises, but respond to those grievances only in the form of rectification in future.

### **6.3. Counter-Terrorism Monitoring by the UN Security Council: the Counter-Terrorism Committee**

After abstaining from the debates on international governance of terrorism for several decades due to the polarised geo-political configurations of the cold war, the UN Security Council has emerged since the late 1980's as the chief international counter-

terrorism monitoring body. The Council exercises a comprehensive counter-terrorism mandate, including in the above-discussed counter-terrorism areas of terrorism financing, the control of arms and dangerous materials, and the cross-border movement of persons and goods, and other areas such as criminal justice, counter-radicalisation and terrorism recruitment. The Council is entrusted with mandate to scrutinize and discipline states using its enforcement powers under Chapter VII of the UN Charter.

The Security Council continues to exercise its policing role against states in connection with counter-terrorism, examples being the sanctions it imposed on Libya,<sup>9</sup> the Sudan,<sup>10</sup> and the Taliban regime of Afghanistan.<sup>11</sup> However, most of the Security Council's counter-terrorism activities follow a conciliatory approach. This approach consciously avoids the language of legal 'obligations' and 'breach/non-compliance', in preference to the conciliatory notions of 'objectives' and 'weaknesses/gaps' in order to foster an atmosphere of constructive engagement with states. The bulk of the Security Council's counter-terrorism activity is currently undertaken through its subsidiary body, the Counter-terrorism Committee (CTC).<sup>12</sup> A closer look into the working methods of the CTC demonstrates how it fosters an atmosphere of constructive engagement.

### **6.3.1. The Positioning of the Counter-terrorism Committee and its Working Methods**

The CTC is established to oversee the implementation of the core counter-terrorism instrument of the Council – Resolution 1373 of 2001 – and a later supplement, Resolution 1624 of 2005.<sup>13</sup> The CTC also oversees the implementation of the various Security Council resolutions<sup>14</sup> that require the protection of human rights in the

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<sup>9</sup> UN Security Council Resolution 748 of 31 March 1992.

<sup>10</sup> UN Security Council Resolution 1044 of 31 January 1996 and Resolution 1054 of 26 April 1996.

<sup>11</sup> UN Security Council Resolution 1267 of 15 October 1999.

<sup>12</sup> Established by UN Security Council Resolution 1373, of 28 September 2001.

<sup>13</sup> UN Security Council Resolution 1373, of 28 September 2001; Resolution 1624, of 14 September 2005. For a detailed exposition of Resolution 1373, see Eric Rosand, 'Security Council Resolution 1373, the Counter-Terrorism Committee, and the Fight against Terrorism', 97(2) *American Journal of Int'l law*, 2003, 333-341.

<sup>14</sup> Security Council resolutions 1456 (2003), 1535 (2004), 1624 (2005), and 1805 (2008). Further on the human rights promotion role of the CTC, see above, chapter 5, section 5.2.2., note 31.

applications of the counter-terrorism norms stipulated under resolutions 1373 and 1624.

The CTC carries out its monitoring role mainly by serving as a resource centre, facilitator of inter-state collaboration, and assessor of states' counter-terrorism activities.<sup>15</sup> In designing its first programme of work, the CTC emphasized that the defining characteristics of its activities would be engaging in *assistance* for, and *dialogue* with, states.<sup>16</sup> Tal Becker, the former legal advisor to the Permanent Mission of Israel to the United Nations in New York from 2001 to 2005, comments:

“Theoretically, the mandate of the CTC...may suggest an aggressive mechanism by which states failing to comply with the resolution [1373] would risk exposure to enforcement action by the Council. From a very early stage, however, states were assured that the Council would adopt a non-confrontational, consensus-based approach that is focused on assisting each government in developing its counter-terrorism capacities.”<sup>17</sup>

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<sup>15</sup> See, Guidelines for the Conduct of the Work of the CTC, 16 October 2001; Framework Document For CTC Visits to States In Order To Enhance The Monitoring Of The Implementation Of Resolution 1373 (2001); Updated Working Method of the CTC, 17 October 2006; Procedures of the Sub-Committees of the Counter-Terrorism Committee (CTC) Regarding the Preliminary Implementation Assessments (PIA); Revised Procedures of the Counter-Terrorism Committee and its subcommittees for the “PIA stocktaking” exercise, 28 January 2010; Guidelines of the Counter-Terrorism Committee for post-visit follow-up, 11 December 2012; Revised procedures for the Counter-Terrorism Committee’s stocktaking of Member States’ implementation of Security Council resolutions 1373 (2001) and 1624 (2005), 11 March 2013.

<sup>16</sup> Counter-Terrorism Committee Work Programme [in pursuance of Resolution 1373], 19 October 2001, S/2001/986; Resolution 1624, para.5, 6(a); SC Resolution 1456, 20 January 2003, para. 4(iii). Sir Jeremy Greenstock, the first president of the CTC stated unequivocally, in an interview with the BBC on 28 October 2001: ‘our job in the Counter-terrorism Committee is to upgrade the legislation and the executive machinery of every state in the UN who is willing but perhaps not so capable of dealing with terrorist finance, a safe haven for terrorism and other actions against terrorism.... the Counter-terrorism Committee is there not to define terrorism but to upgrade the capability of states to deal with it when they find it...’, available at [http://www.bbc.co.uk/otr/intext/20011028\\_int\\_3.html](http://www.bbc.co.uk/otr/intext/20011028_int_3.html) (last accessed 6 June 2015).

<sup>17</sup> Tal Becker, *Terrorism and the State: Rethinking the Rules of State Responsibility*, Hart Publishing, Oxford/Portland, 2006, p125, see also pp125-128. Cortright and Lopez also give similar account: ‘to date, the CTC has decided not to sit in judgment of ... states or to report to the Security Council on states it has determined to be non-compliant’, David Cortright and George Loper, *Uniting Against Terror: Cooperative Non-military Responses to the Global Terrorist Threat*, MIT Press, 2007, p46.

The CTC undertakes these objectives in five working methods, all of which illustrate the role of the CTC as a centre of support and coordination for states, and not as a platform of inter-state contestation or top-down scrutiny against states. These five working methods are state reporting, country visits, technical assistance, compilation and dissemination of best practices, and liaison between states and various international actors.<sup>18</sup> The last three working methods manifestly embody a supportive approach toward states: equipping states technically, providing legal information, and synchronizing/synergizing states' activities with international entities. Only the other two working methods – state reports and country visits – potentially constitute a critical engagement with states. In what follows, these two working methods are discussed to illustrate that they, too, are exercised in such a way that the element of scrutiny is suppressed in pursuit of an engaged and empowerment-centred governance.

### **6.3.2. The Working Methods of the Counter-Terrorism Committee: State Reporting and Country Visits**

The working methods of state reporting and country visits are undertaken in conjunction, as an integrated comprehensive documentary and physical assessment of states' legal and practical infrastructure on terrorism. These two methods are documented in a process of written exchange between states and the CTC, commencing with the preparation of Preliminary Implementation Assessment (PIA) for each state.<sup>19</sup> A PIA constitutes the baseline assessment based on which states' further progress in implementing the resolutions is continually assessed.

The initial PIA document is prepared based on the regular reports from states, observations from country visits, input from various sources such as relevant international organizations and other Security Council subsidiary bodies (e.g., the Al-Qaeda Sanctions Committee), and in consultation with the assessed state.<sup>20</sup> With respect to the later, the CTC engages in a series of 'dialogues' with state officials,

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<sup>18</sup> *See*, Counter-Terrorism Committee Work Programme [in pursuance of Resolution 1373], 19 October 2001, S/2001/986; SC Resolution 1456, 20 January 2003; Follow-up of the Counter-Terrorism Committee to resolution 1456 (2003) of the Security Council, 19 February 2003, S/2003/193 (Annex); further, see website of CTC <http://www.un.org/en/sc/ctc/index.html>.

<sup>19</sup> *See*, Updated Working Method of the CTC, 17 October 2006

<http://www.un.org/en/sc/ctc/docs/workingmethods-2006-10-17.pdf> (last accessed 6 June 2015)

<sup>20</sup> Updated Working Method of the CTC, 17 October 2006, para. 1.1.

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formally and informally, at their capitals or through their Permanent Missions in New York. The final draft of the PIA is communicated to the assessed state prior to being endorsed by the CTC and passed on to the Security Council. The PIA is in practice a mutually-agreed document and not a critical assessment of the state. This de-emphasises the CTC's authoritative role<sup>21</sup> in order to “encourage greater focus on states implementation and less on reporting as an end in and of itself”,<sup>22</sup> deliberately reducing the critical distance between the CTC and states.

Further illustrations in this line are also found in the PIA and subsequent follow-up documents. The PIA file of a given state contains a main document that takes stock of the status of the state's implementation of the Security Council resolutions 1373 and 1624, and a cover note that contains the core conclusions deduced from the PIA. The CTC guidance dictates that a cover note should contain:

- “A summary of possible *shortfalls* in implementation [and]
- Recommendations/options on how the Committee and its CTED can best *facilitate enhanced implementation* by the Member State in question...”<sup>23</sup> (emphasis added)

The guidance further provides a list of possible recommendations to be used in a cover note – all framed in conciliatory terms:

- “Need for further *information/dialogue* with the member state...
- Suggested priority areas for technical *assistance*, if appropriate, and proposals for potential donors/provider
- Other suggestions for how Member States can address any *shortfalls* identified, and

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<sup>21</sup> Becker refers to ‘the non-belligerent and transparent posture’ of the CTC, see Tal Becker, *Terrorism and the State: Rethinking the Rules of State Responsibility*, Hart Publishing, Oxford/Portland, 2006, p126.

<sup>22</sup> Updated Working Method of the CTC, 17 October 2006, above note 49.

<sup>23</sup> *Ibid*, para. 1.2.

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- Indications as to when, at the outset, it seems realistic to expect the State concerned to *fill* the identified *shortfalls*...”<sup>24</sup> (emphasis added)

Country visits, as part of the preparation of a PIA, consists of face-to-face meeting with officials of a state, on-site visits to particular places of interest (such as border checkpoints or computerized control rooms), and “wrap-up sessions” at the end of the visit to give feedback to state officials.<sup>25</sup> The primary purpose of country visits is determining the type and level of assistance a state needs to implement its counter-terrorism obligations arising from Security Council resolutions on terrorism. Similar to the PIA document, the results of individual country visits are reported in a conciliatory tone, with focus on the following three sets of conclusions: 1) “*areas of concern* in the implementation of [Resolution 1373]...”, 2) “The *capacity* of the State to implement its obligations under [Resolution] 1373...”, and 3) “The priority *assistance needs* of the visited State...”<sup>26</sup> (emphasis added)

Follow-up assessments subsequent to the initial PIA and country visits are documented in the form of Overview Implementation Assessment (IOA), Detailed Implementation Survey (DIS), and a follow-up table of visit recommendations.<sup>27</sup> The IOA and DIS contain a list of practical and legal measures the state has to put in place in the future, and an indication of available assistance to the state in that regard. These follow-up documents will be forwarded to the state, which would have to respond within 12 months. Even when a state fails to respond to the follow-up communications within this deadline, the CTC does not invoke ‘non-compliance’ or any notion of breach of obligation. Instead, the CTC invites the state to a meeting, or sends out further reminders or, in some cases, defers the deadline for response.<sup>28</sup> This is

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<sup>24</sup> Updated Working Method of the CTC, 17 October 2006, para. 1.3. The suggestions for the substantive elements of cover letters resembles those provided for cover note.

<sup>25</sup> Framework Document For CTC Visits to States in Order to Enhance the Monitoring of the Implementation of Resolution 1373 (2001).

<sup>26</sup> Procedures For CTC Visits to Member States, para.3

<http://www.un.org/en/sc/ctc/docs/policypapers/procedures-for-visit.pdf>; see, also, General Guidelines

For Conducting CTC Visits to Member States,

<http://www.un.org/en/sc/ctc/docs/policypapers/general-guidelines-for-ctc-visit.pdf>.

<sup>27</sup> Revised procedures for the Counter-Terrorism Committee’s stocktaking of Member States’ implementation of Security Council resolutions 1373 (2001) and 1624 (2005), 11 March 2013.

<sup>28</sup> Revised Procedures of the Counter-Terrorism Committee and its subcommittees for

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remarkable because the CTC has the coercive powers and the mandate of the Security Council at its disposal to take coercive measures against such states, pursuant to the binding Security Council resolutions that it oversees, should it choose to do so.

The aim of the state reporting and country visit working methods of the CTC is enhancing future implementation of Security Council's counter-terrorism resolutions, and much less retrospectively scrutinising states' compliance with those instruments. When PIA or follow-up assessment exercises reveal a state's non-compliance with its obligations, the CTC typically responds in the form of suggestions for future improvement and (technical) assistance in that regard.<sup>29</sup>

In sum, although composed of the same fifteen member states of the Security Council, the CTC system brands itself in contradistinction to the policing role of the Security Council. The CTC system attempts to appear as a softer, pragmatic, expert partner of states in the management of the problem of terrorism. In opposition to the exclusive and authoritative Security Council, the CTC system appears more inclusive and transparent;<sup>30</sup> less authoritative, more engaged. It presents itself as a resourceful technical partner for states, interested primarily in nudging and assisting them toward a better enforcement of international rules and regulations on terrorism, and not in scrutinizing.

The CTC carefully avoids using the language of obligations and compliance in its monitoring of states' implementation of international counter-terrorism norms, including relevant human rights norms. It also gears all monitoring exercises toward empowering states, and not holding them answerable as such; motivating and supporting them into compliance, and not coercing them into compliance or punishing

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the "PIA stocktaking" exercise, 28 January 2010, para 11-12, [http://www.un.org/en/sc/ctc/docs/2013/2013-03-11-stocktaking\\_revised\\_procedures.pdf](http://www.un.org/en/sc/ctc/docs/2013/2013-03-11-stocktaking_revised_procedures.pdf)

<sup>29</sup> Updated Working Method of the CTC, 17 October 2006, p7.

<sup>30</sup> This idea is reflected since the very beginning of the work of the CTC, *see*, Work Program of the CTC, Letter dated 19 October 2001 from the Chairman of the Counter-Terrorism Committee addressed to the President of the Security Council, 19 October 2001, S/2001/986, (cover letter). *See*, also, Guidelines for the Conduct of the Work of the CTC, Note by the Chairman, 16 October 2001, para. 1(c): 'the guiding principles of the Committee's work will be co-operation, transparency and even-handedness.' As part of this branding, the CTC engages other actors, such as the media, international organizations, and expert networks in an effort to publicize the Security Council-based international counter-terrorism activity and enlist the partnership of these various bodies.

them for non-compliance. A retrospective accountability of states, and a possibility of redress for harm inflicted in pursuance of international counter-terrorism norms is not possible through the Security Council's Counter-terrorism Committee.

#### 6.4. Counter-Terrorism Financing Monitoring of the FATF

The implementation of international counter-terrorism financing rules and standards is overseen primarily outside of the UN framework by the Financial Action Task Force (FATF), the FATF-style regional bodies (FSRBs),<sup>31</sup> and the two prominent international financial institutions (IFI's) – the World Bank ('the Bank'),<sup>32</sup> and the International Monetary Fund ('the Fund' or 'IMF').<sup>33</sup> The FATF oversees the implementation of its widely accepted 40+9 Recommendations on money laundering and terrorism financing,<sup>34</sup> the contents of which overlap with and supplement the general terrorism financing provisions of Security Council Resolution 1373 and the 1997 Convention on Terrorism Financing. The World Bank and the IMF are not significant actors with regard to the development of counter-terrorism financing standards, but they are active with regard to the enforcement of those standards – they have incorporated FATF Recommendations as part of their assessment criteria in their routine assessments of states' financial sectors.<sup>35</sup> The FSRBs, the World Bank, and the

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<sup>31</sup> These are the Eastern and Southern Africa Anti-Money Laundering Group (ESAAMLG), the Asia Pacific Group on Money Laundering (APG), the Caribbean Financial Action Task Force (CFATF), the Eurasian Group (EAG), the Latin America Anti-Money Laundering Group (GAFILAT), the West Africa Money Laundering Group (GIABA), the Middle East and North Africa Financial Action Task Force (MENAFATF), and the Council of Europe Anti-Money Laundering Group (MONEYVAL).

<sup>32</sup> Specifically, the International Bank for Reconstruction and Development (IBRD).

<sup>33</sup> The UN system on CTF also recognizes and defers to the standards and monitoring assessment of this FATF-led international consortium of specialized bodies in the financial sector. This is true with regard to the works of the Security Council's Counter-terrorism Committee, the 1267 Sanctions Committee, the Secretary-General's Counter-Terrorism Implementation Task Force (CTITF), the United Nations Office on Drugs and Crime (UNODC). E.g. The Security Council has explicitly drawn upon the FATF Recommendations in its resolutions and has called upon states to adopt and implement the FATF Recommendations in fulfilling their obligation to suppress the financing of terrorism arising out of Resolution 1373 and the 1997 Terrorism Financing Convention.

<sup>34</sup> Available at [www.fatf-gafi.org](http://www.fatf-gafi.org).

<sup>35</sup> The Bank and the Fund jointly conduct comprehensive assessment programs known as the Financial Sector Assessment Program (FSAP) and the IMF independently conducts an Offshore Financial Centres Assessment (OFC). These two IFIs also oversee the implementation of other broader international rules and standards in the financial sector that are also relevant for terrorism financing purposes, such as the various principles on banking adopted by the Basel Committee, 'objectives and principles' on securities adopted by the International Organization of Securities



IMF have also adopted FATF's methodology for the monitoring of international counter-terrorism standards.<sup>36</sup> The monitoring methodology of FATF, in other words, is the predominant mode of enforcement in the most important international monitoring bodies of counter-terrorism financing.

Similar to the Security Council, the FATF's working methods show a de-legalised and state-empowerment-centred approach to the monitoring, which carefully suppresses confrontational or accusatory approach towards states. Three types of monitoring tools are at the disposal of the FATF: self-evaluation by states, mutual evaluation exercise, and a blacklisting system.

#### 6.4.1. Self-evaluation

Self-evaluation is a process whereby states participating in the FATF framework evaluate their own performance with regard to the formal implementation of international rules and standards in their legal systems (referred to as 'technical compliance') and the practical effectiveness of any such implemented rules and standards in countering terrorism financing (referred to as 'effectiveness assessment').

Technical compliance is the taking of measures to ensure that the necessary normative (laws and policies) and institutional frameworks for the implementation of FATF Recommendations exist at the national level. For example, technical compliance issues could arise in connection with a FATF Recommendation that requires bank officials to divulge privileged information about their clients to national financial intelligence authorities. One such issue could be whether the state has enacted laws that exempt bank officials from legal responsibility for a possible breach of their client confidentiality duties when divulging the required information. Another issue could be

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Commission, and principles on insurance adopted by the International Association of Insurance Supervisors. *See* previous chapter. The FATF also recognizes the standards set by these three organizations as 'core principles' relevant with regard to terrorism financing. *See*, e.g. Glossary of the FATF 'Methodology for Assessing Technical Compliance with the FATF Recommendations and the Effectiveness of AML/CFT Systems', February 2013, p.146.

<sup>36</sup> Peter Romaunik, *Multilateral Counter-Terrorism*, note 2 above, p. 135. The FSRBs, the Bank and the Fund also collaborate with the FATF with regard to their counter-terrorism financing assessments. And as each organization can undertake the assessment of only a handful of states per year, the FATF, the Bank, and the Fund mutually recognize each other's country assessments as their own.

whether the state has clearly designated a central government body to receive and analyse data that bank officials divulge. The assessment of effectiveness, which is equally emphasized in FATF practice, involves a more practical examination of “whether the key objectives of a [counter-terrorism financing] system, in line with the FATF standards, are being effectively met in practice”.<sup>37</sup>

As the name indicates, self-evaluation is a process that provides high autonomy for states and a least contentious mechanism of enforcement as there is no possibility for any state or non-state actor other than the very state that is conducting the self-assessment to contribute to or contest the assessment. Self-assessment reports are less important than independent FATF monitoring tools; their primary relevance is found not in their definitive indication of a state’s compliance level, but as a starting point for the most important<sup>38</sup> FATF monitoring exercise: the mutual evaluation process.

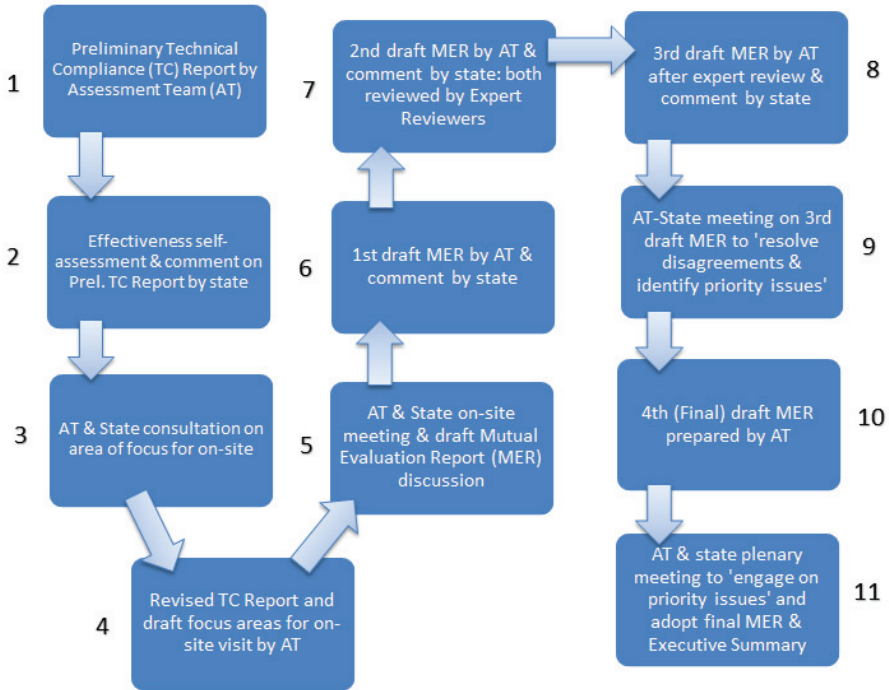
#### **6.4.2. FATF Mutual Evaluation Process: Procedure**

Mutual evaluation is a consultative process concerning a state’s technical compliance and effectiveness assessment of FATF Recommendations on terrorism financing, involving the state that is being assessed, other FATF member states, and technical experts and delegates from international organizations relevant in terrorism financing matters. The basic procedures of a FATF mutual evaluation process is summarised in the flowchart below.

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<sup>37</sup> ‘Methodology for Assessing Technical Compliance with the FATF Recommendations and the Effectiveness of AML/CFT Systems’, FATF/OECD, 2013, p. 14.

<sup>38</sup> Riccardo Sansonetti, ‘The Mutual Evaluation Process: A Methodology of Increasing Importance at International Level’, 7(3) *Journal of Financial Crime*, 2000, pp.218 - 226

**Diagram 1: Summary of FATF mutual evaluation assessment process**

The above diagram summarizes the full process of mutual evaluation. The important features of this process relevant for the discussion here are its forward-looking and conciliatory predisposition. The FATF is forward-looking in that it is strictly interested in results and not in the mere compliance with the letter of its standards as such; that is indeed its *raison de etre*. It is dissatisfaction with the pace of wide-membership multilateral forums such as the UN General Assembly that led G8 states to establish the FATF as a flexible and effective mechanism to ensure international response to terrorism financing. And both the process and outcome of the mutual evaluation reflects this. The process is wholly consultative between the FATF, the assessed state, experts, and at times invited non-state entities, mainly businesses (*Steps 3, 5, 9, 11*), and the persistent agenda during these consultative meetings is identifying a way-forward

and not accounting for the past. Because of that, problem-identification is a key exercise in several of the mutual evaluation stages: selecting “areas of focus” for on-site visit (Step 3 & 5), “identifying priority issues” (Step 9) and “engaging on priority issues” (Step 11). The outcomes of this consultative process typically include action plans for the future and packages of international cooperation and assistance programmes (*Stage 11*).

The mutual evaluation process is conducted by way of a conciliatory approach. And precisely because the process discourages an interrogative approach by the Assessment Team (*‘AT’, above Step 1*), assessed states are more inclined to discuss areas where they are less compliant with FATF assessors: non-compliance could be packaged in terms of ‘deficiencies’ and ‘capacity’ issues – barring exceptionally serious lack of political will – and the default FATF response comes in the form of further ‘action plans’ and ‘capacity building programs’. Particularly in the context of developing states, the entire discourse is infused with development-speak.<sup>39</sup>

The Assessment Team, composed of delegates from select FATF member states guided by FATF experts, exchanges its findings with the state that is being assessed at every level of the assessment (*Steps 2, 3, 5, 6, 7, 8, 9, 11*). What makes these exchanges consultative is not only the fact that states are given the chance to comment on the findings of the Assessment Team, but also the fact that the two sides further engage formally and informally before, during, and after the on-site visit to resolve disagreements that arise during such exchanges, and to come up with a mutually agreed report. As a result, the focus areas for the Assessment Team’s assessment and subsequent follow-ups of CTF systems are determined equally by the assessors and the assessed.

Given that the FATF itself designed its working methods, and it continually updates the guidance documents regarding the working methods, the procedure of the mutual evaluation process shows a deliberate avoidance of an authoritative and coercive role on the part of the FATF. The choice is for a conciliatory engagement both as between

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<sup>39</sup> Porter, Doug, Deborah Isser, and Louis-Alexandre Berg. ‘The Justice-Security-Development Nexus: Theory and Practice in Fragile and Conflict-Affected States’, 5(2) *Hague Journal on the Rule of Law*, 2013, pp. 310–328.

the FATF and states and as between states in the mutual evaluation exercises. The same is observable in the substantive guidelines of the mutual evaluation exercises.

The FATF guidelines also provide for the Assessment Team to invite, at the discretion of the assessed state, private sector representatives for a meeting during the on-site visit segment of the assessment.<sup>40</sup> The private sector representatives invited for such meetings are typically financial institutions (such as banks, insurances, money service businesses, portfolio managements, funds, and investment agencies) and their associations, and what are called Designated Non-Financial Businesses and Professions (such as online and physical casinos, real estate agents, dealers in precious materials, lawyers and legal services, and trust firms). The guidelines further urge such meetings between the Assessment Team and private sector representatives to be held “in private, and without a government official present.”<sup>41</sup> However, any input taken from these non-state actors, including grievances pertaining to their rights and interests, is treated only as an input for future action plans and to determine in which areas exactly the state needs international cooperation and assistance programmes (*Stage 11*), not for the purposes of accountability or redressing their grievances. There is no stage of the mutual evaluation process where such grievances would be discussed without being exclusively tied to the forward-looking discussions of lessons learned and future improvement.

### **6.4.3. FATF Mutual Evaluation Process: Substantive Guidelines**

The FATF substantive guidelines on the mutual evaluation process reveal features that demonstrate the empowerment approach to monitoring. One such feature is the forward-looking objectives of the assessment process and another is the elasticity of the assessment yardsticks.

The guiding objective of both technical compliance and effectiveness assessments is clearly stated as the identification of areas and means of intervention for further implementation of anti-terrorism financing rules. States’ level of compliance is determined not to establish responsibility for non-compliance but to determine what

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<sup>40</sup> ESAAMLG Methodology, para 35.

<sup>41</sup> ESAAMLG Methodology, para 36.

factors account for any non-compliance, and how to overcome such factors, with international assistance if necessary. For example, in conducting technical compliance assessment, a FATF guideline states that the inquiry should not be limited to determining the existence or otherwise of a fixed set of normative and institutional implementation steps a state has taken, but should rather include analysis of a state's specific contextual factors, such as the type of risk that its financial sector is particularly vulnerable to, the extent to which the economy is monetized and formalized, the level of political stability, and the strength of its regulatory bodies.<sup>42</sup>

The objective in taking these contextual factors into account while assessing technical compliance is to identify the *factors* that explain a state's compliance level with an eye for curing them. The FATF manual for assessors elaborates that such contextual factors "...may in some cases explain why a country is compliant or non-compliant..."<sup>43</sup> and therefore "where assessors identify a lack of compliance ...missing [contextual elements] may be a reason for this and should be identified in the [report]."<sup>44</sup> The assessment of technical compliance, which is ordinarily understood as a formal and straightforward inquiry into *whether or not* a state has complied with a given rule or standard, in this context takes the form of an explanatory inquiry as to *why* a state's compliance is at the level it is. The objective of technical compliance assessment is, therefore, forward-looking in the sense that the driving consideration is the explanation and cure of non-compliance, and not accountability for it.

Likewise, and as the name itself indicates, the goals of effectiveness assessment directly reflects the FATF's empowerment approach to monitoring. In effectiveness assessment, states' performance is assessed vis-à-vis a set of specific practical outcomes that presumably indicate effectiveness. FATF assessors are instructed to assess these assessment points in light of two overarching questions: (i) "to what extent is the outcome being achieved?" and (ii) "what can be done to improve effectiveness?"<sup>45</sup>

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<sup>42</sup> FATF methodology guideline.

<sup>43</sup> Methodology for Assessing Technical Compliance with the FATF Recommendations and the Effectiveness of AML/CFT Systems', FATF/OECD, 2013, p. 6.

<sup>44</sup> *Ibid.*

<sup>45</sup> *Idem*, pp16-17.

## CHAPTER 6

The goal of such assessment, FATF specifies, is “*enabling* states to prioritize measures to *improve* national [counter-terrorism financing] systems”<sup>46</sup> (emphasis added).

The elasticity of the frame of measurement used to assess both technical compliance and effectiveness assessments also reflects the effort to soften the formal notions of compliance and breach. The technical compliance and effectiveness of states’ implementation of FATF Recommendations is measured not using the categorical binaries of ‘compliant/non-compliant’, or ‘effective/non-effective’, but rather using a spectrum of scales that identifies a range of ‘achievements’ and ‘weaknesses’. The FATF uses a four-level scale in evaluating states’ technical compliance: ‘compliant’, ‘largely compliant’, ‘partially compliant’, and ‘non-compliant’. In assessing effectiveness, the FATF uses a similarly four-level grading of states’ performance: ‘high level effectiveness’, ‘substantial level of effectiveness’, ‘moderate level of effectiveness’, and ‘low level of effectiveness’. The qualifiers ‘largely’, ‘partially’, ‘high level’, ‘substantial’, ‘moderate’, and ‘low-level’ fine-tune and bridge the sharp divide between the categorical extremes of ‘compliant’ and ‘non-compliant’ or ‘effective’ and ‘non-effective’. Those bridge categories also have the overall effect of shifting the focus away from the responsibility of states toward the progression of the subject matter, i.e. the implementation of FATF’s counter-terrorism financing standards.

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<sup>46</sup> *Idem.* Similarly, the IMF states that the task of its assessors under the FSAP and OFC programs is to identify the ‘strengths and weaknesses’ of a state’s legal, institutional and supervisory framework on terrorism financing, to evaluate the ‘effective implementation’ of measures therein, and to recommend ‘action to correct deficiencies and come into compliance with the FATF standard.’ The World Bank, likewise, describes its assessment program as a process whereby ‘participating countries can identify financial system vulnerabilities and develop appropriate policy responses’. The Bank and the Fund’s joint FSAP assessment program primarily yields consultatively prepared reports that are designed to initially ‘support the dialogue between FSAP team and its country counterparts’ and in subsequent reviews to ‘identify new challenges faced by the [states’ financial] system... [and assess] progress in implementing FSAP recommendations...’. The results of the joint FSAP assessment, the Bank and the Fund state, are ‘...often used to develop a technical assistance program for the assessed country’; and the Fund actually defines its OFC program as a ‘program of assessments and technical assistance.’ See, ‘Twelve-Month Pilot Program of Anti-Money Laundering and Combating the Financing of Terrorism (AML/CFT) Assessments and Delivery of AML/CFT Technical Assistance’, Joint Interim Progress Report of the Work of the IMF and the World Bank, March 2003; ‘Anti-Money Laundering and Combating the Financing of Terrorism: Review of the Quality and Consistency of Assessment Reports and the Effectiveness of Coordination’ joint IMF-World Bank report, April 2006.

#### 6.4.4. FATF Blacklisting and Counter-Measures

The third monitoring tool at the disposal of the FATF is a system of blacklisting and authorisation of counter-measures against states that are deemed particularly lacking in political will for the implementation of terrorism financing rules and standards. However, this tool is used sparingly, only as a last resort, and is increasingly becoming less relevant as the majority of states have progressed in their compliance with FATF Recommendations. The blacklisting system, known as the “Non-Cooperative Countries and Territories” (NCCT), operated only between the years 2000 and 2006. It is replaced by a process called the International Cooperation Review Group (ICRG). The ICRG system, while still maintaining the naming and shaming element from the previous blacklisting system, has evolved into a system of extended engagement with states for persuasion and empowerment to fully comply with FATF terrorism financing Recommendations.

When a state’s mutual evaluation exercise yields the result of ‘significant deficiency’, the ICRG conducts further review and the outcome of such review is presented to the state concerned for reflection. The state concerned is also given the “opportunity to participate in face-to-face meetings with the regional review group to discuss the report, including developing an action plan with the FATF to address the deficiencies identified”.<sup>47</sup> It is only after the exhaustion of such process and upon finding that the state concerned is not committed enough to fully implement the FATF Recommendation or the action plan prepared after the ICRG assessment that the FATF proceeds to take coercive measures against the state in question. The coercive measures include blacklisting and authorizing countermeasures by member states. Since 2010, the FATF has revised its guidelines to make an even further distinction within non-compliant jurisdictions between those that still have political commitment to comply with FATF Recommendations and those that lack such commitment. Only the latter (so-called ‘high risk and non-cooperative jurisdictions’) are be subjected to coercive measure, which includes the FATF publicly naming that jurisdiction as non-compliant and authorising its member states to apply counter-measures against the non-compliant jurisdiction, including the severance of all financial ties. But non-

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<sup>47</sup> FATF website, *see* <http://www.fatf-gafi.org/topics/high-riskandnon-cooperativejurisdictions/more/moreabouttheinternationalco-operationreviewgroupicrg.html>.



compliant jurisdictions that still show high level political commitment to FATF Recommendations are not blacklisted but put under a special on-going monitoring process whereby the FATF devises further action plans to accelerate the jurisdiction's compliance.

The blacklisting and countermeasures system is both increasingly softened (the shift from NCCT to ICRG) and hesitantly used as a very last resort. Currently, only two states – Iran and North Korea, which are already excluded from the international financial system for other reasons – stand on the list of non-compliant jurisdictions subjected to public naming and counter-measures.<sup>48</sup> In sum, the working methods of the FATF, like that of the Security Council's Counter-terrorism Committee, suppress the legal-formal language of rights and obligations and is dedicated to engaging and empowering states toward full and effective implementation of terrorism financing rules and standards.

Across the different fields of counter-terrorism governance, the trend is that monitoring of norms is undertaken by non-legal bodies whose main function is to serve as centres of resource and expertise and platforms of international cooperation.<sup>49</sup> These monitoring bodies eliminate their critical detachment from states, and focus on building states' implementation capability. They are open to entertaining critical feedback on their monitoring work and states' implementation of counter-terrorism norms, but such criticism is used only as a lesson for future improvement and not as a ground for retrospective scrutiny or accountability.

## **6.5. The Erosion of Procedural Safeguards in Context**

The trends of de-legalisation and state-empowerment in the design and practice of international counter-terrorism monitoring bodies entail that such bodies do not serve as platforms where grievances of non-state actors could be contested or redressed. The

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<sup>48</sup> FATF Public Statement, February 2015.

<sup>49</sup> Notable exception being the Special Tribunal for Lebanon established by the United Nations Security Council in 2009 for the trial of persons accused of carrying out the killing of Rafiq Hariri, the former prime minister of Lebanon, along with 22 other persons. This Tribunal, however, applies the domestic law of Lebanon, and not international law. Moreover, it has no mandate beyond that specific case. See, Security Council Resolution 1664 (2006) of 29 March 2009, Resolution 1757 (2007) of 30 May 2007, Annexed the Statute of the Tribunal.

failure of these monitoring bodies to act as platforms of contestation and accountability is more detrimental when seen in light of the limitations of alternative avenues of contestation and accountability. The following discussion briefly outlines four alternative procedural mechanisms whereby the grievances of non-state actors arising from the implementation of international counter-terrorism norms could be contested and redressed. This discussion points out that these mechanisms, although offering platforms of contestation and accountability, their potential as checks against the dominant trend of dynamism in international governance of terrorism is curtailed for various reasons. These mechanisms are (a) inter-state judicial contestation, (b) national and regional judicial systems, (c) individual complaint mechanisms of international human rights bodies, and (d) individual complaint mechanisms within international counter-terrorism institutions.

### **6.5.1. International Judicial Bodies: the International Court of Justice**

International judicial bodies serve as platforms of contestation and accountability between states. The jurisdiction of international courts and tribunals is generally treaty-based. Treaties may contain provisions that provide for the adjudication of contestations on the interpretation and application of their content through inter-state judicial bodies. The available international treaties on terrorism – the Sectoral Conventions<sup>50</sup> – contain dispute resolution clauses that mandate the International Court of Justice (ICJ) to entertain inter-state contestation on the interpretation or application of those instruments.<sup>51</sup> The grievances of individuals and businesses arising from the wrongful application or the violation of the Sectoral Conventions could potentially be addressed through inter-state proceedings at the ICJ. This mechanism was utilised by Libya, for example, to contest the demand of the US and the UK for

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<sup>50</sup> Above, chapter 1, note 18.

<sup>51</sup> A provision that similarly appears in all of these conventions states: ‘Any dispute between two or more state parties concerning the interpretation or application of this convention which cannot be settled through negotiation within a reasonable time shall, at the request of one of them, be submitted to arbitration. If, within six months of the date of the request for arbitration, the parties are unable to agree on the organisation of the arbitration, any one of those parties may refer the dispute to the International Court of Justice, by application, in conformity with the Statute of the Court’. *See, e.g.*, Art. 24 Aircraft Convention of 1963, Art. 12 Unlawful Seizure Convention of 1970, Art. 14 Civil Aviation Convention of 1971, Art. 13. Diplomatic Agents Convention of 1973, Art. 16 Hostages Convention of 1979, Art. 24 Terrorist Financing Convention of 1997 and Art. 20 New Civil Aviation Convention of 2010.

the extradition of Libyan citizens suspected of being the masterminds of the Lockerbie bombing.<sup>52</sup>

As the Lockerbie case also shows, elaborated in detail elsewhere,<sup>53</sup> the role of the ICJ as a platform of inter-state contestation with respect to the Sectoral Conventions is rendered without effect due to the rising involvement of the UN Security Council in international governance of terrorism. States, particularly the permanent members of the Security Council, can mobilise the Security Council to take action with respect to any of the matters covered by the Sectoral Conventions on terrorism. Once such matter has been dealt with by a binding decision of the Security Council, the corresponding Sectoral Convention ceases to be the exclusive normative framework under which the matter falls. The Security Council decision and the Sectoral Convention exist side-by-side, both equally applicable on the matter. However, as the UN Charter prevails over any other international treaty,<sup>54</sup> the obligations of states arising out of the Sectoral Convention will be superseded by those arising from the decision of the Security Council.

If the Security Council decision stipulates terms that contradict those provided under the Sectoral Convention, the latter would be rendered inapplicable to the extent of the contradiction. In such scenarios, disputes that are brought before the ICJ based on the Sectoral Convention would be rendered without object for the purposes of the jurisdiction of the ICJ. According to the reasoning of the ICJ in the Lockerbie case, a Security Council decision poses a challenge to the establishment of the jurisdiction of the court in treaty-based disputes if (a) the terms of the Security Council decision

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<sup>52</sup> See, *Questions of Interpretation and Application of the 1971 Montreal Convention Arising from the Aerial Incident at Lockerbie (Libyan Arab Jamahiriya v. United States)*, Application Instituting Proceedings, 3 March 1992; and *Questions of Interpretation and Application of the 1971 Montreal Convention Arising from the Aerial Incident at Lockerbie (Libyan Arab Jamahiriya v. United Kingdom)*, Application Instituting Proceedings, 3 March 1992.

<sup>53</sup> Nathanael Ali, 'Between a Rock and a Hard Place: Treaty-Based Settlement of Terrorism-Related Disputes in the Era of Active United Nations Security Council Involvement', 6(2) *Erasmus Law Review*, 2013, (online, [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2364355](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2364355) last accessed 6 June 2015).

<sup>54</sup> UN Charter, art. 103: 'In the event of a conflict between the obligations of the Members of the United Nations under the present Charter and their obligations under any other international agreement, their obligations under the present Charter shall prevail'. Read in conjunction with art. 25 of the Charter.

contradict those of the treaty in question, and (b) such decision has come into existence before the treaty-based dispute is filed at the court.<sup>55</sup> The jurisdiction of the court is derived from the legal basis that governs the matter in dispute. Such matter ceases to be governed by a Sectoral Convention when and to the extent that it is dealt with by a countervailing decision of the Security Council. As a result, claims connected to the matter that arise from the application of a Sectoral Convention would be rendered without object before the court. This would mean that even if a state resorts to the ICJ to contest the actions of another state based on the Sectoral Conventions, the role of the ICJ would be curtailed if the contested action is grounded on a Security Council decision.

In cases where the parties in dispute have made general declarations recognising the compulsory jurisdiction of the ICJ, the court could establish jurisdiction regardless of the pre-emption of the treaty in dispute by a Security Council decision.<sup>56</sup> However, although the preliminary hurdle of jurisdiction could be overcome, the countervailing Security Council decision poses a challenge at the merits stage of the proceeding. That is, the court could determine the decision of the Security Council to be the applicable law with respect to the dispute at hand, and consequently dismiss claims that are founded on the Sectoral Conventions on terrorism. Moreover, general declarations recognising the compulsory jurisdiction of the ICJ are of limited utility as they are applicable only on the basis of reciprocity, i.e. between states that have both recognised the compulsory jurisdiction of the court.<sup>57</sup>

Furthermore, the role of the ICJ with respect to international counter-terrorism laws is limited to disputes that arise from the Sectoral Conventions, which constitute only a part of a greater set of international normative instruments on terrorism. As was

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<sup>55</sup> *Questions of Interpretation and Application of the 1971 Montreal Convention Arising from the Aerial Incident at Lockerbie (Libyan Arab Jamahiriya v. United States)*, *Application Instituting Proceedings*, 3, para 36-37.

<sup>56</sup> General declarations accepting the compulsory jurisdiction of the ICJ are made in accordance with article 36 (2) of the statute of the court, which states that states parties may “at any time declare that they recognize as compulsory ipso facto and without special agreement, in relation to any other State accepting the same obligation, the jurisdiction of the Court”.

<sup>57</sup> As of June 2015, seventy-one states have deposited declarations recognizing the compulsory jurisdiction of the ICJ. Several of these declarations, however, contain exceptions restricting their applicability with respect to various situations or states. See, website of the ICJ [www.icj-cij.org](http://www.icj-cij.org). Further, see, Stanimir A. Alexandrov, ‘The Compulsory Jurisdiction of the International Court of Justice: How Compulsory Is It?’, 5 (1) *Chinese Journal of International Law*, 2006, 29-38.

shown in chapters 4 and 5 above, whether in terrorism financing, the control of arms and dangerous materials or the cross-border movement of persons and goods, the bulk of international counter-terrorism norms originate not from treaties but from decisions of international organisations such as the UN Security Council and the FATF. These decisions, taking the forms of standards, recommendations, and best practices, hardly contain dispute settlement provisions, and do not refer to the ICJ. Even if such provisions exist, governance of terrorism at the institutions such as the Security Council and the FATF is undertaken through swift, short-term, constantly adapting measures that are not amenable for the lengthy and arduous process of litigation at the ICJ. For the above legal and practical reasons, the relevance of the ICJ as a platform of inter-state contestation in international governance of terrorism is rendered negligible.

### 6.5.2. National and Regional Courts

National and regional courts provide possibilities of holding states accountable in connection with the implementation of international counter-terrorism norms. In states and regions with effective judicial protection, individuals can challenge state's implementation of international counter-terrorism regulations based on human rights norms. As of 2014, there have been human rights-based legal proceedings challenging the implementation of the Security Council's sanctions regime against Al-Qaeda and associates in the domestic courts of nine states and at the European Court of Human Rights and the European Court of Justice as of 2014.<sup>58</sup> In some of these case, individuals have been successful in challenging counter-terrorism measures of assets-freeze and travel restrictions.<sup>59</sup> These cases have shown that such judicial mechanisms

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<sup>58</sup> See, Sixteenth report of the Analytical Support and Sanctions Monitoring Team of the Committee established Pursuant to Resolution 1267, S/2014/770, p 15, footnote 32. See also, Antonios Tzanakopoulos, *Disobeying the Security Council: Countermeasures against Wrongful Sanctions*, Oxford University Press, 2011; Mathias Herdegen, 'Review of the Security Council by National Courts: A Constitutional perspective', in Erika De Wet and André Nollkaemper, eds., *Review of the Security Council by Member States*, Intersentia, 2003, pp77-84; P.J.G (Jos) Kapteijn, 'The Role of the ECJ in Implementing Security Council Resolutions', in Idem (De Wet and Nollkaemper) pp57-62.

<sup>59</sup> E.g. Joined Cases C-402/05 P and C-415/05 P, *Yassin Abdullah Kadi and Al Barakaat International Foundation v. Council of the European Union and Commission of the European Communities* [2008] ECR I-6356; *Nada v. Switzerland*, European Court of Human Rights, Application no. 10593/08, Judgment of 12 September 2012; *Her Majesty's Treasury v. Mohammed Jabar Ahmed and others*; *Her Majesty's Treasury v.*

provide viable avenues of contesting and seeking redress for grievances that arise in connection with states' implementation of international counter-terrorism regulation.

These judicial avenues are, however, not available in several states, particularly in states from Africa and Asia – the two regions that are the most important targets of international counter-terrorism activity. Internally, effective judicial protection of human rights is weak or non-existent in most African and Asian states.<sup>60</sup> The same is true at the regional level. In Asia – a region which encompasses sub-regions such as the Middle East and South East Asia – there is no regional human rights legal framework or judicial body.<sup>61</sup> In Africa, there is a nascent regional human rights legal regime. The African Commission on Human and Peoples' Rights receives state-to-state and individual complaints regarding allegations of violation of the African Charter on Human and Peoples' Rights by any state party to the Charter.<sup>62</sup> The African human rights court which also oversees the implementation of the Charter, is competent to entertain complaints from individuals against a very limited number of African states. As of 2014, only twenty-six out of the fifty-four member states of the African Union have accepted the court's jurisdiction by ratifying the Protocol establishing the court.<sup>63</sup> Among these twenty-six states, only five have made the special declaration that is required to accept court's competence to entertain applications from individuals and

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*Mohammed al-Ghabra*; R (on the application of *Hani El Sayed Sabaei Youssef*) v. Her Majesty's Treasury [2010] UKSC 2, Judgment of 27 January 2010; *Hani El Sayed Elsebai Yusef v. European Commission*, the General Court of the European Union, Case T-306/10, judgment of 21 March 2014. See also, Juliane Kokott and Christoph Sobotta, 'The Kadi Case – Constitutional Core Values and International Law – Finding the Balance?', 23 (4) *European Journal of International Law*, 2012, 1015-1024.

<sup>60</sup> For a discussion of some exceptions, see Eyal Benvenisti, 'United We Stand: National Courts Reviewing Counterterrorism Norms', in Andrea Bianchi and Alexis Keller, eds., *Counterterrorism: Democracy's Challenge*, Hart, 2008, 251-276; Elizabeth Stubbins Bates, 'Terrorism and International Law: Accountability, Reform and Remedies', A Report of the International Bar Association Taskforce on Terrorism, Oxford University Press, 2011.

<sup>61</sup> Henry J. Steiner, Philip Alston, and Ryan Goodman, *International Human Rights in Context: Law, Politics, Morals*, Oxford University Press, 2008 (first edition 1996), p925ff.

<sup>62</sup> In accordance with arts. 48-49 (state-to-state complaint) and 55 (individual complaint) of the African Charter on Human and Peoples' Rights. See, further, Frans Viljoen, *International Human Rights Law in Africa*, 2nd ed., Oxford University Press, Oxford, 2012; 'Human rights in Africa: normative, institutional and functional complementarity and distinctiveness', 18 *Southern African Journal for International Affairs*, 2011, 191-216.

<sup>63</sup> The 1998 Protocol to the African Charter on Human and Peoples' Rights on the Establishment of the African Court on Human and Peoples' Rights. From among the seven states in the Horn of Africa, for example, only two – Kenya and Uganda – have accepted the court's jurisdiction.

NGOs.<sup>64</sup> National and regional judicial avenues of contesting states' implementation of international counter-terrorism regulation, therefore, are of very limited utility in states and regions from the Global South where the effects of international counter-terrorism measures are most felt.

### **6.5.3. Complaints Procedures at the Human Rights Council and International Human Rights Treaty Bodies**

International human rights monitoring bodies that are based on the United Nations Charter and international human rights treaties offer yet another alternative avenue of contesting human rights violations arising from states' implementation of international counter-terrorism regulations. The United Nations Human Rights Council, the principal charter-based body, has a confidential complaint procedure and special procedures mechanisms that can be used to scrutinise states' compliance with human rights in counter-terrorism. Through the confidential complaint procedure individuals, groups and NGO's contest specific human rights violations of states before the Human Rights Council.<sup>65</sup> The special procedures mechanism is, on the other hand, a procedure through which the Council mandates a special rapporteur to assess human rights compliance from a thematic or country-specific perspective, and thus not to entertain individual cases.

A special rapporteur on counter-terrorism, known as the special rapporteur on the promotion and protection of human rights while countering terrorism, was established in 2005.<sup>66</sup> The special rapporteur has a thematic mandate. That is, he/she is tasked with undertaking studies, investigations, and suggesting recommendations on how best

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<sup>64</sup> Requirement for the declaration found under arts. 5 and 34 (6) of the Protocol establishing the court. The five states that have made the declaration are Burkina Faso, Ghana, Malawi, Mali, and Tanzania. See, website of the African Union, <http://www.au.int/en/organs/cj>.

<sup>65</sup> Resolution 5/1 of the UN Human Rights Council of 18 June 2007. Since the establishment of this procedure under the newly constituted Human Rights Council, complaints concerning situations in twelve states have been referred to the Council. The outcomes of these complaints remain confidential. The list of these complaints is available at <http://www.ohchr.org/Documents/HRBodies/ComplaintProcedure/SituationsConsideredUnderComplaintProcedures.pdf> (last accessed 6 June 2015)

<sup>66</sup> Established by UN Commission on Human Rights resolution 2005/80 of 21 April 2005. [The UN Commission on Human Rights is the predecessor to the current UN Human Rights Council].



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to ensure the promotion and protection of human rights in counter-terrorism. Within this frame, the special rapporteur is mandated to receive and exchange information and communications from and with various actors, including ‘the individuals concerned, their families, their representatives and their organizations’.<sup>67</sup> In this sense, the special rapporteur serves as an important mechanism for amplifying the voices of aggrieved non-state actors. However, the special rapporteur does not have mandate to hold states to account for those grievances. Its power is limited to the forward-looking tasks of providing advisory service, technical assistance, and facilitating international cooperation for the better realisation of human rights in counter-terrorism.<sup>68</sup>

Most of the core international human rights treaties are overseen by expert bodies, so-called treaty bodies, which can entertain individual communications and state-to-state complaints procedures.<sup>69</sup> These are procedures whereby individuals and states communicate to the treaty body contesting the violation of rights by a state that is party to the relevant human rights treaty. Two international human rights treaties are particularly relevant with respect to counter-terrorism: the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights. The treaty bodies of both treaties, referred to as the Human Rights Committee and the Committee on Economic, Social and Cultural Rights, are mandated to receive individual communications and state-to-state complaints.

Similar to the case of national and regional human rights-based judicial proceedings, however, the individual communication and state-to-state complaint procedures at international human rights treaty bodies are mechanisms applicable only with respect to violations of rights by a very limited number of states. With respect to individual communication procedures, individuals can only bring complaints against those states parties to the relevant human rights treaty which have ratified or acceded to the optional protocols that establish the individual communications procedure. Several states, and more importantly several states from corners of the Global South that host heightened counter-terrorism activity, have not ratified the optional protocols to the ICCPR and the ICESCR accepting the competence of the respective treaty bodies to

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<sup>67</sup> Resolution 2005/80 of the UN Commission on Human Rights, para 14 (b).

<sup>68</sup> *Idem*, para. 14 (a), (d), and (e).

<sup>69</sup> See, Henry J. Steiner, Philip Alston, and Ryan Goodman, *International Human Rights in Context: Law, Politics, Morals*, Oxford University Press, 2008 (first edition 1996), 669-924.



entertain individual communications.<sup>70</sup> For example, in the greater Horn of Africa,<sup>71</sup> which is one of the key regions of international counter-terrorism activity, only three of the seven states have accepted the competence of the Human Right Committee to receive individual communications based on the ICCPR and none of the seven states have accepted that of the Committee on Economic, Social and Cultural Rights.<sup>72</sup>

The state-to-state complaint procedure is provided for under most of the core human rights treaties, including the ICCPR.<sup>73</sup> However, this procedure is applicable only with respect to states that make a special declaration accepting the competence of the treaty-body to entertain such complaints. With respect to some other human rights treaties, including the ICESCR, state-to-state complaint procedure is provided under a separate optional protocol, which states have to ratify or accede to in order for the procedure to apply toward them.<sup>74</sup> Several states have either not made the special declaration or not ratified or acceded to the optional protocols. Furthermore, the utility of the state-to-state complaint procedure is curtailed mainly due to the fact that states are reluctant to exercise it; none of the state-to-state complaint procedures provided by seven of the core human rights treaties,<sup>75</sup> including the ICCPR and the ICESCR, have been used to date.<sup>76</sup>

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<sup>70</sup> The relevant protocols are, the First Optional Protocol to the International Covenant on Civil and Political Rights of 1996, and the Optional Protocol to the International Covenant on Economic, Social and Cultural Rights of 2008.

<sup>71</sup> A common reference to the following set of seven states: Djibouti, Eritrea, Ethiopia, Kenya, Sudan, South Sudan, Somalia, and Uganda.

<sup>72</sup> See, a repository of status of ratifications maintained by the UN Office of the High Commissioner for Human Rights, available online at <http://indicators.ohchr.org/>. The three states that have ratified the first Optional Protocol to the ICCPR are Somalia (1990), Uganda (1995) and Djibouti (2002).

<sup>73</sup> Provided under articles 41-43 of the ICCPR.

<sup>74</sup> Art. 10, Optional Protocol to the International Covenant on Economic, Social and Cultural Rights.

<sup>75</sup> The other human rights treaties that provide for state-to-state complaint procedure are the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (art. 21), the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (art. 74), the International Convention for the Protection of All Persons from Enforced Disappearance (art. 32), the Convention on the Rights of the Child (art.10 of the Optional Protocol), and the International Convention on the Elimination of All Forms of Racial Discrimination (arts. 11-13).

<sup>76</sup> The UN Office of the High Commissioner for Human Rights, [www.ohchr.org](http://www.ohchr.org).

#### 6.5.4. Complaint Mechanisms within International Counter-Terrorism Bodies

Another alternative avenue of accountability with respect to international governance of terrorism is individual complaint procedures within the international counter-terrorism governance bodies themselves.<sup>77</sup> No such procedure exists at most of the relevant international counter-terrorism governance bodies. Some of these bodies, such as the FATF, are open to the participation of individuals, businesses and civil society representatives, but such participation only serves as a feedback mechanism and not for submitting complaints.<sup>78</sup>

An exception in this regard is the existence of the Ombudsperson<sup>79</sup> with respect to the Security Council's counter-terrorism sanctions regime on Al-Qaeda and associates. In spite of its deficiencies in terms of providing effective remedy and its decision-making and investigative powers,<sup>80</sup> the Ombudsperson reviews the cases of sanctioned individuals and entities and seeks their de-listing if he/she deems the available evidence against the listed individuals does not fulfil the threshold of 'reasonable suspicion' required for listing. But this needs to be put in perspective: the Ombudsperson is mandated with respect to a limited set of sanctions adopted under only one of the several sanctions regimes that the Security Council has instituted, and its role does not cover states' implementation of the various other counter-terrorism measures stipulated under Resolution 1373. Moreover, the very relevance of the Ombudsperson is at times undermined by the Security Council when the later re-lists individuals and entities under another sanctions regime immediately after the Ombudsperson secures

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<sup>77</sup> Examples of such procedure is the Inspection Panel of the World Bank, see further Andrea Naude Fourie, *The World Bank Inspection Panel and Quasi-Judicial Oversight: in Search of the Judicial Spirit in Public International Law*, Eleven Publishers, Utrecht/Portland, 2009.

<sup>78</sup> E.g. the FATF Private Sector Consultative Forum held between the FATF and businesses and civil society representatives. For reports of these meetings, see FATF website [www.fatf-gafi.org](http://www.fatf-gafi.org)

<sup>79</sup> Established by UN Security Council Resolution 1904, of 17 December 2009. Further on the mandate of the Ombudsperson and related official documents, see <http://www.un.org/en/sc/ombudsperson/>

<sup>80</sup> E.g. Grant L. Willis, 'Security Council Targeted Sanctions, Due Process and the 1267 Ombudsperson', 42 *Georgetown Journal of Int'l Law*, 2010-2011, 673.

their de-listing from the Al-Qaeda sanctions regime.<sup>81</sup> The dominant trend is still resistant to such safeguard procedures, and the establishment of the Ombudsperson is a rare concession, brought about after persistent counter-reaction against the sanctions regime.<sup>82</sup>

In what follows, two trends that manifest the erosion of the role of international counter-terrorism monitoring as a safeguard mechanism are identified: the de-legalisation of international monitoring and the rise of a state-empowerment approach to norm monitoring. What these trends reflect is a systemic shift away from authoritative compliance monitoring and toward a supportive and engaged monitoring in international governance of terrorism.

## 6.6. Conclusion: Towards a Community of Collective Endeavour

The monitoring of states' implementation of international counter-terrorism norms follows the logic that underpins dynamism in the development of the norms, i.e. a move away from legal formality and towards pragmatism and state empowerment driven solely by functional consideration. The discourse is one of fostering a sense of community of collective endeavour around counter-terrorism where responsibility is shared among all but is not pointedly invoked with respect to specific actors. The idea is to get all participants of this community to own the project of counter-terrorism and contribute to it as much as they can, and not just to comply with the bare minimums of legal obligation. The monitoring of states' implementation of international counter-terrorism norms is, therefore, devoid of the legal discourse of obligations and compliance/breach, and undertaken from the perspective of state capability and

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<sup>81</sup> See, Gavin Sullivan and Ben Hayes, 'Blacklisted: Targeted Sanctions, Preemptive Security and Fundamental Rights', Report of European Center for Constitutional and Human Rights, 2010, available online at [www.ecchr.de](http://www.ecchr.de).

<sup>82</sup> The primary such reaction came from the courts in Europe. As of 2014 there has been legal proceedings challenging the sanctions in the domestic courts of nine states and at the European Court of Human Rights and the European Union Court of Justice, *see*, Sixteenth report of the Analytical Support and Sanctions Monitoring Team of the Committee established Pursuant to Resolution 1267, S/2014/770, p 15, footnote 32.

empowerment. Instead, international obligations are framed as objectives and compliance is assessed in the language of ‘accomplishments’ and ‘weaknesses’.

Consequently, monitoring is not undertaken as an exercise of retrospective scrutiny against states, but as a pragmatic assessment of states’ implementation successes and needs. The response to non-compliance almost invariably comes in the form of action plans for improved implementation and international assistance in the future. In other words, international monitoring focuses not on ensuring answerability for non-compliance, but on addressing the factors behind non-compliance. As a result, international monitoring bodies on terrorism do not serve as platforms of contestation regarding states’ compliance with international norms, including safeguard norms that protect the rights and interests of non-state actors in counter-terrorism. The grievances of non-state actors that are brought to the attention of international monitoring bodies are dealt with as feedback for the state concerned in view of future improvement, and not as complaints to be accounted for and redressed. Grievances are normalised as lessons for improving the system *in the future* as part of the ongoing self-correction of dynamism and as unfortunate but inevitable collateral damages of experimentation. Lessons would be learned, improvement would be made in future practice, and the cycle goes on without repercussion or redress for grievances. The rights of non-state actors affected by the implementation of international counter-terrorism norms are ultimately responded to by way of promise of non-repetition in the future, but not invoked and accounted for as matters of principle. These international monitoring bodies, therefore, do not offer procedural safeguards for contesting and seeking redress for violations of the rights of non-state actors. These adverse effects on individuals and businesses, which arise from states’ implementation of international counter-terrorism norms, are not accounted for at international monitoring bodies. Instead, they are taken only as feedback that indicate directions for future rectification.

As international monitoring of counter-terrorism engages states only from the perspective of state capability and empowerment, the adverse effects on individuals and businesses become particularly entrenched in states that do not have adequate judicial protection internally, which is a case more prevalent in the Global South. States could nominate names of their political adversaries to be listed under UN counter-terrorism sanctions, or revoke the licenses of businesses or non-profit organisations

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that involve in opposition political activism in the name of international counter-terrorism financing norms. These states may not have internal complaint or judicial review mechanism that provides adequate protection for such individuals and entities that are adversely affected by states' wrongful implementation of international counter-terrorism norms. In such cases, the detrimental position of the affected individuals and businesses would be further entrenched as international counter-terrorism monitoring bodies would also not provide them with adequate platform to contest and seek redress for their grievances.

## CONCLUSION AND FURTHER THOUGHTS

### 7.1 Overview

This thesis presents an overview of international regulatory activities on terrorism. These activities, which a casual observer may regard as disparate, exhibit common patterns, representing a new approach to international governance. This new approach to international governance has distinctive conceptual foundations, manifestations, and consequences.

Contemporary international governance of terrorism is founded on a cosmopolitan conceptualisation of the problem of terrorism and the normative responses to it. Terrorism is framed as a global public problem, a problem primarily involving the criminality and victimhood of the individual across global society. This conceptualisation frames terrorism as a matter of public concern, not just as a governmental or inter-governmental concern. Consequently, counter-terrorism is framed as a common good that is pursued through proactive collective endeavour, i.e. the management of risk through the shared contributions of all sectors of global society. This is a shift from earlier efforts that were centred on the preservation of governmental interests and peaceful inter-state relations.

The key manifestations of this new approach to international governance of terrorism are openness in terms of the institutional framework and flexibility with regard to the substantive normative measures that are taken. Taken together, these dimensions reveal a dynamic mode of governance for addressing a technically sophisticated and continually evolving global problem. This dynamic mode of governance victimises non-state actors (mainly individuals and businesses) in new, at times less visible ways, and it does disproportionately so towards non-state actors in the Global South. And most importantly, this mode of governance systematically undermines both the vocabulary and the procedural mechanisms through which the victimisations of non-state actors can be contested and redressed.

This chapter proceeds first by highlighting the key findings with respect to the manifestations and consequences of the contemporary trends of dynamism and the erosion of procedural safeguards in international governance of terrorism. It subsequently draws further conclusions regarding the patterns of privilege and disadvantage among various actors that arise from contemporary trends in international governance of terrorism. Lastly, this chapter points towards directions for further research.

## **7.2. Dynamism and the Erosion of Procedural Safeguards**

International governance of terrorism has grown beyond the confines of criminal justice and the regulation of inter-state peace. It has expanded into various regulatory areas, thereby increasing the range of affected non-state actors. The international normative framework on terrorism now includes the regulation of various routine activities such as financial transactions, the production, handling, transfer and trade of arms and dangerous materials, air and maritime transport, border management, immigration and custom procedures. Consequently, the affected non-state actors are no longer limited to individual suspects of terrorism, but also financial institutions and their customers, aviation and maritime transportation companies, business solutions and technology providers, arms manufacturers and traders, and individual international travellers to mention some. The effects include being subjected to new control and accreditation regimes, denial of financial and other services, travel restrictions and travel inconvenience in general, exposure to violations of data privacy, and prejudicial immigration and asylum restrictions. Some of the above-mentioned actors (particularly businesses) also bear a heavy financial burden and face market competitiveness disadvantage as a consequence of their participation in counter-terrorism governance. These effects are less visible as they take place in routine processes, as opposed to the more visible military actions or criminal prosecutions, but nonetheless entail severe adverse consequences.

These adverse effects on non-state actors are produced and entrenched by the dynamic approach to international governance of terrorism and the attendant erosion of procedural safeguards. Dynamic governance involves multiple and constantly expanding set of norms, actors and policy domains (openness) and operates with a

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sense of tentativeness and adjustability (experimentalism). The erosion of procedural safeguards refers to resistance to the vocabulary and processes that facilitate contestation and redress in governance. The combination of dynamism and erosion of procedural safeguards allows for maximum functional expediency and minimum accountability in international governance of terrorism.

The international normative framework on terrorism is a *multi-faceted* project involving a diverse set of norms and actors from different policy fields. As was illustrated with the examples of counter-terrorism financing, the control of arms and dangerous materials, and the cross-border movement of persons and goods, the international normative framework on terrorism ranges from criminal justice stipulations to detailed technical standards for industries. International governance of terrorism also involves the participation of various actors, both governmental and private. Private financial institutions, businesses and business solution providers, internet service providers, military and security technology providers, human rights organisations, industry self-regulation associations and others interact with intergovernmental frameworks of governance of terrorism. Such interactions include taking part in the preparation of normative instruments (treaties, regulatory decisions, technical standards, and recommended practices), cooperating in the development of regulatory schemes (e.g. registration, accreditation schemes) and technological tools for regulatory use (e.g. computer software, security screening device specifications.)

This normative framework is also *absorptive* in the sense that it constantly expands. Both in terms of norms and actors, all that is considered relevant to counter-terrorism is absorbed into the international normative framework. Even safeguard norms and actors that constrain and scrutinise the project of counter-terrorism, such as human rights norms and organisations, are increasingly being incorporated into the development of the international normative framework on terrorism. It is now commonplace to regard these safeguard norms not only as competing requirements that need to be balanced with counter-terrorism objectives, but rather as integral components of a more effective, holistic response to terrorism.

This seemingly chaotic ensemble of diverse and constantly increasing norms and actors in international governance of terrorism is reflective of a pattern of openness of the governance framework, a strategic blurring of formal boundaries. And this pattern



allows for the diffusion of legal responsibility. States disperse their exercise of public power onto international and local actors by conducting the governance of terrorism through international technical standardisations, industry peer-pressure on best practices, private business policies and so on. International governance of terrorism is construed as the responsibility of all sectors of global society, and consequently the development of international counter-terrorism norms is no confined to multilateral processes where one-state-one-vote system prevails. But the openness of the governance framework does not equally benefit all sectors of global society. As the playing field becomes open for all, actors with better institutional or material power, i.e. those from the Global North, dominate the process. This imbalance disenfranchises actors in the Global South as problems are tackled through the lenses of the powerful Global North.

The substantive measures of international governance of terrorism are also developed and operated with flexibility. This flexibility specifically refers to the taking of international counter-terrorism governance measures with a *trial-and-error* and *adaptive* tendency. Instead of channelling efforts into long-term, generalized normative frameworks on terrorism, preference is given to practically-grounded regulatory schemes that are developed, tested, and globally disseminated incrementally. The element of tentativeness ingrained in these governance tools at the same time helps to justify the absence of procedural or institutional mechanisms that safeguard non-state actors from (unintended) adverse consequences. Several of those innovative, flexible and practical tools of governance, ranging from smart financial sanctions to business accreditation programs, are put in place without accompanying complaint mechanisms that individuals and businesses can access to contest the decisions of the international governance bodies.

This does not mean, however, that the adverse consequences that non-state actors suffer continue totally unaddressed. In fact, these schemes are furthermore subject to continuous adaptation. Adaptation is a process of constant revision and improvement to address grievances that arise from the implementation of those tools. Adaptation is a key trait of current international governance of terrorism, and complements the other component of substantive flexibility, i.e. the *trial-and-error* approach. The approach of *trial-and-error* allows for experimentation with innovative tools of governance, and

adaptation is the process of taking a step back and re-evaluating the various governance tools that are being experimented with. Adaptation, however, remains a forward-looking exercise: it is the taking of grievances as feedback for future improvement but not as complaints for retrospective contestation and accountability. Processes that facilitate retrospective contestation and accountability, and thereby provide procedural safeguards through which stakeholders affected by the exercise of public power can contest and seek redress, are suppressed and substituted by continuous functional betterment in dynamic governance.

The erosion of procedural safeguards in this dynamic governance is further visible in the discourse and practice at international counter-terrorism monitoring bodies. The discourse and practice of these international monitoring bodies is mostly devoid of a top-down scrutiny of states and suppresses state-to-state contestation by replacing the legal notions of ‘rights and obligations’ and ‘breach and compliance’ with the managerial tenets of ‘goals and objectives’ and ‘weaknesses and gaps’. In connection, international counter-terrorism monitoring bodies assess states’ compliance through the prism of capacity and empowerment. Questions of non-compliance, including non-compliance with human rights and other safeguard norms applicable in counter-terrorism, are almost always dealt with as issues of capability and responded to through programmatic agendas of supporting the state for a better compliance. Even those monitoring bodies with strong coercive legal authority and/or material leverage, such as the UN Security Council and the FATF, carefully refrain from readily using those powers in deference for fostering an atmosphere of solidarity. The idea is to get all participants in this community to own the project of counter-terrorism and contribute to it as much as they can, and not just to comply with the bare minimums of legal obligation.

The trends of dynamism and the erosion of procedural safeguards constitute an operative framework of contemporary international governance of terrorism in the sense that the two trends are interlinked as mutually supportive pillars of a distinctive mode of governance. In fact, the two trends are symbiotically interlinked. The erosion of procedural safeguards enables an uninhibited open and flexible (i.e. dynamic) mode of governance by suppressing the constraint posed by retrospective accountability. The element of self-correction and continuous improvement as part of dynamism, in turn,

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alleviates some of the frustration that arises from the absence of formalized safeguard processes. In other words, accountability is sacrificed for, and somewhat compensated by, functional innovation and progress.

Dynamism and the erosion of procedural safeguards in international governance of terrorism represent a novel approach to international governance that suppresses formal elements of international law, thereby enabling a functionally robust normative response to technically sophisticated and constantly evolving global problem. The specific formal elements of international law suppressed in dynamism are the principles of state consent and legal certainty. The two are providers of legitimacy and accountability in classical international governance. State consent ensures, albeit only formally, that international norms are developed with the approval of all states. The principle of legal certainty aids the ascertainment of obligations and consequent invocation of responsibility in cases of breach. Dynamism is a mode of governance that has arisen out of unease towards the inhibitions that these formal elements of international law have posed to expediency, and hence functional robustness, in international governance. This search for functional robustness in international governance, however, leads to an abandonment of the practical relevance of those formal elements of international law – the facilitation of contestation and accountability in a world of perpetual dissensus. Dynamic international governance of terrorism, as outlined in this thesis, abandons those formal elements of international law without offering a viable substitute for the preservation of their practical role. Contestation and accountability are considered too adversarial and backward-looking, and hence antithetical to the cosmopolitan partnership and constant forward motion that dynamism represents. In this mode of governance, grievances are glossed over as unfortunate costs of a collectively shared endeavour and acted upon as feedback for future improvement. However, the danger with cosmopolitan claims is, as Koskeniemi puts it, that they always are revealed to serve partial interests.<sup>1</sup> No matter how egalitarian the frame within which international governance is conceived, its costs are never evenly shared. Consequently, there is an ever present need for processes through which the exercise of public power would be contested and remedied.

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<sup>1</sup> Martti Koskeniemi, 'The Subjective Dangers of Projects of World Community', in Antonio Cassese, ed., *Realizing Utopia: The Future of International Law*, Oxford University Press, 2012, 3-13.

These trends of dynamism and the erosion of procedural safeguards in international governance of terrorism give rise to further concerns. This mode of governance, despite its promise of constant improvement, reproduces privileges and disadvantages for various state and non-state actors at both local and global scales. The following section will expound on this concern.

### **7.3. Further Thoughts: Patterns of Privilege and Disadvantage**

Contemporary international governance of terrorism gives rise to three patterns of privilege and disadvantage at local and global levels: the immunization of the state, the co-option of critical actors, and the empowerment of certain private actors.

#### **7.3.1. Immunization of the State**

Following the reconceptualization of international governance of terrorism as a collaborative endeavour, the state is repositioned as a protector of the common good. Consequent to this repositioning of the state, the role of international counter-terrorism monitoring bodies has become one of stimulating and empowering the state for counter-terrorism. States' non-compliance with counter-terrorism norms, including non-compliance with safeguard norms, is repackaged as an issue of inability or inefficiency and addressed through programmatic responses that invariably involve action plans and assistance packages. The default response to criticisms of police torture would be more training of police officers on human rights in counter-terrorism. The default response to a practice of wrongful targeting in national sanctions systems would be enhanced intelligence cooperation for more precision. The default response to broad and abuse-prone counter-terrorism legislation would be more legal drafting assistance, rather than, say, accountability for police torture, compensation for wrongful sanctioning, or denial of cooperation for abuse of a counter-terrorism law. This trend immunises the state in that with the clever repackaging of non-compliance into questions of capacity, even states that blatantly violate human rights in their pursuit of counter-terrorism would evade criticism.

Granted, one cannot speak of international governance of terrorism as a project of immunisation of the state without being confronted with the contrary instances where states face coercive measures and de-legitimation, particularly from the Security

Council-led international governance of terrorism. In the context of Horn of African states, for example, Eritrea has been subjected to regional (IGAD) and international (UN Security Council) sanctions and marginalization in connection with alleged sponsorship of terrorism. Nevertheless, when put in perspective, such cases stand as exceptions: the bigger story in international governance of terrorism is not that of the scrutiny and marginalization of the few, but the collaboration between the majority of states and the resulting resurgence of the state. In the Horn of Africa, the more significant phenomenon is not the marginalization of Eritrea, but the collaboration and the resurgence of all the remaining seven states of the sub-region.<sup>2</sup>

The effect of state-empowerment in international governance of terrorism has a greater negative impact in fragile and non-democratic societies, such as those in the Horn of Africa, due to the poor or non-existent levels of domestic democratic or legal platforms of contestation and redress. The combination of state fragility and terrorism vulnerability has made the Horn of Africa a site for the (often intersecting) international projects of state building and counter-terrorism. And the core impact of the international counter-terrorism project in this region has been resuscitating the state, even back from its total demise, as in the case of the rehabilitation of the state of Somalia.

### 7.3.2. Co-option of Critical Actors

Co-option is the process of bringing stakeholders, including and especially critics, on-board by portraying a convergence of objectives. The process is one of centre-periphery pull, the centre tapping-on and pulling peripheral actors to ultimately buttress the centre's objectives.<sup>3</sup> The centre in international governance of terrorism, at least in the formal sense, is the state and its policing role, and other (non-state) actors are drawn-in to buttress the state's policing efficacy and legitimacy. The participation of peripheral actors, including civil society representatives, businesses, and international organizations that work on non-core counter-terrorism related issues

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<sup>2</sup> These states coordinate their counter-terrorism activities mainly through the Intergovernmental Authority on Development (IGAD). IGAD's counter-terrorism mandate is executed through its Capacity Development Program against Terrorism (ICPAT), see website [www.icpat.org](http://www.icpat.org).

<sup>3</sup> B.S. Chimni, 'Co-option and Resistance: The Two Faces of Global Administrative Law', 37 *Int'l Law and Politics*, 2005, 799-827.

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(such as human rights organisations), is actively sought by several international governance forums on terrorism. Even at forums that are regarded as highly state-centred and exclusionary, such as the Security Council, a closer look at their operations reveals a remarkable effort of outreach and transparency. This thesis has detailed some of the activities of the Security Council's Counter-terrorism Committee system geared toward projecting an image radically opposed to that of the Security Council. The Executive Directorate of the Counter-terrorism Committee, for example, frequently liaises with non-governmental organizations and think tanks. In the outreach and consultative forums that the Counter-terrorism Committee organizes in various regions of the world, representatives of businesses and civil society are often included, albeit mostly with the restriction that territorial state's approval is required for the participation of these actors.

The participation of non-state actors in international governance of terrorism mostly takes place informally. This is due to the fact that the process of developing international norms and standards itself does not take the form of momentous negotiations and adoption of treaties, but rather in the form of a set of incremental and multi-pronged processes that culminate in technical standards, recommended practices, decisions of international organizations and so on. The participation of peripheral actors in the development of international normative framework on terrorism, therefore, involves modest steps such as the tabling of proposals and ensuring their incorporation in final documents of consultative forums, contributing to revisions and updates of technical standard instruments, advocating for specific content in the decisions of international organizations such as the UN Security Council and so forth.

Likewise, monitoring of international standards and norms on terrorism takes place within the frameworks of international organizations' committees, task forces, roundtables, multilateral consultative forums and the like. This means that it is procedurally less cumbersome to bring various, non-state stakeholders on board as these bodies operate with less legal formality. In the country-visit monitoring activities of both the Security Council's Counter-terrorism Committee and the Financial Action Task Force, for example, private businesses and civil society representatives are invited. In addition,

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United Nations human rights and development bodies operate in close collaboration with both of these two monitoring bodies.

This collaboration takes place within the controlled bounds of a strictly friendly, conciliatory environment. Participation by peripheral actors is highly welcomed, so long as these actors do not seek to float or institutionalize contestation and accountability. In this sense, therefore, participation is changed into co-option. Criticism is still within the bounds of accepted intervention, so long as it remains a criticism that demands changes in the future, not redress for the past. In most instances, the institutional design is unsuitable for surfacing contestation or demands for redress. And when institutional design allows for a degree of scrutiny and coercion against states, such as the case with the Counter-terrorism Committee's mandate to monitor Resolution 1373, in practice these institutions almost always default to being consultative forums.

The controlled environment of conciliatory engagement is fostered by a discourse of collective struggle. According to this discourse, all participants share a common objective, namely suppressing terrorism effectively and legitimately, and therefore all participants are bound in cosmopolitan partnership in their counter-terrorism endeavours. International governance of terrorism is construed as a shared struggle wherein all participants share in the sacrifice and responsibility. In the ever ongoing process of striving to strike the optimum between efficacy and legitimacy in counter-terrorism, all parties are supposed to share in the costs of inevitable wrongs along the way.

A variety of non-state actors are invited to take part within a strictly forward-looking, non-contestational parameter of governance that is underpinned by a discourse of collective struggle. Insisting upon processes of contestation or redress at international venues where counter-terrorism measures originate is regarded as obstructive. Redress is backward-looking, and contestation reduces forward speed, leading to finger-pointing between partners that are preoccupied with a constantly improving counter-terrorism endeavour, but one that naturally produces mistakes along the way.

It is precisely due to this need to create a shared responsibility that even the most authoritative international counter-terrorism bodies such as the Security Council and

the Financial Action Task Force flank their authoritative norm-setting roles with consultative roles. These bodies at times make stern pronouncements of rules and demand and scrutinize state reports. But at the same time they also dissolve their critical distance from states and engage in organizing consultative forums, outreach programs (including actual trips to every region) and the like to signify and induce local ownership of those international rules.

### 7.3.3. Empowerment of Certain Private Actors

International counter-terrorism norms, which are of public law character, often take actual effect by being embedded in the business decisions of private actors. These could be business decisions by financial institutions (e.g., the termination of banking services to customers with high-risk of exposure to terrorist financing), or decisions by international transporters of persons and goods (e.g. increased insurer or logistics provider fees for added counter-terrorism compliance), or by knowledge centres in technology relevant to the use of nuclear materials (e.g. universities denying access to education in atomic science for students with certain nationalities<sup>4</sup>).

The devolvement of international counter-terrorism enforcement to private actors, which is becoming a preferred channel of enforcement,<sup>5</sup> breeds a scenario that privileges certain private actors over others. As was touched upon earlier, similar international counter-terrorism norms effect certain individuals and businesses more severely than others. Requirements for the installation of costly and technically advanced counter-terrorism financing measures empower big financial institutions

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<sup>4</sup> Such case has already taken place in connection with a closely related issue-area of international governance, the proliferation of weapons of mass destruction. The Netherlands' in 2008 adopted a rule (later overturned by the Supreme Court) restricting access to higher education studies in fields related to nuclear science to Iranian students, pursuant to Resolution 1737 of the UN Security Council. See, <http://uitspraken.rechtspraak.nl/#ijn/BX8351>.

<sup>5</sup> Observation by Penelope Nevil, a specialist practitioner on sanctions matters at 20 Essex Street, London, during her guest lecture at the Lauterpacht Center for International Law, University Of Cambridge, 14 February 2014. See, further, Penelope Nevill, 'Sanctions and commercial law', chapter in Happold and Eden (eds.), *Sanctions and Embargoes in International Law: Law and Practice*, Hart, (forthcoming, January 2016); 'Military Sanctions Enforcement in the Absence of Express Authorization', in Marc Weller (ed.), *The Oxford Handbook of the Use of Force in International Law*, Oxford University Press, 2015, 272-292.



over smaller ones.<sup>6</sup> Similar requirements in the area of aviation counter-terrorism restrict access of smaller airlines to certain markets, and, in reverse, ensure the market dominance of bigger airlines. And the creation of privilege and disadvantage among private actors follows a consistent pattern. Due to the technical sophistication of this area of governance, private actors possessing greater technical advantage or the resource to acquire it consistently benefit from the application of international counter-terrorism standards.

The above three patterns of privilege and disadvantage among state and non-state actors resulting from international governance of terrorism goes to show the fragility of cosmopolitan claims in international governance. Such claims, as those underpinning contemporary international normative activities on terrorism, espouse the existence of a universal interest that international norms simultaneously and equally satisfy, and towards which states act as trustees. The manifestations and consequences of contemporary international governance of terrorism discussed in this thesis illustrates that international counter-terrorism norms do not satisfy interests universally. Interests are local and partial, and the role of states should be likewise conceived. Moreover, the enduring role of legal governance should be the facilitation of contestation and accountability among actors, states or otherwise, who represent local and partial interests in the pursuance of universal goals.

#### **7.4. Rethinking Applicable Legal Frameworks: Directions for Future Research**

As highlighted in the discussions of counter-terrorism in the areas of finance, the control of arms and dangerous materials, and the cross border movement of persons and goods, international governance of terrorism often regulates routine governmental decisions and business practices. Most such governmental decisions are governed by national and regional public law, such as criminal law, administrative law, or

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<sup>6</sup> Some respond to such regulation by dissolving themselves and resorting to informal/underground operation, creating even less transparency, which is counter-productive to the very counter-terrorism financing objectives of the FATF Recommendation. *See*, Cockayne and Liat Shetret, 'Capitalizing on Trust: Harnessing Somali Remittances for Counterterrorism, Human Rights and State Building', Center on Global Counterterrorism Cooperation, March 2012; Tom Keatinge, 'Breaking the Banks: The Financial Consequences of Counterterrorism', *Foreign Affairs*, June 26, 2014.

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constitutional law. In as far as international law literature addresses the legal complexities that arise from regulatory dimensions of international governance of terrorism, the focus has been on these public law aspects. Financial counter-terrorism measures are assessed, for example, vis-à-vis due process requirements found under national or regional human rights laws and administrative laws.

There is a gap in the literature as regards the legal issues that arise from business decisions in the enforcement of international regulatory standards on terrorism. These business decisions generally fall under national or regional private law frameworks, such as contract law, non-contractual liability law (tort), property law, commercial law, and competition law. The distinctive challenge in the case of business decisions, as opposed to the case of governmental decisions, concerns the fact that the intersection is between national and regional *private* law frameworks and the international *public* law framework in which counter-terrorism norms are embedded.

When private actors integrate the enforcement of international counter-terrorism norms into their business practice, such as the decision to terminate banking services to MSBs in the example given at the beginning of this thesis, a public law imperative becomes embedded within a private law framework. Furthermore, such decisions by private actors increasingly involve consequences of public policy issue (e.g. humanitarian catastrophe in Somalia) and public law (e.g. the fundamental socio-economic rights of Somalis).

In the case of governmental decisions (national public law) that enforce international counter-terrorism regulation (international public law), legal scholars mobilized notions of public international law itself to address the problem, such as by invoking international human rights and humanitarian law. The role of public international law in addressing public policy concerns that arise at the intersection of national private law and international counter-terrorism regulation is yet to be seen. It appears appropriate to examine and rethink the role public international law could play in this legal-theoretical challenge, with an eye for providing a voice to actors that bear the cost of the dynamic international governance of terrorism.

It is also relevant to note that the descriptive framework and the proposed directions of legal reform identified in this thesis could be of relevance to areas of international

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governance other than terrorism. For example, the ways finance is channelled to terrorist purposes involve sophisticated financial maneuverers and constantly changes. Other issue-areas of counter-terrorism, such as cross border movements or the management of dangerous materials, involve technological or practical sophistication that needs to be matched with innovation and flexibility in governance. Correspondingly, international governance in these issue-areas is developed and improved-upon on the go, under a deformed collaborative framework that involves as much input and contributors as possible and as little procedural checks as possible. This mode of operation has a particular appeal in issue-areas of governance that pose technically sophisticated and evolving challenge for policy makers, both in areas of low and high politics such as food security and nuclear energy respectively.<sup>7</sup> Consequently, the directions of future legal rethinking suggested above may be of value for the analysis of other issue-areas of international governance, and for this reason could be undertaken with a comparative or multi-sectoral approach.

Finally, the dynamic mode of international governance of terrorism and the attendant erosion of procedural safeguards described in this thesis respond to practical challenges governments face in tackling technically sophisticated and constantly evolving global problems. This mode of governance could also have utility in various other global problems with similar attributes. However, its appeal to functional expediency in governance should be counterbalanced with the fact that it remains corrosive to the vigorous protection of rights.

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<sup>7</sup> On international governance of food safety, see Alessandra Arcuri, 'The coproduction of the global regulatory regime for food safety standards and the limits of a technocratic ethos', European University Institute Working Paper RSCAS 2014/97, 2014. On international governance of nuclear energy, see Justin Alger, 'A Guide to Global Nuclear Governance: Safety, Security and Non-proliferation', the Centre for International Governance Innovation, Nuclear Energy Futures special publication 2008; Ann Florini and Benjamin K. Sovacool, 'Bridging the Gaps in Global Energy Governance',<sup>17</sup> (1) *Global Governance: A Review of Multilateralism and International Organizations*, 2011, p 57-74.

## Summary

### **Dynamism and the Erosion of Procedural Safeguards in International Governance of Terrorism**

Contemporary international governance of terrorism reflects a conceptualisation of terrorism as a global public problem that both affects and needs to be responded to by all sectors of global society. Consequently, counter-terrorism has taken the form of proactive risk management that involves the regulation of various mundane activities of governmental and private actors, such as financial transactions, the production, management and trade of arms and dangerous materials, air and maritime transport, border management, immigration and custom procedures.

The expansion of international governance of terrorism into these various regulatory areas of activity, in turn, affects a wide range of individuals and entities across the globe, albeit in less visible ways than military invasions or drone strikes. The range of affected parties include individual senders and recipient of financial transactions, international travellers, banks and other financial institutions, aviation and maritime transportation companies, business solutions and technology providers, and arms manufacturers and traders. The effects include being subjected to new control and accreditation regimes, denial of financial and other services, travel restrictions and travel inconvenience in general, exposure to violations of data privacy, and prejudicial immigration and asylum restrictions. Some of the above-mentioned actors (particularly businesses) also bear a heavy financial burden and face market competitiveness disadvantage as a consequence of their participation in counter-terrorism governance.

These adverse effects on non-state actors result from and are further entrenched by a novel form of international governance of terrorism, referred to in the thesis as dynamism. This is a mode of governance characterised by the abandonment of the

formal elements of classical international law in preference for open institutional framework and flexible normative measures. The specific formal elements of international law suppressed in dynamism are the principles of state consent and legal certainty. The two principles are providers of legitimacy and accountability in classical international governance. State consent ensures, albeit only formally, that international norms are developed with the approval of all states. The principle of legal certainty aids the ascertainment of obligations and consequent invocation of responsibility in cases of breach.

Dynamism is a mode of governance that has arisen out of unease towards the inhibitions that these formal elements of international law have posed to expediency in international governance. It is anchored on the need for a functionally robust response to technically sophisticated and constantly evolving global problems such as terrorism. This thesis asserts that dynamism is not only an academically interesting model of international governance, but it is also a practically alarming one. By surveying the areas of counter-terrorism financing, the control of arms and weapons, and the cross-border movement of persons and good, the thesis shows that while dynamism enables the adventurous pursuit of functional robustness in these areas, it systematically produces and entrenches harm on individuals and businesses, particularly in the Global South. The thesis further highlights trends in the discourse and practice of the United Nations Security Council and the Financial Action Task Force – the prominent international monitoring bodies of counter-terrorism norms – to show the simultaneous erosion of procedural mechanisms that safeguard the rights and interests of non-state actors. The combination of dynamism and erosion of procedural safeguards, the thesis posits, allows for maximum functional expediency and minimum accountability in international governance of terrorism.

Four dimensions of the manifestation of dynamism are identified in this thesis. These are *multifaceted* and *absorptive* institutional framework and *trial-and-error* and *adaptive* normative measures. The international normative framework on terrorism is a *multifaceted* project involving a diverse set of norms and actors from different policy fields. The normative measures range from criminal justice stipulations to detailed technical standards for industries. International governance of terrorism also involves the participation of various actors, both governmental and private. Private financial institutions, businesses and business solution providers, internet service providers, military and security technology providers, human rights organisations, industry self-regulation associations and others interact with intergovernmental frameworks of governance of terrorism. Such interactions include taking part in the preparation of normative instruments (treaties, regulatory decisions, technical standards, and recommended practices), cooperating in the development of regulatory schemes (e.g. registration, accreditation schemes) and technological tools for regulatory use (e.g. computer software, security screening device specifications.)

This normative framework is also *absorptive* in the sense that it constantly expands. Both in terms of norms and actors, all that is considered relevant to counter-terrorism is absorbed into the international normative framework. Even safeguard norms and actors that constrain and scrutinise the project of counter-terrorism, such as human rights norms and organisations, are increasingly being incorporated into the development of the international normative framework on terrorism. It is now commonplace to regard these safeguard norms not only as competing requirements that need to be balanced with counter-terrorism objectives, but rather as integral components of a more effective, holistic response to terrorism.

This seemingly chaotic ensemble of diverse and constantly increasing norms and actors in international governance of terrorism is reflective of a pattern of openness of the

governance framework, a strategic blurring of the formal contours of state consent under international law. Instruments of varying degrees of normativity, and national, intergovernmental, private and hybrid actors from multiple fields are brought to bear on international governance of terrorism. This multi-faceted approach is driven by a sense *wisdom of the crowd* logic: garnering the best possible cumulative result by diversifying and maximizing voices and participants. By so 'liberalising' the institutional framework, states diffuse governance roles, and hence responsibility, not only upwards by acting through international organisations, but also downwards by deputising businesses as front-line governance actors in counter-terrorism.

The substantive measures of international governance of terrorism are also developed and operated with flexibility. This flexibility specifically refers to the taking of international counter-terrorism governance measures with a *trial-and-error* and *adaptive* tendency. Instead of channelling efforts into long-term, generalized normative frameworks on terrorism, preference is given to practically-grounded regulatory schemes that are developed, tested, and globally disseminated incrementally. The element of strategic tentativeness ingrained in these governance tools at the same time helps to justify the absence of formal processes that safeguard non-state actors from (unintended) adverse consequences. Several of those innovative, flexible and practical tools of governance, ranging from smart financial sanctions to business accreditation programs, are put in place without accompanying complaint mechanisms that individuals and businesses can access to contest the decisions of the international governance bodies.

This does not mean, however, that the adverse consequences that non-state actors suffer continue totally unaddressed. In fact, these schemes are furthermore subject to continuous *adaptation*, i.e. the process of constant revision and improvement to address grievances that arise from the implementation of those tools. Adaptation complements

the trial-and-error approach: while trial-and-error is a process of experimentation with innovative tools of governance, adaptation is the taking of a step back and re-evaluating the effects of those experimental tools of governance. Adaptation, however, remains a forward-looking exercise: it is the taking of grievances as feedback for future improvement but not as complaints for retrospective contestation and accountability. Processes that facilitate retrospective contestation and accountability, and thereby provide procedural safeguards through which stakeholders affected by the exercise of public power can contest and seek redress, are suppressed and substituted by the promise of continuous functional betterment.

The erosion of procedural safeguard in international governance of terrorism is visible in the discourse and practice of international counter-terrorism monitoring bodies. The discourse at these bodies is devoid of a top-down scrutiny of states and suppresses state-to-state contestation by replacing the legal notions of ‘rights and obligations’ and ‘breach and compliance’ with the managerial tents of ‘goals and objectives’ and ‘weaknesses and gaps’. Moreover, these monitoring bodies assess states’ compliance through the prism of capacity and empowerment. Questions of non-compliance, including non-compliance with human rights and other safeguard norms applicable in counter-terrorism, are almost always dealt with as issues of lack of capability and responded to through programmatic agendas of supporting the state for a better compliance. Even those monitoring bodies with strong coercive legal authority and/or material leverage, such as the UN Security Council and the FATF, carefully refrain from readily using those powers in deference for fostering an atmosphere of solidarity. Contestation and accountability are considered too adversarial and backward-looking notions, and hence antithetical to the cosmopolitan partnership and constant forward motion that dynamism represents. In this mode of governance, grievances are glossed over as unfortunate costs of a collectively shared endeavour and acted upon only as feedback for future improvement. The idea is to get all participants in this community



to own the project of counter-terrorism and contribute to it as much as they can, and not just to comply with the bare minimums of legal obligation.

The trends of dynamism and the erosion of procedural safeguards constitute an operative framework of contemporary international governance of terrorism in the sense that the two trends are interlinked as mutually-supportive pillars of a distinctive mode of governance. The erosion of procedural safeguards enables an uninhibited open and flexible (i.e. dynamic) mode of governance by suppressing the constraint posed by retrospective accountability. The element of self-correction and continuous improvement as part of dynamism, in turn, alleviates some of the frustration that arises from the absence of formalized safeguard processes. In other words, accountability is sacrificed for, and somewhat compensated by, functional innovation and progress.

## Nederlandse Samenvatting

### **Dynamisme en de erosie van procedurele waarborgen in internationale governance op het gebied van terrorisme**

Dit proefschrift biedt een overzicht van huidige internationale, regulerende activiteiten inzake terrorisme. Deze activiteiten, welke als divers beschouwd kunnen worden, vertonen gelijke patronen en bieden een voorbeeld van een nieuwe manier van internationale governance wat ook wel dynamisme genoemd kan worden. Dynamisme is een vorm van governance welke gekenmerkt wordt door het achterwege laten van formele aspecten van internationaal recht ten faveure van een meer open institutioneel kader en flexibele normatieve maatregelen.

De formele aspecten van het internationaal recht die terzijde worden geschoven, zijn het principe van state consent, d.w.z. de instemming van staten, en dat van de rechtszekerheid. Deze twee principes zijn essentieel voor legitimiteit en aansprakelijkheid binnen internationale governance. De instemming van staten zorgt ervoor dat internationale normen ontwikkelen bij de gratie van de goedkeuring van alle staten, weliswaar is dit louter formeel zo. Het principe van de rechtszekerheid draagt bij aan het verankeren van verplichtingen in het recht en als gevolg hiervan aan het mogelijk maken van het invoeren van verantwoordelijkheid bij schendingen van het recht.

Dynamisme is een vorm van governance dat ontstaan is uit een ongenoegen met de manier waarop deze formele aspecten van het internationaal recht het daadkrachtig en direct optreden in internationale governance tegenwerken. Het is gefundeerd in een behoefte aan een functioneel, robuust gehoor aan technisch-complexe en constant veranderende, globale problemen zoals terrorisme. Dit proefschrift betoogt dat dynamisme niet alleen een academisch aantrekkelijk model voor internationale governance is, maar ook dat het een kritische blik op de praktijk mogelijk maakt aangezien het in het kader van terrorisme voor een systematische inbreuk op de rechten van individuen en ondernemingen zorgt, in het bijzonder in de zuidelijke hemisfeer, en voor een zogenaamde erosie van waarborgprocessen.

Dit proefschrift schetst de conceptuele basis en vier specifieke manifestaties van deze dynamische manier van internationale governance op het gebied van terrorisme. Het doet dit door het bespreken van enkele internationale terrorismebestrijdingsmaatregelen op het gebied van de financiering van terrorisme; het vrije verkeer van personen en goederen; en het bezit van wapens en munitie. Het betoogt dat waar dynamisme de weg naar functionele robuustheid in deze gebieden mogelijk maakt, waarbij het vaak gerechtvaardigd wordt in termen van het belang van allen ('the common good'), de voor- en nadelen van deze vorm van governance niet evenredig gedragen worden in de internationale gemeenschap. Het proefschrift beschouwt verder het discours en de praktijk van internationale toezichtsorganen op het gebied van de terrorismebestrijding met als doel het expliciteren van de gelijktijdige erosie van procedurele mechanismen welke de rechten en belangen van niet-statelijke actoren in beginsel beogen te waarborgen. Het proefschrift betoogt dat de combinatie van dynamisme en deze erosie van procedurele waarborgen maximale functionele doelmatigheid en minimale aansprakelijkheid in internationale governance op het gebied van terrorisme mogelijk maakt.

Huidige internationale governance op het gebied van terrorisme behelst in zich een conceptualisering van terrorisme als een globaal, publiekelijk probleem dat op elke sector binnen de internationale gemeenschap van invloed is en dan ook een reactie vereist van alle sectoren. Derhalve heeft terrorismebestrijding de vorm aangenomen van proactieve risicomanagement welke ziet op de regulering van enkele alledaagse activiteiten van gouvernementele en private actoren, waaronder financiële transacties; de fabricatie en handel in wapens en gevaarlijke stoffen; de lucht- en scheepvaart; de controle van grenzen; immigratie; en douaneprocedures.

De uitbreiding van internationale governance op het gebied van terrorisme naar deze activiteiten is op haar beurt van invloed op een groot aantal personen en entiteiten wereldwijd, al is dit weliswaar op minder zichtbare wijze het geval dan bijvoorbeeld in het geval van militaire invasies of aanvallen met drones. Het scala aan getroffen partijen betreft onder andere individuele afzenders en ontvangers van financiële transacties; internationale reizigers; het bankwezen en andere financieel-economische instellingen; luchtvaartmaatschappijen en scheepvaartbedrijven; ondernemingen en aanbieders van allerlei technologieën; wapenfabrikanten en wapenhandelaren. De effecten behelzen

onder andere het voldoen aan nieuwe controle-en accreditatieregimes; de weigering van financiële en overige diensten; beperkingen qua reizen en reisongemak in het algemeen; schending van de privacy van datagegevens; vooringenomenheid in immigratiebeleid; en restricties in asielbeleid. Sommige van de hierboven genoemde actoren (in het bijzonder ondernemingen) dragen daarnaast ook een zware, financiële last en worden geconfronteerd met nadelige effecten qua concurrentie als gevolg van hun bijdrage in de governance op het gebied van het bestrijden van terrorisme.

Deze nadelige effecten op niet-statelijke actoren worden veroorzaakt door en zijn geworteld in de dynamische benadering van internationale governance op het gebied van terrorisme en de derhalve erosie van procedurele waarborgen. Vier dimensies van dynamisme worden besproken in het proefschrift. Deze zijn: een multilateraal (multifaceted) en absorberend (absorptive) institutioneel kader en maatregelen die zich kenmerken door een ‘vallen-en-opstaan’-mentaliteit (trial-and-error) en zich continu aanpassen (adaptive).

Het internationale normatieve kader aangaande terrorisme is een multilateraal project inhoudende een diverse set aan normen, en actoren uit verschillende beleidsterreinen. De normatieve maatregelen variëren van strafrechtelijke bepalingen tot gedetailleerde technische standaarden die gelden voor allerlei industrieën. Internationale governance op het gebied van terrorisme behelst ook de participatie van allerlei actoren, zowel gouvernementeel als privaat. Private financiële instellingen; ondernemingen en aanbieders van zakelijke innovatie; internetaanbieders; militair-technologische -en beveiligingsaanbieders; mensenrechtenorganisaties; zelfregulerende initiatieven; en anderen werken samen met intergouvernementele netwerken van terrorisme-governance. Dergelijke interacties behelzen het helpen in de voorbereiding van het ontwikkelen van normatieve instrumenten (bijvoorbeeld verdragen, maatregelen van besluit, technische standaarden en praktijkaanbevelingen), het meewerken aan de ontwikkeling van regulerende schema's (bijvoorbeeld registratie-en accreditatieschema's), en dat van technologische hulpmiddelen (bijvoorbeeld computer software en specificaties voor screeningsmiddelen voor beveiligingsdoeleinden).

Dit normatieve kader is ook absorberend in de zin dat het steeds meer dingen in zich opneemt. Zowel in termen van normen als in termen van het aantal actoren zien we

dat alles wat als relevant wordt beschouwd om terrorisme te bestrijden in het kader wordt opgenomen. Zelfs waarborgen en actoren die de mogelijkheden van bestrijding kunnen beperken dan wel nauwgezet bekritisieren, zoals de normen onderliggend aan mensenrechten en mensenrechtenorganisaties zelf, worden in toenemende mate opgenomen binnen dit internationale normatieve kader dat ziet op terrorisme. Het is inmiddels normaal om deze waarborgen niet alleen als vereisten te zien waartegen terrorismebestrijdingsdoeleinden afgewogen moeten worden, maar ook als integraal onderdeel van een meer effectief, holistisch antwoord op terrorisme.

Dit ogenschijnlijk chaotisch ensemble van een toenemend en divers aantal normen en actoren in internationale governance op het gebied van terrorisme is kenmerkend van de openheid die het governance denkkader karakteriseert, een strategische vervaging van de formele contouren van instemming van staten onder internationaal recht. Instrumenten met verschillende mates van normativiteit, en nationale, intergouvernementele, private en hybride actoren uit verschillende branches komen samen in de internationale governance op het gebied van terrorisme. Deze meerzijdige benadering lijkt te worden aangewakkerd door een wisdom of the crowd-logica: het doen ontkiemen van het best mogelijke, cumulatieve resultaat door diversificatie en maximalisatie van stemmen en participanten. Door middel van een dergelijk 'liberaliserend' institutioneel kader, is het mogelijk voor staten om governance-rollen onder een grotere groep actoren te verspreiden, en daarmee verantwoordelijkheid van zich af te schuiven, niet alleen 'naar boven toe' door middel van het handelen via internationale organisaties, maar ook 'naar beneden toe' door middel van het rekruteren en aanwijzen van ondernemingen als eersterangs governance-actoren in het bestrijden van terrorisme.

De inhoudelijke maatregelen aangaande de internationale governance op het gebied van terrorisme zijn daarnaast ontwikkeld en worden ingezet met de nodige flexibiliteit. Deze flexibiliteit ziet met name op het nemen van internationale terrorismebestrijdingsmaatregelen welke neigen naar een sterk trial-and-error-karakter en een sterk aanpassingsvermogen lijken te hebben. In plaats van het kanaliseren van mogelijkheden in langdurende, generieke normatieve kaders inzake terrorisme, wordt er voorkeur gegeven aan praktisch-georiënteerde schema's welke stapsgewijs ontwikkeld, getest en verspreid worden. Strategische voorzichtigheid dat ingebed zit

in deze governance-middelen helpt in het rechtvaardigen van de afwezigheid van formele processen die niet-statelijke actoren kunnen beschermen tegen (niet opzettelijke) averechtse gevolgen. Enkele van deze innovatieve, flexibele governance-middelen, variërend van slimme financiële sancties tot accreditatieprogramma's voor ondernemingen, worden geïmplementeerd zonder de mogelijkheid van een klachtenprocedure waar individuen en ondernemingen naar kunnen grijpen om in opspraak te komen tegen beslissingen van internationale governance-organen waar ze het niet mee eens zijn.

Dit betekent echter niet dat de negatieve gevolgen die niet-statelijke actoren kunnen raken ongehoord en onbehandeld blijven. Integendeel, de hierboven genoemde schema's zijn onderworpen aan een continu proces van adaptatie, d.w.z. een proces van constante herziening en verbetering om zo tegemoet te komen aan de grieven en klachten die ontstaan als gevolg van de implementatie van governance-middelen. Adaptatie complementeert de trial-and-error benadering: waar trial-and-error een proces behelst waarin het experimenteren met innovatieve governance-middelen centraal staat, behelst adaptatie het nemen van een stap terug en een evaluatie van de effecten van dergelijke governance-middelen. Adaptatie is echter wel toekomstgericht: het gehoor geven aan grieven en klachten dient als feedback voor toekomstige verbetering, niet als grond voor retrospectieve betwisting en aansprakelijkheid. Procedures die retrospectieve betwisting en aansprakelijkheid mogelijk maken, en daarbij procedurele waarborgen vormen voor belanghebbenden die als gevolg van de publieke uitoefening van macht op zoek zijn naar betwisting en compensatie, worden onderdrukt en zijn vervangen door de belofte van continue, functionele vooruitgang.

De gelijktijdige erosie van procedurele waarborgen in internationale governance op het gebied van terrorisme is zichtbaar in het discours en de praktijk van internationale toezichtsorganen die zich begeven op het gebied van terrorismebestrijding. Het discours onder deze organen is verstoken van een top-down waardering van het handelen van staten, en onderdrukt betwisting tussen staten door middel van het vervangen van de juridische noties van 'rechten en verplichtingen' en 'schending en compliance' met de meer management-achtige begrippen als 'doelen en doeleinden' en 'zwaktes en gaten'. Daarnaast beschouwen deze toezichtsorganen statelijke compliance in termen van capaciteit en de versteviging van posities (empowerment). Kwesties van

non-compliance, inhoudende ook de non-compliance met mensenrechten en andere waarborgen die van toepassing zijn in de bestrijding van terrorisme, worden vrijwel altijd afgedaan als een gebrek aan capaciteit en er wordt tegen opgetreden door middel van allerlei programmatische initiatieven die hulp voor een betere compliance omvatten. Zelfs die toezichtsorganen met een sterke, dwingende autoriteit en/of de beschikking hebben over materiële dwangmiddelen, zoals de VN Veiligheidsraad en de Financial Action Task Force (FATF), houden zich verre van het inzetten van hun macht uit eerbied voor het cultiveren van een sfeer van solidariteit. Juridische betwisting en aansprakelijkheid worden gezien als te polemische en verouderde noties, en dus als antithetisch ten opzichte van het kosmopolitische partnerschap en de continue beweging voorwaarts die dynamisme karakteriseren. Volgens deze modus van governance, worden grieven en klachten gezien als onfortuinlijke kosten als gevolg van een collectief gedeelde inspanning en wordt er louter naar dergelijke grieven en klachten gehandeld als vorm van feedback voor verbetering in de toekomst. Het idee is om alle participanten in de internationale gemeenschap aan boord te krijgen van terrorismebestrijding en om hen zoveel mogelijk een bijdrage te laten leveren, en niet om enkel te voldoen aan de minimale standaard van het hebben van juridische verplichtingen.

De trend van dynamisme en dat van de erosie van procedurele waarborgen vormen samen een operationeel kader voor huidige internationale governance op het gebied van terrorisme in de zin dat de twee trends verbonden zijn als evenredig ondersteunende pijlers van een karakteristieke modus van governance. De erosie van procedurele waarborgen maakt een onbegrensde en flexibele (d.w.z. dynamische) manier van governance mogelijk door het onderdrukken van de restrictie die retrospectieve aansprakelijkheid vormt. Het element van zelfverbetering en continue vooruitgang als onderdeel van dynamisme verlicht op zijn beurt enige frustratie die ontstaat als gevolg van de afwezigheid van formele waarborgprocessen. Met andere woorden, aansprakelijkheid wordt opgeofferd, en in enige mate gecompenseerd, door functionele innovatie en voortgang.

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Nathanael Tilahun Ali was born on 17 September 1986 in Wondo Genet, Ethiopia. He studied law at Mekelle University, Ethiopia, and obtained a master's degree in international and European Union law at Erasmus University Rotterdam, the Netherlands, in 2010. After obtaining his law degree in 2008, he worked as a legal aid officer at Prison Fellowship Ethiopia, a local non-profit organisation. Alongside his doctoral research, Mr. Ali also taught international law courses to bachelor and master's degree students at Erasmus School of Law, and gave guest lectures and presentations in various locations across Europe and in his native Ethiopia. With the help of financial support from Erasmus School of Law, the Erasmus Trustfunds, and the European Union Cooperation in Science and Technology (COST), he held visiting research fellowships at Hofstra University in New York (2011) and the University of Cambridge (2014). He has also been a recipient of a research grant from the Institute of Global Law and Policy at Harvard Law School, where he undertook short research visits in the summers of 2014 and 2015. Since December 2014, he has been appointed as a lecturer in international law at Erasmus School of Law.



