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Words Matter: Human Rights Language in the United Nations' Counter-Terrorism Law, Policy and Proceedings

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Abstract

This thesis critically analyses the mobilisation of the language of human rights by and within three UN principal organs involved in counter-terrorism: The General Assembly, the Security Council and the office of the Secretary-General. The thesis shows that, in the context of counter-terrorism, human rights language is strategically deployed in order to assert or contest political power, legal authority and moral authority. Focusing on both the meetings and the soft-law output of these three organs, the thesis explores a number of ways in which the language of human rights is invoked in the context of the UN's counter-terrorism work. Firstly, the thesis shows how the notion of 'respect for human rights' is invoked in order to differentiate between a democracy-loving, peaceful, civilised 'us' and the barbarous terrorist enemy, sustaining the narrative of the war on terror that was written by the United States and its allies in the aftermath of September 11. Secondly, the thesis explores the rhetoric of states of the Global South. These states frequently use the language of human rights in order to criticise the counter-terrorism policies and practices of the United States and its allies in the war on terror, highlighting the irony in the latter's claims to be global defenders of human rights. Thirdly, the thesis examines how human rights promotion itself has, over time, come to be spoken of as a counter-terrorism measure. Finally, the thesis suggests that human rights provide a set of standards for evaluation of the conduct and decisions of UN branches. Thus, overall, the thesis charts and analyses the politics of human rights as it has played out in the UN's counter-terrorism work over the past two decades, reflecting upon the implications of these developments for both international law and the human rights movement.

Lay Summary

The United Nations is an international organisation that was created at the end of World War II. The Organisation's primary aims are to promote international peace, human rights and compliance with international law. To that end, the UN comprises a number of principal organs that are responsible for the advancement of the organisation towards its fundamental goals. These include the General Assembly, the Security Council and the office of the Secretary-General. While all 193 UN Member States are represented in the General Assembly, only 15 hold a seat on the Security Council at any one time. These principal organs have been heavily involved in counter-terrorism since the late-twentieth century, and their counter-terrorism work expanded after the September 11 attacks.

This thesis critically examines the role of human rights in the terrorism-related meetings and decisions of the UN principal organs mentioned above. The way that human rights are *spoken about* at this international level is crucial in determining whether human rights are respected in the context of states' counter-terrorism efforts. Human rights are recognised and protected in a number of international treaties, including the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights. While the core elements of these treaties, like the right to life and freedom from torture, apply at all times, the war on terror has seen many nations – primarily the United States and its allies – claim that it is necessary to violate or suspend these rights in order to combat terrorism. This thesis contends that the United States and its allies have harnessed the Security Council's power in order to globalise this state of legal exception; they have turned to the Council to build the narrative of a *global* war on terror that is being fought against an evil, barbaric and uncivilised terrorist 'other.' This narrative has enabled the implementation of new international counter-terrorism laws that are conducive to widespread human rights violations. The thesis also argues that developing states have used the meetings and decisions of the General Assembly to criticise the violation of human rights in the context of the war on terror, led by the United States and its allies. The aim of the thesis is, then, to show how the relationship between human rights law and counter-terrorism is a political one. These politics are played out within and between the UN's principal organs.

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Chapter 1: Introduction

A. Background

In 2007, postmodern American author Don DeLillo released *Falling Man,* a fiction novel about a lawyer who escaped from the World Trade Center in Manhattan on September 11. The novel is an exploration of the spectacle of terrorism, its central characters repeatedly witnessing and reliving the attacks over the following days and weeks. The most poignant line in the book, however, transcends the experiences of its main characters, speaking more broadly to the war on terror. 'These are the days after,' DeLillo wrote. 'Everything is measured by after.'[1] The same words are repeated later in the novel. 'These were the days after,' DeLillo wrote again, 'And now the years.'[2] The years have, of course, become decades. The war on terror, declared in the immediate aftermath of the attacks,[3] has continued for nearly twenty years, with efforts to eradicate international terrorism spanning every continent and directed at a range of organisations.

As is now well known, the war on terror is not a 'war' in the traditional sense, but rather encompasses a wide range of policies and practices including, but not limited to, military action: the invasions of Afghanistan and Iraq, data retention and surveillance, enhanced border protection and aviation security measures, detention of terrorist suspects at Guantanamo Bay, interrogation of suspects at CIA 'black sites' around the world, rendition of suspects to third states, and the use of lethal drone strikes. These actions are not tied together by a single, geographically defined battlefield or even one, clearly identifiable enemy. What makes this disparate range of actions discernible as parts of a singular campaign is the concept of the war on terror itself. The war on terror does not just encompass a range of policies and physical actions; it also entails a range of values, ideals and views of the world. It is, as Jackson observes, 'A set of actual practices… and an accompanying series of assumptions, beliefs, justifications and narratives – it is an entire language or discourse.'[4]

[1] Don DeLillo, *Falling Man: A Novel* (Scribner 2007) 138.
[2] ibid 230.
[3] George W Bush, 'Address to Nation on Terrorist Attacks' (*National Archives Catalog,* 11 September 2001) <https://catalog.archives.gov/id/6171390> accessed 13 June 2020.
[4] Richard Jackson, *Writing the War on Terrorism: Language, Politics and Counter-terrorism* (Manchester University Press 2006) 8.

Human rights are central to the language, values and beliefs driving the war on terror. Since its inception, the war on terror has been described as an effort to defend democracy, freedom and human rights. Rather than a form of bodily violence, terrorist attacks are often characterised as a form of violence against democracy, peace, freedom, liberty and human rights. 'These acts shatter steel,' President Bush stated on September 11, 'But they cannot dent the steel of American resolve. America was targeted for attack because we're the brightest beacon for freedom and opportunity in the world,' he continued, 'And no one will keep that light from shining.'[5] Conversely, terrorists, and state sponsors of terrorism, have typically been described as barbarous, uncivilised and tyrannical. This has allowed for both foreign military interventions and the adoption of stringent domestic counter-terrorism measures to be represented as attempts to free people from, and protect their rights against, the evil of terrorism.

Yet while the war on terror has been fought in the name of human rights, it has also provided a justification for their limitation and violation. The right to privacy has, for example, been significantly limited by laws that enable surveillance, data retention and the collection of advanced passenger information for international flights. Similarly, in implementing and enforcing laws criminalising incitement to terrorism, many states have restricted the rights to freedom of expression and association. Within the logic of the war on terror, these restrictions upon human rights are seen as necessary as they enable the state to effectively curtail the threat posed by organisations like al-Qaeda. 'The debate about the human rights implications of the "war against terrorism",' Charlesworth observes, 'Has become far too quickly polarised into human rights *versus* protecting the security of the civilian population, as if human rights were somehow inevitably at odds with a nation's security interests.'[6] This notion of a clash between human rights and national security has also seen states reinterpret the scope of application of international human rights law, such that human rights are read away from counter-terrorism operations. Denying the extra-territorial application of its human rights obligations, the United States government initially argued that those detained at Guantanamo Bay, part of Cuban territory, were not protected by either the US Constitution

[5] Bush (n 3).
[6] Hilary Charlesworth, 'Human Rights in the Wake of Terrorism' (2003) 82 ALRC Reform 26, 26.

or by international human rights law. This allowed for their detention without charge, access to legal counsel or judicial review.[7] Meanwhile, the United States claims that its counter-terrorism operations are part of a non-international armed conflict with al-Qaeda and its affiliates, wherever in the world they might be found. The existence of an armed conflict allows states to derogate from certain obligations under international human rights law such as the duty to respect the right to life, enabling the lawful targeting and killing of the terrorist 'enemy.'[8]

At the conceptual core of the war on terror is, therefore, a cynical and agonistic view of human rights. This view is neither based upon respect for international law nor for human life. It is, rather, based upon the hubris of the United States and its allies, who – as leaders of the international coalition against terrorism – assert the moral authority to define what human rights are, whose human rights matter most, and which rights must be sacrificed in order to defend 'our' way of life against terrorists. This research project began as an attempt to chart the United Nations' (UN's) promotion and enforcement of international human rights law in the face of the September 11 attacks and the war on terror. That attempt was, of course, underpinned by the naïve belief that the UN invariably lives up to its purposes and principles, including the enforcement of, and promotion of respect for, universal human rights. Yet in reality, the politics of, and cynicism regarding, human rights are replicated in the proceedings and decisions of the UN's principal organs.

The true starting point of this thesis was, therefore, the realisation that international human rights law is itself politicised within the UN. It is not the case that international human rights law provides a guiding framework for a cohesive, singular global counter-terrorism effort, coordinated by the Organisation's branches. Rather, the language of human rights is continually invoked by a variety of actors involved in the UN's counter-terrorism work and to a number of different political ends. This language of human rights purports to provide a way of distinguishing between right and wrong, moral and immoral, lawful and unlawful; but it

[7] Rosa E Brooks, 'War Everywhere: Rights, National Security Law, and the Law of Armed Conflict in the Age of Terror' (2004) 153 University of Pennsylvania Law Review 675, 727-8.
[8] Andrea Birdsall, 'Drone Warfare in Counterterrorism and Normative Change: US Policy and the Politics of International Law' (2018) 32(3) Global Society 241, 255; Mary Ellen O'Connell, 'The Choice of Law Against Terrorism' (2010) 4 Journal of National Security Law & Policy 343, 345.

also provides a way of drawing *political* distinctions between us and them, between winners and losers, between acceptable and unacceptable ways of acting, seeing and being in the world. For the first two decades of the war on terror, the UN has operated as a microcosm of the global politics of human rights. The United States and its allies have harnessed the Organisation's power, and particularly their position within the Security Council, to garner (and demand) global support for the war on terror. Meanwhile, others, particularly states of the Global South, have utilised the UN as a forum in which to contest the logic and legality of this war. In both cases, actors have drawn upon the language of universal human rights as a justification for their arguments or actions. At the UN, therefore, the language of human rights is regularly invoked in attempts to justify, contest and regulate actions taken as part of the global war on terror.

B. The Project

This thesis critically analyses the mobilisation of the language of human rights by and within three UN principal organs involved in counter-terrorism: The General Assembly (UNGA), the Security Council (UNSC) and the office of the Secretary-General (Secretariat). The thesis shows that, in the context of counter-terrorism, human rights language is strategically deployed in order to assert or contest political power, legal authority and moral authority. Focusing on both the meetings and the soft-law output of these three organs, the thesis explores a number of ways in which the language of human rights is invoked in the context of the UN's counter-terrorism work.

Firstly, the notion of 'respect for human rights' is invoked in order to differentiate between a democracy-loving, peaceful, civilised 'us' and the barbarous terrorist enemy. This language is primarily used in UNSC meetings by the United States and its allies in the war on terror, and, as a result of those states' disproportionate power within that body, it resonates in the Council's resolutions. The contemporary international human rights movement, which came about alongside the UN, is spoken of as a culture, one that unites states in a joint endeavour to defeat the scourge of international terrorism. Here, the language of human rights is used as part of an othering discourse that renders terrorists, supporters of terrorism and terrorist violence as part of the margins within and against which the international community operates. Comprising terror, violence and abnormality, these margins both threaten and

animate efforts to defend human rights. Part of this 'us' and 'them' discourse, deployed within and entrenched by certain UN organs, is the idea that September 11 gave rise to a new, collective right: to be free from terrorism itself. This is discussed at length in chapter 4, which focuses on the UNSC.

Secondly, states of the Global South frequently use the language of human rights in order to criticise the counter-terrorism policies and practices of the United States and its allies in the war on terror. As chapter 5 shows, Global South states have been particularly vocal in meetings of the UNGA, in which all UN Member States are represented and able to vote on proposed resolutions and decisions. The UNGA's meetings reflect the complex political dynamic between Global North and South states, each invoking the language of human rights in different ways and to different ends. Often subject to harsh criticism for their poor human rights records and disrespect for the rule of law, states of the Global South have taken to the UNGA to decry the hypocrisy of the United States and its allies. Although they speak as global defenders of human rights, these latter states have flagrantly violated international human rights law in the context of their counter-terrorism operations and have turned to the UNSC to internationalise their fight against terror. The language of human rights is thus mobilised in order to challenge certain states' claims to moral authority and to draw attention to inequalities in the use of international human rights law as a set of standards by which to evaluate states' behaviours. This, however, reveals the conflictual nature of the contemporary human rights movement. The substantive chapters of this thesis show that international law, including the language of universal human rights, is continually involved in the project of shaping and constituting the state itself. International legal lexicon and universal human rights discourse have become ways of speaking, being understood and acting as part of the international arena. These discourses are, in other words, signifiers of a state's or organisation's belonging to the contemporary international sphere. Their mobilisation is, then, normalising. By referring to international standards of human rights in their criticism of the war on terror, Global South states reproduce and entrench the forms of power and subjugation they seek to challenge.

Thirdly, the promotion and protection of human rights are themselves spoken of as counter-terrorism measures. The past two decades have seen the gradual emergence, within UN

meetings and documents, of the argument that addressing marginalisation, discrimination, oppression, racism, poverty, inequality and underdevelopment is a crucial part of the fight against terrorism. This has had a number of implications for both the counter-terrorism measures implemented by UN organs and for the way that the relationship between human rights and counter-terrorism is discussed. Most significantly, all Chapter VII counter-terrorism measures adopted by the UNSC now include statements, in either their preambles or operative paragraphs, that states must ensure that they implement UNSC resolutions in a manner consistent with their obligations under international human rights law. These documents recognise that human rights and counter-terrorism are 'complementary and mutually reinforcing,' and they acknowledge that counter-terrorism measures that violate human rights are likely to exacerbate the conditions conducive to the spread of violent extremism. Yet these changes in wording have not resulted in the implementation of counter-terrorism measures that respect universal human rights. As shown in chapter 4, the UNSC has operated in emergency mode since September 11 and continues to do so despite these changes in the wording of its resolutions. Even if they urge states to respect human rights, the Council's resolutions are emergency measures that require Member States to enact sweeping changes within their legal systems. Many of these changes – such as the imposition of stricter border controls, collection of traveller data and citizenship revocations – violate human rights. Thus, while human rights have become more significant in the wording of UN counter-terrorism resolutions, they still do not inform international or national counter-terrorism policies and practices.

Fourthly, the technical legal language of human rights is used to evaluate the counter-terrorism measures implemented by both states and UN branches. In particular, the Secretariat draws upon legal terminology in order to operate as an oversight mechanism, criticising the decisions of other UN branches and providing specific guidelines on states' legal obligations. The Secretariat also attempts to promote synthesis between the UN principal organs involved in counter-terrorism and UN human rights actors, including the Special Procedures of the Human Rights Council. In this sense, the Secretary-General attempts to speak as an enforcer of international law and human rights.

Overall, this thesis charts and analyses the politics of human rights as it has played out in the UN's work on counter-terrorism over the past two decades. Far from assuming that human rights constitute a body of international law that has reached a post-ontological stage and assumed a life of its own, the thesis approaches international human rights law as a product and function of political power. As both a world forum and an organisation that pursues the dual objectives of human rights and international peace, the UN is at the epicentre of these politics. The decisions, resolutions, plans of action, reports and meetings of the Organisation's principal organs illustrate the existence of multiple, competing accounts of the relationship between human rights and counter-terrorism. Human rights are concurrently seen and spoken of as an integral part of counter-terrorism efforts, as anathema to counter-terrorism, and as a set of legal constraints upon both states and international organisations. Human rights, furthermore, provide a basis for assertions and contestations of power.

As an interdisciplinary work relating to international law, international organisations and international relations, this thesis uniquely contributes to a number of areas of literature and bridges the theoretical and substantive divides between them. The thesis makes three main contributions to existing scholarship. Firstly, it broadens the scope of critical terrorism studies (CTS) by analysing the roles of international law and organisations in political discourses relating to counter-terrorism. In doing so, the thesis connects CTS with critical international law scholarship. As I show in part D (below), these two areas of literature are substantively and ontologically related, but they have yet to be drawn together in the academic literature. Secondly, the thesis aims to invigorate scholarship on human rights and counter-terrorism. While human rights researchers have extensively documented the erosion of human rights in the course of the war on terror, none have considered how international human rights law has been weaponised within this context in order to support or justify particular political outcomes relating to counter-terrorism. The thesis thus challenges the parameters of existing human rights scholarship, highlighting an important area for further research. Thirdly, the thesis builds upon existing international organisations literature by studying the UN not as a monolithic actor in international affairs, but as a setting for political interactions between states. The critique presented in the thesis is not, therefore, of the UN itself, but of the political dynamics by which it is driven.

Research was conducted as a rhetorical and documentary analysis. Analysis began with UNSC's, UNGA's and Secretariat's resolutions, decisions, plans of action and official reports relating to counter-terrorism. At this stage of the project, I sought to understand the importance and role of human rights within the counter-terrorism work of these three principal organs, which have been instrumental in the institutionalisation and internationalisation of counter-terrorism efforts since September 11. This part of the project was designed to investigate how the UN's counter-terrorism frameworks are informed by, or seek to promote, human rights. The second part of the project involved analysis of UNSC meetings relating to counter-terrorism and UNGA plenary meetings that involved either general counter-terrorism debate or official review of the Assembly's Global Counter-Terrorism Strategy. This stage of research revealed that the inclusion of human rights considerations within UNSC counter-terrorism resolutions is often controversial. The gradual increase in the human rights content of these resolutions is a result of long processes of negotiation, whereby states have debated and contested the importance and relevance of human rights considerations to the UN's counter-terrorism work. Meanwhile, the UNGA's counter-terrorism resolutions and strategies show that the Assembly has more consistently engaged with, and attempted to work within, international human rights law. However, transcripts of plenary meetings show that the human rights dimension of the Assembly's work has largely been promoted by Global South states. Thus, the UNGA functions as a counterpoint to the UNSC, where decision-making processes are not inclusive and are dominated by the permanent five members of the Council. The UNGA's plenary meetings have provided a forum for criticism of these states' disregard for human rights, and they have allowed for attention to be drawn to the human rights implications of the UNSC's Chapter VII counter-terrorism decisions. The thesis thus reveals that while the UN's principal organs have become a setting for debate regarding human rights' relevance and application to counter-terrorism, the issue also influences political dynamics between these organs.

C. Overview

Chapter 2 sets out the theoretical framework for this thesis, beginning with an exploration of the theories underpinning the discursive approach to critical international law scholarship taken in the substantive chapters. The chapter discusses critical approaches to the study of discourse, which have developed from Foucault's theory and have heavily influenced the

work of many critical international law scholars. The chapter then pivots to a discussion of various international political theories relating to human rights and security, with some contemporary theory, including the writings of Habermas and Beck, directly relating to human rights and counter-terrorism. These theories are significant to the present study because cosmopolitanism, both in its ideal Kantian form and in the form of Beck's cosmopolitan sociology, resonates within the UN's constitutive documents and the decisions of its principal organs. The UN is sustained by this cosmopolitan discourse, its Charter and official documents promising a world order that is centred upon the interlinked objectives of universal human rights and peaceable international relations. Chapter 2 situates the language of international human rights law within this cosmopolitan discourse; the legal recognition and attempted enforcement of human rights is at the core of the Organisation's ostensible advancement towards cosmopolitanism. Throughout this thesis, it is argued that the language of human rights provides a potent justification for a range of political actions under the UN's auspices *precisely because* the Organisation still represents the cosmopolitan ideals that drove its foundation at the end of World War II.

Chapter 3 provides an overview of the international legal and institutional frameworks for counter-terrorism. It explores the range of treaties, conventions, UN organs, committees and sub-committees that, together, form the international framework for counter-terrorism. As noted above, this international regime is complex and continually in flux, and the chapter reflects the gradual evolution of international law, UN institutions and soft-law frameworks. Throughout this thesis, I note the work of the UN Human Rights Council, particularly its Special Procedures and the committees attached to each of the human rights treaties. The work of these bodies is not considered at length as an individual chapter of this thesis, as the project's focus is limited to those principal organs involved in the making of counter-terrorism decisions and frameworks. It is, however, important to note the oversight functions of these bodies, and their role as a counterpoint to the UNSC's work is discussed in chapter 5 and the concluding chapter.

Chapter 4 examines the proceedings and decisions of the UNSC. It notes, as other scholars have done, that the human rights content of UNSC counter-terrorism decisions has gradually become more explicit and detailed. The chapter points out, however, that while the UNSC's

decisions have ostensibly become human rights-based, the Council ultimately leaves it to Member States to implement its Chapter VII decisions in a manner consistent with their human rights obligations. The language of human rights is far more visible in UNSC decisions now than it was in the weeks and months after September 11, but the Council's international frameworks for counter-terrorism are still not based upon respect for and promotion of human rights and freedoms. An examination of the Council's meetings shows that the language of human rights has been used to various, conflicting political ends. While the permanent five members and their allies have justified the war on terror and strict domestic counter-terrorism measures in the language of human rights, other rotating Council members have challenged the UNSC to redesign its counter-terrorism framework such that it is consistent with and promotes international human rights law. Examining states' implementation of the Council's counter-terrorism decisions, the chapter concludes that the Council has, at the behest of its permanent members, become complicit in the propagation of the othering discourses of the war on terror, normalising a permanent state of emergency since September 11 and, ultimately, mandating a range of repressive and violent measures against suspected terrorists and terrorist organisations.

Chapter 5 then considers the work of the UNGA, including reports and plans of action presented to the Assembly by the office of the Secretary-General. Examining a range of UNGA decisions including the Global Counter-Terrorism Strategy, the chapter characterises the dialogue between the UNGA and UNSC as a call-and-response. It argues that while the UNSC's outputs are worded as authoritative, emergency decisions that override other international frameworks, the UNGA's soft-law outputs aim to streamline international human rights law within a coordinated, multilateral approach to counter-terrorism. The UNGA's plenary meetings reflect the crucial role of states of the Global South in the conception of these rights-based global frameworks. Yet at the same time, they demonstrate the extent to which the Global South has been subsumed within the language of international human rights law and the UN's cosmopolitan discourse. The UNGA has become a forum for states to criticise the counter-terrorism measures implemented and mandated by the United States and its allies. Yet in articulating this critique, states of the Global South have used the language that has historically been used by the North to assert its superiority and moral authority. This, in many

ways, highlights the political function of international human rights law, which defines the language that states must use in order to be recognised on the international plane.

Reflecting upon the theoretical and practical implications of this thesis, chapter 6 returns to DeLillo's novel. 'What you see is not what we see,' he wrote. 'What you see is distracted by memory, by being who you are, all this time, for all these years.'[9] The chapter concludes that the UN's principal organs have become forums for states to contest and negotiate the relationship between human rights and counter-terrorism. Yet in doing so, states have drawn upon complex histories, and they have grappled with rapidly changing political and legal landscapes. On its face, international human rights law purports to provide an 'ethical lingua franca,'[10] a way of distinguishing between right and wrong, moral and immoral. Yet in reality, the language of international human rights law grounds, and is used to constrain, a variety of political actions. This thesis does not designate international human rights law as a source for good or bad, but rather assesses its role in the justification of policy, in the assertion of power and in struggles against power. Human rights law – which seems ahistorical, apolitical, proceduralised, institutionalised and codified – is very much part of the political machinations of the UN, driving (and potentially splintering) the counter-terrorism work undertaken by its principal organs.

D. Literature

'People go to war,' writes Der Darian, 'Because of how they *see, perceive, picture, imagine* and *speak* of others; that is, how they construct the difference of others as well as the sameness of themselves.'[11] This thesis interrogates the use of the language of human rights to construct the notions of difference, otherness, foreignness and enmity, as well as the ideas of sameness, exclusivity and unity, that drive the war on terrorism. These ideas have been built and contested by and within the UN's principal organs, which have been heavily involved in international counter-terrorism efforts since the late 1990s and particularly since September 11. Though a study of international law, the thesis does not primarily investigate

[9] DeLillo (n 1) 115.
[10] John Tasioulas, 'Justice, Equality, and Rights' in Roger Crisp (ed), *The Oxford Handbook of the History of Ethics* (Oxford University Press 2013) 786.
[11] James der Derian, quoted by Jackson (n 4) 60.

what the law is or how it applies to particular situations arising from international terrorism and counter-terrorism. Rather, the following chapters investigate the way in which international human rights law provides a way of seeing, speaking about and justifying particular responses to the problem of terrorism. This study of the operation and mobilisation of human rights language at the UN reveals how international human rights law frames a multitude of political perspectives on, and actions against, terrorism, some of which directly oppose others. The thesis is, therefore, primarily a critical study of international law, human rights and counter-terrorism. It draws upon and aims to contribute to a number of interrelated areas of literature that broadly pertain to international affairs: critical international law scholarship, critical terrorism studies, legal scholarship on human rights and terrorism, literature on international organisations, and international political theory, the last of which is discussed at length in chapter 2.

D.1. Critical international law scholarship

Critical international law scholars do not view international law as a discreet, apolitical and impartially enforced body of rules that regulate states' conduct. Rather, they are broadly concerned with the power dynamics that shape, and are shaped by, international law. As Marks points out, politics are present in international law and international law is present in politics.[12] Drawing upon Foucault's conception of the circulation of power, critical international law scholars examine the ways in which international law is constituted by, and constitutive of, politics. Put simply, the critical scholar argues that international law produces winners and losers, the latter often being colonised and/or Global South states. International law bolsters the power of some states while entrenching the marginalisation of others. It renders some forms of violence unlawful while legitimising others as lawful. And through the use of legal procedures and terminology, it prescribes how we should think about and see the world, whilst foreclosing other perspectives and possibilities.

Although they share a common theoretical standpoint, critical international law scholars are methodologically diverse and multi-disciplinary. Thus, while we might broadly refer to critical

[12] Susan Marks, 'State-Centrism, International Law, and the Anxieties of Influence' (2006) 19 Leiden Journal of International Law 339, 347.

international law scholarship as a body of literature that seeks to deconstruct and problematise the political power that is at play in international law, it is important to note the breadth and multi-dimensionality of this area of literature; critical thinkers draw upon a range of disciplines and scholarly traditions including post-structuralism, post-colonial theory, gender theory, race theory and sociology. Although these works are interlinked, and their authors are in dialogue with one another, the following overview focuses on those strands of critical scholarship that are of direct relevance to this research project.

Firstly, many critical scholars analyse international law as a discourse.[13] This is not to say that international law is immaterial or that it does not produce material effects; international law is written down in treaties and conventions, and it is 'visible' in physical structures such as the UN headquarters and the International Court of Justice. The operation of international law also produces certain physical effects. For example, the law determines which parts of the ocean and seabed states can (and cannot) exploit for commercial purposes, how states' armed forces behave in times of armed conflict, and how states behave when operating flights in one another's airspace. To approach international law as a discourse is not to ignore these physical manifestations of the law, but rather to acknowledge that international law is more than treaties and conventions, international organisations, courts and tribunals. To critical scholars, international law is powerful because it functions as a discourse, providing a (politically biased) way of seeing, understanding, evaluating and responding to things in the world.

This discursive conception of international law is at the core of critical scholarship, which emerged as a distinct school of thought in the 1980s. Some of the most significant work in this area, which has defined the goals and parameters of critical international law scholarship, is that of David Kennedy. Particularly relevant to this study is Kennedy's conception of international law as a 'rhetorical project.'[14] To Kennedy, international law is a discourse that regulates the relationship between something constructed as 'law' on one hand and

[13] See, for instance, David Kennedy, 'A New Stream of International Law Scholarship: Four Lectures' (1988-1989) 7(1) Wisconsin International Law Journal 1.
[14] ibid 8.

something constructed as 'society' on the other.[15] Kennedy challenges the image of public international law – as both an area of study and practice – as being separate from, and above, the state.[16] This image is, according to Kennedy, created through international law's 'obsessive' and repetitious commitment to doctrine, procedures and institutions.[17] To Kennedy, mainstream international law scholarship is based upon a romantic separation of law, which is posited as doctrinal and procedural, and the political, which is considered to be the domain of the state. Kennedy advocates for a more nebulous conception of politics, in which power is dispersed through law, legal institutions and the state.[18]

Thus, to Kennedy, international law is discursive; it is 'a group of people sharing professional tools and expertise.'[19] International legal lexicon 'is composed of typical problems, a stock of understood solutions, a vocabulary for evaluating new ideas, a sense of their own history and a way of looking at the world.'[20] Yet to critical international law scholars, this lexicon of international law, the repetition of which sustains the law's image as stable, predictable and authoritative, actually enacts a politics of 'inclusion and privilege'[21] and of exclusion and marginalisation. This is because, in providing a way of evaluating situations and responding to problems, international law is normalising; it marginalises other ways of seeing, thinking about and organising the world.

For the past three decades, critical international law scholars have sought to demonstrate how this discourse of international law marginalises, normalises, excludes and regulates, and have done so by drawing upon contemporary philosophy and critical theory. Much of this scholarship examines international legal concepts, doctrines and principles as extensions of imperialism and colonialism. Anghie, for example, argues that contemporary international law is fixated upon state sovereignty and borders. International law seeks to universalise a fixed, Eurocentric and Westphalian conception of statehood, requiring its subjects to conform

[15] ibid.
[16] ibid 8.
[17] ibid 2.
[18] ibid 49.
[19] David Kennedy, 'My Talk at the ASIL: What Is New Thinking in International Law?' (2000) Proceedings of the American Society of International Law 104, 104.
[20] ibid.
[21] Kennedy (n 13) 49.

to this conception in order to function on the international plane. In doing so, the law marginalises other views of statehood and nationhood, and it extinguishes alternative formulations of the relationship between people and land or territory.[22] More recently, Anghie has argued that international law relating to nuclear weapons has brought about another form of empire, one in which the rules of states' behaviours towards one another are, in fact, determined by the five states that are legally authorised by the Nuclear Non-Proliferation Treaty to possess nuclear weapons: China, France, Russia, the United Kingdom and the United States.[23]

Scholarship on international law's complicity in, or contribution to, imperialism and colonialism informed the design of this research project. In particular, the thesis closely examines the way that the language of international human rights law serves a dual purpose within the UN's principal organs. On one hand, this language is used in order to create an 'other' – terrorists and their supporters – that must be excluded from or kept at the margins of the international community. In other words, international law grounds, and is driven by, a politics of exclusion. If the law is a rhetorical project that aims to prescribe how we should see, speak and act in the world, it necessarily excludes 'others' who do not see, speak and act in similar ways. International law has an agonistic relationship with these 'others'; it is threatened by them, but its very existence is justified by the need to keep them at bay. 'All of law and society,' writes Kennedy, 'Exists within and against another set of margins – a margin composed of things thought of as perversion, faith, eros, terror, chaos, tyranny, war, etc.'[24] Mégret considers international law's creation and exclusion of a margin in relation to the laws of war. He traces the concept of the unlawful combatant, used to describe detainees at Guantanamo Bay and thus deny them the protections of the Geneva Conventions, to the construction of the colonial 'other', observing that those who were subjected to colonial oppression were typically described as barbaric and savage.[25] Mégret argues that although

[22] See Antony Anghie, *Imperialism, Sovereignty and the Making of International Law* (Cambridge University Press 2012).
[23] Antony Anghie, 'Politic, Cautious, and Meticulous: An Introduction to the Symposium on the Marshall Islands Case' (2017) 111 American Journal of International Law Unbound 62, 62.
[24] Kennedy (n 13) 12.
[25] Frédéric Mégret, 'From "Savages" to "Unlawful Combatants": A Postcolonial Look at International Humanitarian Law's "Other"' in Anne Orford (ed), *International Law and its Others* (Cambridge University Press 2006) 267.

international humanitarian law ostensibly affords everybody some kind of legal protection, it has historically sought to exclude the colonial 'other'; colonised peoples were simply viewed as too brutish and uncivilised to be capable of understanding or abiding by the law. This logic is, according to Mégret, reproduced in the denial of legal protection to 'unlawful combatants' in the war on terror. According to the United States government, terrorists are not entitled to the protections of the Geneva Conventions because they fail to distinguish themselves from civilians, because they do not intend to follow the rules of war and because, like 'non-civilised peoples,' they cannot be expected to recognise the importance of reciprocity, the principle that all parties to an armed conflict should equally respect the rights and dignity of enemy combatants.[26] As the substantive chapters of this thesis show, international human rights law similarly creates and excludes a margin; terrorists are said to be animated by a hatred of human rights and democracy, terrorist attacks are characterised as human rights abuses, and 'we' as humanity are said to have a right to be free from terror.

On the other hand, the language of international human rights law is used by another group at the margin, states of the Global South, to resist and challenge the power and purported moral authority of the United States and its allies in the war on terror. Thus, while the rhetorical project of international law is complicit in the creation of global power imbalances, it also shapes states' demands for change. This is, according to Pahuja, because both states of the Global South and critical scholars retain a 'critical faith' in the radical potential of international law.[27] Focusing on decolonisation, claims to Permanent Sovereignty over Natural Resources, and calls for the establishment of an international rule of law following the conclusion of the Cold War, Pahuja argues that 'ever since the establishment of the contemporary institutions of international law at the end of the Second World War, the Third World has been trying to use international law to affect social, political, economic and legal change.'[28] Pahuja concludes, however, that the Global South's demands for radical change are constrained by the fact that the language in which they are expressed, the supposedly

[26] ibid 300.
[27] Sundhya Pahuja, *Decolonising International Law: Development, Economic Growth and the Politics of Universality* (Cambridge University Press 2011) 1.
[28] ibid 2.

'universal' language of international law, derives from and enhances 'provincial' (i.e. European) values.[29]

To Pahuja, therefore, the Global South's use of international legal lexicon to challenge power imbalances and demand change is self-defeating. This is because, in pursuing international law's promise of transformation, these states reproduce and entrench the law's normalising effects; they speak the language that has, in fact, built the structures of power they seek to dismantle. Investigating and uncovering this problem is at the core of some critical scholars' work. Eslava, for example, describes himself as an international legal ethnographer, and is concerned with international law's everyday effects on the ground.[30] Examining the impacts of international law and the development project upon local government in Bogota, Colombia, Eslava observes a process of 'autochthonous internationalisation,' or 'internationalisation from within.'[31] According to Eslava, international law and development have transformed Bogota such that it is 'less "messy" and more "meticulous", and therefore closer to the international ideal of how a locality should function and appear today.'[32] Thus, as noted above, international law is prescriptive in the sense that it defines acceptable and unacceptable ways of being within the world. Pahuja and Eslava have thus observed how international law moulds the state. Contrary to the widespread view that international law is constituted *by* states, both scholars argue that international law continually determines how entities must function, behave and speak in order to operate as states within the international sphere. This critical view of the cyclical power relationship between the state and international law is reflected throughout this thesis and especially in the discussion of the UNGA in chapter 5. In order to criticise the actions of the United States and its allies in the war on terror, and to challenge the validity of the UNSC's decisions, states of the Global South have enacted the language of international law and institutions, whose moral, legal and political authority they seek to challenge.

[29] ibid 2. Pahuja's use of the term 'provincial' is based upon the work of postcolonial theorist Dipesh Chakrabarty. See, for instance, Dipesh Chakrabarty, *Provincializing Europe: Postcolonial Thought and Historical Difference* (Princeton University Press 2000).
[30] Luis Eslava, *Local Space, Global Life: The Everyday Operation of International Law and Development* (Cambridge University Press 2016) 29.
[31] ibid 21.
[32] ibid 18.

While it primarily contributes a critical exploration of the UN's work on counter-terrorism and human rights, this thesis also participates in an ongoing dialogue about the value and purpose of critical international law scholarship. Adopting Foucault's terminology and methodology, critical scholars that approach international law as a politics of exclusion seek to *problematise* the ways in which the law operates.[33] In simpler terms, they seek to uncover international law's marginalising, normalising and exclusionary effects, asking how the rhetoric of international law 'introduces something into the play of true and false and constitutes it as an object for thought.'[34] As noted above, however, even this approach seems to be underpinned by a 'critical faith' in international law; one presumably would not dedicate their time to studying international law, even from a critical standpoint, without any belief in its capacity to bring about a better world. It is, then, worth reflecting upon and explicitly stating the importance of critical research into international law.

Firstly, critical scholars reject the view of international law as a 'discipline of crisis.'[35] Charlesworth argues that by focusing upon crises of international law like the NATO intervention in Kosovo and September 11, scholars restrict the range and types of questions they can ask about the law. She argues that scholars should, instead, reflect upon the 'everyday life' of international law.[36] When we consider the law's everyday life, we are able to understand how the routinisation of international law's power creates scope for certain kinds of political action. Johns, for example, argues that far from suspending or creating an exception to the law, international lawyers who conceived of detention and interrogation at Guantanamo Bay put the law and legal institutions to work in justifying these practices.[37] Thus, secondly, by understanding how international law justifies and enables certain political actions, we are able to challenge and reimagine the ways in which it operates. To this extent, critical international law scholarship is an emancipatory project; it aims to prompt scholars and practitioners to rethink claims that the law is indeed conducive to predictability, stability

[33] See Michel Foucault, 'The Concern for Truth' in Lawrence D Kritzman (ed), *Michel Foucault: Politics Philosophy Culture, Interviews and Other Writings, 1977-1984* (Alan Sheridan tr, Routledge 1988) 257.
[34] ibid.
[35] Hilary Charlesworth, 'International Law: A Discipline of Crisis' (2002) 65 Modern Law Review 377; Eslava (n 30) 30.
[36] Charlesworth (n 35) 391.
[37] Fleur Johns, 'Guantánamo Bay and the Annihilation of the Exception' (2005) 16(4) European Journal of International Law 613.

and justice. Ultimately, critical scholarship shows that the law operates to the advantage of some and at the expense of others.

In chapter 2, however, I argue that critical scholars are seldom explicit about their commitment to a certain set of normative values, focusing on exposing the 'dark sides' of international law at the expense of any reflection upon how we can bring about a better, more just world. Drawing upon international political theory, I argue that the critical approach taken in this thesis is based upon the conviction that the most effective state and international security practices are based upon a commitment to universal rights and dignity.

D.2. Critical Terrorism Studies

Critical international law scholars approach international law as a rhetorical project. Through the repetition of legal terminology, doctrine and procedures, international law prescribes the 'right' and 'wrong' ways of seeing, understanding, behaving in and being in the world. While critical scholars examine international law's complicity in global power imbalances, they also consider the ways in which the law is used by those at the margins in an attempt to challenge the present international order. Drawing upon the critical law scholarship outlined in this chapter, the remainder of this thesis shows how international human rights law is mobilised by and within the UN's principal organs in order to shape, justify and challenge policies and practices of counter-terrorism. The substantive chapters of the thesis explore how international human rights law constrains and enables global counter-terrorism and is itself being rewritten within that context.

Though primarily an example of critical international law scholarship, this thesis dovetails with the work of exponents of critical terrorism studies (CTS). Like critical law scholarship, CTS is methodologically non-prescriptive and pluralistic. Exponents of CTS broadly call upon terrorism researchers to be critical towards the state, challenging common understandings of terrorism and the way they came about. This thesis draws upon the discursive aspect of CTS, which examines how the construction of the threat of terrorism within political discourses justifies violence, curtailment of human rights, racism and discrimination upon the basis of religion. Critical terrorism scholars distinguish their work from that of orthodox terrorism scholars by arguing that the latter school accepts the definition of the terrorist as a non-state

actor at face value.[38] To critical scholars, even the understanding of terrorism as the work of non-state actors is the result of deliberate, political acts of representation that predate, but were amplified by, September 11. A key scholar in this field is Richard Jackson, whose work has shaped the agenda and parameters of CTS. Jackson's book, *Writing the War on Terrorism,* examines the United States government's construction of the language of terrorism and counter-terrorism in the aftermath of September 11.[39] To Jackson, the war on terrorism is based around a set of binaries – us/them, civilised/barbaric, peaceful/violent, democratic/undemocratic, liberator/liberated – that are used to distinguish between 'us' and the terrorist enemy. The deliberate use of these binaries justifies, and generates demands for, the use of violent and repressive measures against terrorists. He writes:

> 'Through a carefully constructed public discourse, officials have created a new social reality where terrorism threatens to destroy everything that ordinary people hold dear – their lives, their democracy, their freedom, their way of life, their civilisation. In this new reality, diabolical and insane terrorists plot to rain down weapons of mass destruction across western cities, while heroic warriors of freedom risk their lives in foreign lands to save innocent and decent folk back home; good battles evil and civilisation stands against the dark forces of barbarism. Within the confines of this rhetorically constructed reality, or discourse, the 'war on terrorism' appears as a rational and reasonable response; more importantly, to many people it feels the right thing to do.'[40]

To Jackson, who takes a discursive approach, CTS is about the political assumptions and views that underpin so-called 'knowledge' about terrorism. Like critical international law scholarship, this branch of CTS seeks to problematise discourses of counter-terrorism, which enable us to understand, accept and even demand particular policies. 'The knowledge of the field [of counter-terrorism],' Jackson has noted elsewhere, 'Is in many instances politically biased, but more importantly, it functions ideologically to reinforce and reify existing structures of power in society, particularly that of the state, and to promote particular elite

[38] Richard English, 'The Future Study of Terrorism' (2016) 1(2) European Journal of International Security 135, 137.
[39] Jackson (n 4).
[40] ibid 1.

political projects.'[41] Jackson thus identifies three core commitments of CTS. Firstly, epistemologically, CTS sees 'knowledge' as the result of social processes, language and discourse; our understanding of terrorism is inextricably linked to social, cultural and political context.[42] Secondly, ontologically, critical terrorism scholars are sceptical of the term 'terrorism' itself, as it does not denote a particular physical form of violence but rather a specific perception of the perpetrators of such violence. 'The nature of terrorism is not inherent in the violent act itself,' write Schmid and Jongman. 'One and the same act,' they continue, 'Can be terrorist or not, depending on intention and circumstance.'[43] Thirdly, CTS is ethically committed to 'universal and human security,'[44] rather than narrow conceptions of national security, which pervade orthodox terrorism studies. Thus, critical scholars' primary criticism of orthodox scholars is that, by actively identifying and defining the terrorist other, they provide 'an authoritative judgment about who may be legitimately killed, tortured, rendered or incarcerated by the state in the name of counter-terrorism.'[45] It is not terrorism itself, but rather the way in which it is seen, spoken of, understood and narrativised that sustains the war on terror. 'It seems self-evident that 9/11 was intimately related to the War on Terror,' writes Holland, 'But this common sense must be made strange. It was not inevitable that the War on Terror would follow 9/11. Rather 9/11 had to first be constructed in a particular and contingent way.'[46]

CTS is, therefore, concerned with how deliberate acts of representation and construction – discourses – shape our understanding of terrorism and, by extension, counter-terrorist policies and practices. This area of CTS was particularly significant in the formulation of the research project and is referred to by Jarvis as the 'interpretivist' strand of critical scholarship.[47] It should, however, be noted that CTS is a much broader area of scholarship that pertains to a wide range of issue areas. Some scholars, for example, have turned from elite counter-terrorism discourses, perpetuated by states and security professionals, to the

[41] Richard Jackson, 'Knowledge, Power and Politics in the Study of Political Terrorism' in Richard Jackson, Marie B Smyth and Jeroen Gunning (eds), *Critical Terrorism Studies: A New Research Agenda* (Routledge 2009) 68.
[42] Richard Jackson, 'The Core Commitments of Critical Terrorism Studies' (2007) 6(3) European Political Science 244, 246.
[43] Alex P Schmid and Albert J Jongman, quoted by Jackson (n 42) 247.
[44] ibid 249.
[45] ibid.
[46] Jack Holland, *Selling the War on Terror: Foreign Policy Discourses After 9/11* (Routledge 2012) 97.
[47] Lee Jarvis, 'The Spaces and Faces of Critical Terrorism Studies' (2009) 40(1) Security Dialogue 5, 6.

constitution of 'everyday knowledge' of terrorism, examining how ordinary citizens have come to know what they know about the issue.[48] Another strand of CTS, which Jarvis calls its 'broadening' strand, seeks to expand thinking on terrorism beyond nonstate violence.[49] This understanding of terrorism is, according to Jarvis, 'Unnecessarily limited, [and] perhaps arbitrary.'[50] Building upon scholars like Chomsky, who have famously identified and condemned instances of state terrorism,[51] some critical scholars advocate for revitalised critique of the concept of the state itself. Rather than seeing the state as a unitary actor capable of terrorist violence, Jarvis and Lister argue, scholars must reimagine the state 'as a strategically selective terrain and outcome of social struggles and processes'; this will enable a better understanding of the forms and manifestations of state terrorism.[52]

As numerous scholars have pointed out, there is no clear division between critical and orthodox terrorism studies.[53] Yet at the very least, all terrorism scholars share an interest in similar subject matter: the state's response to, and regulation of, political violence. The same can be said about mainstream and critical international law scholars whose work relates to terrorism and counter-terrorism; all are, in some way, interested in how terrorism challenges existing international legal frameworks. In both fields, however, critical scholars are distinguished by the questions they ask and how they go about answering them. The critical project is animated by concern and frustration with how our present reality is constituted by political and social processes. Interestingly, CTS, which burgeoned in the decade following September 11, has yet to consider the role of international law and organisations in the political discourse of the war on terror. As outlined in the previous section, this thesis

[48] See, for example, Lee Jarvis and Michael Lister, '"I Read It in the FT": "Everyday" Knowledge of Counter-Terrorism and its Articulation' in Lee Jarvis and Michael Lister (eds), *Critical Perspectives on Counter-Terrorism* (Routledge 2014); Richard Jackson and Gareth Hall, 'Knowing Terrorism: A Study on Lay Knowledge of Terrorism and Counter-Terrorism' (5th Biennial Oceanic Conference on International Studies, Sydney, 2012).
[49] Jarvis (n 47) 5.
[50] ibid 6.
[51] See, for example, Heinz Dieterich, 'Global U.S. State Terrorism: An Interview with Noam Chomsky' (1985) 24 Crime and Social Justice 96; Noam Chomsky, 'International Terrorism: Image and Reality' (1987) 27/28 Crime and Social Justice 172.
[52] Jarvis and Lister (n 48) 44.
[53] English (n 38) 137; Jessie Blackbourn, Helen Dexter, Rani Dhanda and David Miller, 'Editor's Introduction: A Decade on from 11 September 2001: What has Critical Terrorism Studies Learned?' (2012) 5(1) Critical Studies on Terrorism 1, 3.

addresses that lacuna; it links the agenda of CTS with critical international law scholarship, thus illuminating a significant area for continued research.

D.3. Terrorism and International Human Rights Law

Next, this thesis draws upon, and contributes to, literature relating to human rights and counter-terrorism. This is an unsurprisingly vast area of literature, its breadth reflecting the extent to which the war on terror has threatened and eroded international human rights law. International law scholars have extensively recorded and condemned violations of international human rights law in the context of the war on terror. Much of the literature focuses on how international human rights law was reinterpreted or dismissed by the United States and its allies, who, in the aftermath of September 11, argued that international terrorism was an unprecedented and unique threat. Nowak and Charbord, for example, write:

> 'Countering terrorism was rebranded the "war against terror" and the existing international legal framework was deemed insufficient to address the new paradigm. New rules, a new approach unconstrained by international law, were necessary. The choice was clear: security or human rights. With the former clearly taking the lead to the detriment of the latter, what followed was an overhaul of calmly, well established rules of international law: lines between legal regimes were blurred, "exceptional" rules became the norm, and rules in violation of non-derogable human rights law, or outside the scope of any judicial review or control, were created.'[54]

These emergency measures, implemented in violation of non-derogable provisions of international human rights law, have formed the subject of much of the counter-terrorism literature of the past two decades. Hicks, for example, argues that the United States' departure from international standards of human rights has provided both motivation and justification for numerous states to implement exceptional measures that do the same.[55] Chief among these exceptional measures are the United States' programme of detention at

[54] Manfred Nowak and Anne Charbord, 'Key Trends in the Fight Against Terrorism and Key Aspects of International Human Rights Law' in Manfred Nowak and Anne Charbord (eds), *Using Human Rights to Counter Terrorism* (Edward Elgar 2018) 13.

[55] Neil Hicks, 'The Impact of Counter Terror on the Promotion and Protection of Human Rights: A Global Perspective' in Richard A Wilson (ed), *Human Rights in the 'War on Terror'* (Cambridge University Press 2005) 216.

Guantanamo Bay and its use of torture in the interrogation of terrorist suspects in Cuba and elsewhere. Numerous scholars have written about the way that international human rights and humanitarian law were read away from the United States' operations at the military base, condemning international lawyers' complicity in the approval of enhanced interrogation methods and denial of access to legal counsel, medical treatment, familial correspondence and fair trial, among other things.[56]

Alongside the documentation of human rights abuses at Guantanamo Bay and of the use of torture in the interrogation of terrorist suspects, scholars have investigated the human rights implications of various counter-terrorism policies including the use of surveillance and restriction of digital content,[57] policing and social cohesion measures conducive to

[56] See, for example, Andrea Birdsall, '"A Monstrous Failure of Justice"? Guantanamo Bay and National Security Challenges to Fundamental Human Rights' (2010) 47(6) International Politics 680; Jeffrey Davis, 'Uncloaking Secrecy: International Human Rights Law in Terrorism Cases' (2016) 38(1) Human Rights Quarterly 58; Joan Fitzpatrick, 'Speaking Law to Power: The War Against Terrorism and Human Rights' (2003) 14(2) European Journal of International Law 241; Maureen Duffy, *Detention of Terrorism Suspects: Political Discourse and Fragmented Practices* (Hart 2018); David Luban, 'Lawfare and Legal Ethics in Guantánamo' (2008) 60(6) Stanford Law Review 1981; Tom Malinowski, 'Restoring Moral Authority: Ending Torture, Secret Detention, and the Prison at Guantanamo Bay' (2008) 618 Annals of the American Academy of Political and Social Science 148; Rita Maran, 'Detention and Torture in Guantanamo' (2006) 33(4) Social Justice 151; Manfred Nowak, 'What Practices Constitute Torture?: US and UN Standards' (2006) 28(4) Human Rights Quarterly 809; Geoffrey Robertson, 'Fair Trials for Terrorists?' in Richard A Wilson (ed), *Human Rights in the 'War on Terror'* (Cambridge University Press 2005); Rebecca Sanders, 'Human Rights Abuses at the Limits of the Law: Legal Instabilities and Vulnerabilities in the "Global War on Terror"' (2018) 44(1) Review of International Studies 2; Philippe Sands, *Torture Team: Deception, Cruelty and the Compromise of Law* (Allen Lane 2008); Philippe Sands, 'Torture Team: The Responsibility of Lawyers for Abusive Interrogation' (2008) 9 Melbourne Journal of International Law 365; Michael P Scharf, 'International Law and the Torture Memos' (2009) 42(1-2) Case Western Reserve of International Law 321; Johan Steyn, 'Guantanamo Bay: The Legal Black Hole' (2004) 53(1) International and Comparative Law Quarterly 1; Luisa Vierucci, 'Prisoners of War or Protected Persons *qua* Unlawful Combatants? The Judicial Safeguards to which Guantanamo Bay Detainees are Entitled (2003) 1(2) Journal of International Criminal Justice 284.

[57] See, for example, Richard Barrett and Tom Parker, 'Acting Ethically in the Shadows: Intelligence Gathering and Human Rights' in Manfred Nowak and Anne Charbord (eds), *Using Human Rights to Counter Terrorism* (Edward Elgar 2018); Maura Conway and Clive Walker, 'Countering Terrorism via the Internet' in Genevieve Lennon and Clive Walker (eds), *Routledge Handbook of Law and Terrorism* (Routledge 2015); Ivan Greenberg, 'From Surveillance to Torture: The Evolution of US Interrogation Practices During the War on Terror' (2015) 28(2) Security Journal 165; Simon McKay and Jon Moran, 'Surveillance Powers and the Generation of Intelligence Within the Law' in Genevieve Lennon and Clive Walker (eds), *Routledge Handbook of Law and Terrorism* (Routledge 2015); Rebecca Sanders, '(Im)plausible Legality: The Rationalisation of Human Rights Abuses in the American "Global War on Terror"' (2011) 15 International Journal of Human Rights 605.

Islamophobia[58] and detention or deportation of foreign terrorist fighters.[59] The far-reaching, repetitious and cyclical nature of human rights violations in the context of counter-terrorism has provoked scholarly debate about the role and continued relevance of international law, particularly human rights and humanitarian law. Franck, for example, contends that repeated and conspicuous breaches of international law by powerful states can reduce the law's 'compliance pull' and, by extension, its perceived legitimacy.[60] He argues, however, that states justify even the most blatant 'scofflaw' behaviour by reference to international law. He writes:

> 'A brief examination of the history of interstatal behaviour since World War II and up to the 2003 invasion of Iraq quickly demonstrates not only that states never challenged the legitimacy of the law they were violating, but, even at the risk of failing the laugh test, insisted that they were acting in full compliance with it.'[61]

Similarly, Birdsall argues that the United States' attempts to justify the 'enhanced interrogation' of terrorist suspects in the language of international law, as well as international responses to these practices, have reified, and not eroded, the legal prohibition of torture.[62] Others, however, argue that any attempt at a legal discussion of terrorism and counter-terrorism is fraught and counterproductive, as both terrorism and international responses to it are beyond the parameters of existing international law. Brooks, for example, argues that the questions posed by the war on terror are questions of policy and not law, and that 'how we answer those policy questions should, ultimately, lead us to create new law.'[63] To Brooks, counter-terrorism policies like the United States' use of drones challenge the international rule of law – which she sees as a shared understanding of the law, legal

[58] See Yunis Alam and Charles Husband, 'Islamophobia, Community Cohesion and Counter-Terrorism Policies in Britain' (2013) 47(3) Patterns of Prejudice 235; Arun Kundnani, *The Muslims Are Coming!: Islamophobia, Extremism, and the Domestic War on Terror* (Verso Books 2014); A. Sivanandan, 'Racism, Liberty and the War on Terror: The Global Context' (2007) 48(4) Race & Class 45.

[59] See Alex Conte, 'States' Prevention and Responses to the Phenomenon of Foreign Fighters against the Backdrop of International Human Rights Obligations' in Andrea de Guttry, Francesca Capone and Christophe Paulussen (eds), *Foreign Fighters under International Law and Beyond* (Springer 2016); Lisa Ginsborg, 'One Step Forward, Two Steps Back: The Security Council, "Foreign Terrorist Fighters", and Human Rights' in Manfred Nowak and Anne Charbord (eds), *Using Human Rights to Counter Terrorism* (Edward Elgar 2018).

[60] Thomas M Franck, 'The Power of Legitimacy and the Legitimacy of Power: International Law in an Age of Power Disequilibrium' (2006) 100(1) American Journal of International Law 88, 93.

[61] ibid 96.

[62] Andrea Birdsall, 'But We Don't Call it "Torture"! Norm Contestation During the US "War on Terror"' (2016) 53 International Politics 176.

[63] Rosa Brooks, 'Duck Rabbits and Drones: Legal Indeterminacy in the War on Terror' (2014) 25 Stanford Law & Policy Review 301.

terminology and concepts – not because they are outright violations of the law, but because they are a 'visible assault' on established legal concepts.[64]

While I build upon this literature throughout the following chapters, and while these scholars' endeavours to draw attention to the human rights issues arising from the war on terror are invaluable, this thesis takes a different approach to international human rights law, and thus makes a novel contribution to existing scholarship. I do not argue that international law itself has been eroded by the war on terror, that the law's importance has increased within this context, or that existing legal frameworks are no longer relevant. Rather, this thesis contends that international human rights law has created, and continues to create, opportunities for states and international organisations to take political action within the context of the war on terror. The question, then, is not of the law's relevance or of levels of legal compliance. It is, rather, one regarding the political life of human rights law.

D.4. International Organisations

Finally, this thesis draws upon, and contributes to, the growing body of literature on the role of international organisations in counter-terrorism. As some scholars have observed, counter-terrorism policy and practice involve a range of actors other than states and international organisations. De Londras, for example, notes the existence of a complex transnational counter-terrorism order, which comprises a range of 'esoteric' laws, institutions, processes and networks. This transnational order, she argues, is bureaucratic and often unseen.[65] 'The contemporary approach to counter-terrorism,' she writes, 'Is not merely about "international law", or domestic law, or EU law, or industry standards, or capacity building, or model laws, or regulatory recommendations; it is about *all* of these different kinds of laws, standards, rules and behaviours.'[66] Similarly, in their volume on the fragmented international framework for counter-terrorism, van den Herik and Schrijver observe that September 11 led to a 'rather

[64] Rosa Brooks, 'Drones and the International Rule of Law' (2014) 28 Journal of Ethics and International Affairs 83.
[65] Fiona de Londras, 'The Transnational Counter-Terrorism Order: A Problématique' (2019) 72(1) Current Legal Problems 203.
[66] ibid 205.

disorganized and uncoordinated proliferation of possible new legal practices, principles, rules and institutions.'[67]

While counter-terrorism does involve a wide range of local, domestic, regional and international actors, various scholars have acknowledged the pivotal role of the UN in counter-terrorism since September 11. As van den Herik and Schrijver point out, the international response to September 11, as fragmented as it may be, has involved extensive 'multilateral institutionalisation.'[68] Numerous scholars have focussed on the UNSC's work, observing that the Council has taken on a quasi-legislative function with its consistent adoption of Chapter VII resolutions relating to terrorism.[69] Some have strongly condemned the UNSC's performance of this legislative role, arguing that the Council has, at the behest of its permanent members, operated in a permanently reactionary, emergency mode since September 11.[70] Meanwhile, Comras, who previously served on the UNSC's sanctions committee, argues that the main shortfall in the UN's approach to counter-terrorism is not the work of the UNSC itself, but rather in the different agendas pursued by states through the Organisation's principal organs. He writes:

> 'Unfortunately, the organisation's failures stand out more clearly than its success. One can trace, at the heart of many of these failings, a flawed diplomacy, pursued by both

[67] Larissa Van Den Herik and Nico Schrijver, 'The Fragmented International Legal Response to Terrorism' in Larissa van den Herik and Nico Schrijver, *Counter-Terrorism Strategies in a Fragmented International Legal Order* (Cambridge University Press 2013).
[68] ibid 12.
[69] ibid 12; Andrea Bianchi, 'Assessing the Effectiveness of the UN Security Council's Anti-Terrorism Measures: The Quest for Legitimacy and Cohesion' (2007) 17 European Journal of International Law 881; Alan Boyle and Christine Chinkin, *The Making of International Law* (Oxford University Press 2007) 3; Ian Johnstone, 'The Security Council as Legislature' in Bruce Cronin and Ian Hurd (eds), *The UN Security Council and the Politics of International Authority* (Routledge 2008); Alex Marschik, 'The Security Council as World Legislator?: Theory, Practice & Consequences of an Expanding World Power' (2005) Institute for International Law and Justice Working Paper 2005/18 <http://iilj.org/wp-content/uploads/2016/08/Marschik-The-Security-Council-as-World-Legislator-2005.pdf> accessed 9 April 2020; Luis MH Martinez, 'The Legislative Role of the Security Council in its Fight against Terrorism: Legal, Political and Practical Limits' (2008) 57(2) International and Comparative Law Quarterly 333; Stefan Talmon, 'The Security Council as World Legislature' (2005) 99(1) American Journal of International Law 175; Devon Whittle, 'The Limits of Legality and the United Nations Security Council: Applying the Extra-Legal Measures Model to Chapter VII Action' (2015) 26(3) European Journal of International Law 671.
[70] See, for example, Anghie (n 22) 305; Ben Emmerson, 'New Counter-Terrorism Measures: Continuing Challenges for Human Rights' in Manfred Nowak and Anne Charbord (eds), *Using Human Rights to Counter Terrorism* (Edward Elgar 2018) 125.

> the permanent members of the Security Council and the bloc of nonaligned and emerging countries that took control of the General Assembly.'[71]

Comras argues that too much scholarship regarding the UN attributes its failures to the Organisation itself or to its organs. To him, scholars need to consider the roles of states and groups thereof, reflecting upon their pursuit of various political agendas through the UN's organs.[72] As discussed in the previous section, this thesis further develops Comras' research agenda within the context of counter-terrorism and human rights. It does not approach the UN as a monolithic or independent actor within international affairs, but as a site for political interactions between states and groups thereof. The thesis, furthermore, approaches the language of international law and organisations as one of the bases of the political interactions between states, providing a set of terminologies, ideas and ideals that inform counter-terrorism discourses.

A number of scholars have also considered the human rights implications of the UN's counter-terrorism work, with a majority focusing on key UNSC counter-terrorism measures such as the sanctions regime, adopted in 1999.[73] While these scholars acknowledge that states are divided on human rights' relevance and application to UN decisions, they argue that the UNSC must uphold international standards of human rights as articulated in the UN Charter. Hudson, for example, argues that the UNSC sanctions regime is 'bound by core aspects' of the right to a fair trial, that the UNSC breached that obligation by failing to provide a review mechanism, and that the UNSC should update the regime in order to 'incorporate minimum fair hearing safeguards.'[74] Hovell, meanwhile, argues for procedural reform of the Security Council, calling for greater respect for due process in the Council's decision-making relating to the counter-terrorism sanctions regime.[75] Others are, however, more optimistic. A number of scholars have noted that, over time, human rights have become more prominent in the UNSC's counter-terrorism decisions and in the work of relevant committees.[76] Most recently,

[71] Victor D Comras, *Flawed Diplomacy: The United Nations and the War on Terrorism* (Potomac Books 2010) xvii.
[72] ibid.
[73] For an overview and discussion of these resolutions, see ch 3 and 4 respectively.
[74] Andrew Hudson, 'Not a Great Asset: The UN Security Council's Counter-Terrorism Regime: Violating Human Rights' (2007) 25 Berkeley Journal of International Law 203, 204.
[75] Devika Hovell, *The Power of Process: The Value of Due Process in Security Council Sanctions Decision-Making* (Oxford University Press 2016).
[76] See, for example, EJ Flynn, 'The Security Council's Counter-Terrorism Committee and Human Rights' (2007) 7(2) Human Rights Law Review 371; Rosemary Foot, 'The United Nations, Counter-Terrorism, and Human

Ginsborg has observed that while the UNSC's decisions relating to foreign fighters have led to the implementation of many domestic policies that threaten human rights,[77] they also contain the most explicit human rights content in the history of the Council's counter-terrorism work.[78] To Ginsborg,

> 'The prominence of human rights and international law and the focus on countering violent extremism in order to prevent terrorism in a Chapter VII resolution give hope that a different agenda may emerge out of the work of the Security Council and its counter-terrorism committees this time around. In its progressive side, resolution 2178 opens the door to new areas of activity by the Security Council committees, and other actors embracing the issue of prevention and countering violent extremism.'[79]

To Ginsborg, the punitive and oppressive dimensions of UNSC Resolution 2178, which required states to implement a range of border security and criminal law enforcement measures to prevent the travel of foreign terrorist fighters,[80] can be separated from its 'progressive' dimension. By making this distinction, however, the scholar over-optimistically predicts the UNSC's entry into a new era, one in which human rights are at the core of its work. Similarly, Joyner suggests that the UN continually attempts to balance individuals' human rights with states' sovereign right to pursue and ensure their own security.[81] Rather than viewing the UN's work as a balancing act or suggesting that human rights are now at the core of all of the Organisation's counter-terrorism work, I view the UN as the sum total of its parts. Ultimately, the Organisation's work is driven by Member States, who utilise its organs in order to pursue various political agendas. Furthermore, rather than suggesting that the UN must navigate the tension between sovereign rights and human rights, and that the latter now prevails, I argue that the language of human rights is used by states in order to justify certain policies, to (re)produce their own power, or to challenge global power imbalances.

Rights: Institutional Adaptation and Embedded Ideas' (2007) 29(2) Human Rights Quarterly 489; Carlotta M Minnella, 'Counter-Terrorism Resolutions and Listing of Terrorists and Their Organizations by the United Nations' in Eran Shor and Stephen Hoadley (eds), *International Human Rights and Counter-Terrorism* (Springer 2020).

[77] For further discussion, see ch 4.

[78] Ginsborg (n 59).

[79] ibid 196.

[80] For an outline and further discussion, see ch 3 and 4 respectively.

[81] Christopher C Joyner, 'The United Nations and Terrorism: Rethinking Legal Tensions Between National Security, Human Rights, and Civil Liberties' (2004) 5 International Studies Perspectives 240.

The use of human rights lexicon enables, and perhaps compels, an imaginary 'us' to have hope that we might yet realise the UN's promise of universal human rights and perpetual peace. The enabling and constraining properties of this language are the focus of the following chapters. Of course, the way in which the language of human rights is deployed within the UN is informed by international law, the Organisation's structure and the mandates of its various branches. My theoretical conception of the UN, human rights and international law is detailed in the following chapter.

Chapter 2: Theory

A. Overview

This chapter explores the theories underpinning the research project. As noted in the previous chapter, the primary concern of this thesis is the way in which international human rights law is mobilised within counter-terrorism discourses at the UN. In considering how human rights law is invoked in order to justify, constrain and contest a range of political actions relating to counter-terrorism, I draw upon the work of critical international law scholars and critical terrorism scholars. Thus, unlike other scholars who focus on the legal issues arising from the UN's concrete counter-terrorism measures,[1] I am interested in the way that human rights are understood and discussed within and by the UNSC, UNGA and the Secretariat. This research agenda is driven by the conviction that the way in which we *talk about* human rights is important and is itself an important area of research. Drawing on the languages of both morality and law, international human rights law purports to provide an authoritative way of distinguishing between right and wrong, acceptable and unacceptable, just and unjust. This framework for understanding and speaking about things – this *discourse* – grounds both political arguments and actions relating to counter-terrorism. For example, when we see the war on terror as an effort to protect human rights and democracy, we are more likely to accept that it may entail the use of lethal force and restrictions upon certain freedoms.

Part B, therefore, lays out the theoretical groundwork for this thesis. It revisits the critical literature outlined in chapter 1, exploring the relationship between that scholarship and Foucault's study of discourses. Part B shows that Foucault's work provides a way of approaching international law itself as a vocabulary, one that prescribes how we should see the world, understand issues and respond to problems. Thus, from a critical perspective, international law influences the way that issues are seen and acted upon because its subjects have, to some degree, accepted and begun to act upon the rules, procedures and institutions that it entails. Critical scholars' primary contention is, however, that the schema for

[1] See, for example, Lisa Ginsborg, 'One Step Forward, Two Steps Back: The Security Council, "Foreign Terrorist Fighters", and Human Rights' in Manfred Nowak and Anne Charbord (eds), *Using Human Rights to Counter Terrorism* (Edward Elgar 2018). For a comprehensive overview of the literature, see ch 1, pt D.

understanding the world provided by international law is politically biased; it favours particular perspectives while marginalising or excluding others.

While the Foucauldian strand of critical scholarship provides us with a way of understanding and exposing the politics of international law, it does not provide a satisfactory approach to the study of human rights. Foucault's interest in the unseen, disciplinary effects of power might allow us to show how human rights are used in security discourses in order to justify counter-terrorism policies that are, in fact, conducive to oppression and discrimination; this is, indeed, one of the objectives of chapters 4 and 5. However, because Foucault's emphasis is upon problematising the operation of power, his work does not provide impetus to human rights scholarship. That is, the work of Foucault and Foucauldian scholars does not explain why it is important to think about human rights in the first place. Thus, part C discusses the importance of the critical study of human rights. While this project aligns with the agendas of critical international law scholarship and CTS, I show that it is underpinned by a normative commitment to two other schools of critical thought, cosmopolitan scholarship and the Welsh school, that are less extensively explored in international law scholarship. These schools of thought allow us to ground our critique of the subversion of human rights in counter-terrorism discourses in the broader argument that contemporary security policies *should* be based upon multilateralism and respect for the rights of those near and far. Part C nevertheless concedes that human rights are inescapably political; even in criticising counter-terrorism policies that violate human rights, as some states and UN branches have done, actors draw upon and reify the political power of this language.

Next, part D explains the UN's relevance and importance to this area of research. It argues, first, that the UN's principal organs play a crucial role in shaping global responses to terrorism, making authoritative decisions relating to international security, allowing states to discuss coordinated, global approaches to counter-terrorism, and facilitating collaboration between various international actors. The UN wields symbolic power and provides a forum for deliberation, making it both an interesting and important object for research. Secondly, part D argues that there is a particularly significant link between the UN and the international human rights movement. The Organisation was designed after World War II to pursue the dual, interlinked objectives of human rights and international peace. It symbolised, and still

symbolises, the world's progression halfway to the Kantian vision of an authority that secures human rights and perpetual peace through the enforcement of a law above states. Promotion of human rights is one of the UN's objects and purposes and has, according to some, been mainstreamed in the Organisation's work. Yet as chapter 4 shows, states' responses to September 11 significantly reduced the prospect of the formation of a cooperative, rights-based approach to global security through the UN. Thus, throughout this thesis, I argue that there is a conflictual relationship between the UN, human rights and cosmopolitanism. On one hand, the Organisation is sustained by its cosmopolitan promise; we continue to look to the UN to bring about a better world and its constitutive documents and decisions continually project a vision of that world. On the other hand, the UN is a setting for the politics of human rights, its association with cosmopolitanism creating scope for states to justify and challenge counter-terrorism policies in the name of human rights.

Part D goes on to detail this project's analytical approach. The substantive chapters of this thesis do not discuss the UN as one unitary actor but rather as a number of international actors, each with their own agendas and purposes. Each of these actors is constituted by states, provides a forum for interactions between states, and has its own relationship with other UN organs. It is within this constellation of interactions and relations that the study of the invocation of human rights within counter-terrorism discourses is pertinent. Finally, part E identifies the key questions driving the research project and explains the significance of the theoretical framework to the chapters that follow.

B. Why do Words Matter?

The substantive chapters of this thesis examine the ways in which human rights are invoked in UNGA, UNSC and Secretariat documents relating to counter-terrorism, and by states participating in relevant proceedings of the UNGA and UNSC. This section explores the importance of words and the value of their study. Firstly, it argues that words give meaning to, and allow us to understand, material things and events. The way in which an issue is spoken about and understood is referred to as a discourse, and those discourses propagated by prominent or powerful actors have broader impacts upon the way in which that particular issue is seen and acted upon. Secondly, this section links discourse theory with the scholarship discussed in chapter 1 and with the research project. I argue that when states and UN

branches discuss or make decisions relating to issues like terrorism, they attempt to do so in accordance with the 'rules' of particular lexica that make their utterances comprehensible, convincing and authoritative. These include the languages of international law, international organisations and universal human rights. However, the use of this language is political, as is the constitution of the language itself. The objective of this thesis is not, then, to ascertain how international human rights law provides a *framework* for counter-terrorism, but rather to understand the politics driving, the politics perpetuated by and the political outcomes brought about by the use of the vocabulary of human rights.

A discourse is a 'schema for understanding' a particular issue and comprises the various documents, statements, speeches, etc. relating to it.[2] While an event such as a bomb blast is a physical occurrence with tangible consequences, we only come to understand that event as an act of transnational terrorism because it is spoken of as such and because we have, over time, come to recognise, anticipate and fear the existence of such a threat to our security. Similarly, while migration comprises a physical element insofar as it involves an individual's or group's relocation across national borders (and often physical features such as oceans), the erroneous view that migrants are likely to be terrorists has developed as a result of deliberate, repeated and politically biased characterisations of foreigners as threatening and dangerous. Thus, we only expect (or demand) that an event like a terrorist attack will lead to the implementation of measures such as restrictions upon travel and migration because we are familiar with the terminologies of terrorism and counter-terrorism and we have developed certain expectations about how governments will or should respond to terrorist attacks. In fact, even the existence of a collective 'we' – a community, national group, region, hemisphere or 'civilisation'[3] grappling with terrorism – is a result of the deliberate political representation of an in-group threatened by a terrorist 'other.' In simpler terms, discourses endow physical events, things and actors with meaning, and, as a result, they define the range of appropriate actions that can or should be taken in relation to them.[4]

[2] Charlotte Epstein, *The Power of Words in International Relations: Birth of an Anti-Whaling Discourse* (MIT Press 2008) 8.
[3] See Samuel Huntington, *The Clash of Civilizations and the Remaking of World Order* (first published 1996, Simon & Schuster 2011).
[4] Stuart Hall, 'Foucault: Power, Knowledge and Discourse' in Margaret Wetherall, Stephanie Taylor and Simeon J Yates (eds), *Discourse Theory and Practice: A Reader* (SAGE 2001) 77.

This definition of a discourse derives from the work of Michel Foucault, who sees both knowledge and truth as socially constructed. To Foucault, powerful actors construct 'the truth' by deliberately, repeatedly speaking about issues in a particular way. He argues, in *The History of Sexuality,* that the concept of 'sexuality' is a relatively recent development in Western society. Foucault traces the concept's emergence as a discursive object in the 18th and 19th centuries, challenging widespread beliefs that each individual inherently 'has' a sexuality. To Foucault, the emergence of sexuality as an area of interest – in scientific research, in confession, etc. – paved the way for the oppression and marginalisation of particular individuals based upon the ideas of perversion and sexual deviancy.[5] When we consider this aspect of Foucault's work, we see that the study of discourses enables us to challenge the ways in which particular issues are understood and to expose the political processes by which those understandings came about. According to Foucault, discourses comprise three elements: objects, subjects and subject positions.[6] An object is, put simply, what a discourse is about: terrorism, data, the economy or aviation, for example. It is, therefore, what the producers of a particular discourse aim to help us understand. A powerful discourse constitutes 'subjects', actors that accept a particular way of seeing or speaking about something as the truth and reproduce it through their own behaviours and utterances.[7] The subjects of a discourse 'are the vehicles of power, not its points of application.'[8] Thus, as noted in chapter 1, international law is only known and operative as 'law' because of its subjects' repetition of legal terminology, procedure and rules. Finally, a discourse furnishes 'subject positions.' A subject position is a 'part allocated to a person by the use of a story.'[9] Counter-terrorism discourses entail a wide range of subject positions and, as I show in chapters 4 and 5, many are related to human rights: heroic first responders, brave military personnel, innocent civilians, threatened citizens and communities, barbaric and uncivilised terrorists.

[5] Michel Foucault, *The History of Sexuality, Part 1: The Will to Knowledge* (first published 1976, Penguin 2019).
[6] Ruth Wodak and Michael Meyer, *Methods of Critical Discourse Analysis* (SAGE 2001) 38.
[7] ibid; Michel Foucault, 'Truth and Power: An Interview with Michel Foucault' (1979) 4 Critique of Anthropology 131, 137.
[8] Michel Foucault, 'Two Lectures' in Colin Gordon (ed), *Power/Knowledge: Selected Interviews and Other Writings (1972-1977)* (Pantheon Books 1980) 78.
[9] Robin Wooffitt, *Conversation Analysis and Discourse Analysis: A Comparative and Critical Introduction* (SAGE Publications 2005) 148.

Discourses thus produce a set of internal rules on how their objects should be understood and responded to. To Foucault, the study of these discourses is a genealogical pursuit:

> 'A form of history which takes account of the constitution of knowledge, discourses, domains of the object etc., without having to refer to a subject which is either transcendent to the field of events, or which flits through history with no identity at all.'[10]

In other words, discourses are historically contingent, their internal rules being the products of a series of interactions and ideological developments to have taken place over time. Thus, subjects may abide by a discourse's rules without even realising they are doing so. This, I argue, is particularly the case in relation to the language of international law and organisations. As chapters 4 and 5 show, this language, which includes the vocabulary of international human rights law, is itself constitutive of political statements and actions. While some actors deliberately invoke human rights lexicon in order to justify or precipitate particular political outcomes, others, like weaker states attempting to criticise the United States' counter-terrorism policies, inadvertently reproduce the politics of this language, which is often employed to marginalise them.

This theoretical approach has influenced the work of many of the critical scholars cited in the previous chapter. For exponents of the discursive approach to CTS, often referred to as the interpretivist approach,[11] the notions of terrorism and counter-terrorism are discursive constructions. In adopting the Foucauldian approach to the study of discourses, these scholars seek to show how the concept of terrorism, taken for granted by most, is underpinned by particular prejudices and worldviews. The construction of terrorists as foreign, uncivilised, others elicits people's acceptance of, and demands for, the use of military force and the mobilisation of national security apparatus against them. Jackson writes:

> 'The language of counter-terrorism incorporates a series of assumptions, beliefs and knowledge about the nature of terrorism and terrorists. These beliefs then determine

[10] Quoted in David Couzens Hoy (ed), *Foucault: A Critical Reader* (B. Blackewell 1986) 136.
[11] See, for instance, Richard English, 'The Future Study of Terrorism' (2016) 1(2) European Journal of International Security 135; Jonathan Joseph, 'Critical of What? Terrorism and its Study' (2009) 23(1) International Relations 93; Jacob L Stump and Priya Dixit, 'Toward a Completely Constructivist Critical Terrorism Studies' (2012) 26(2) International Relations 199.

> what kinds of counter-terrorism practices are reasonable or unreasonable, appropriate or inappropriate: if terrorists are assumed to be inherently evil, for example, then eradicating them appears apposite while negotiating with them appears absurd. The actual practice of counter-terrorism gives concrete expression to the language of counter-terrorism.'[12]

One of the objectives of CTS is, therefore, to understand how the discursive othering of terrorists, and the perpetuation of a state of emergency, can generate demands for particular policies which would, in 'ordinary' circumstances, be deemed unacceptable.[13] The critical scholar's aims are to understand *how* terrorism is spoken about and to examine *why* it is spoken about in that way. Words matter, because the meanings attached to terrorism ultimately determine how it is seen and acted upon.

This theoretical approach, therefore, enables the researcher to expose the ways in which power is enacted through rhetoric. It inheres a view of power as cyclical, continually operating upon and being reproduced by its subjects. 'Power,' Foucault writes,

> 'Must be analysed as something which circulates, or rather as something which only functions in the form of a chain. It is never localised here or there… Power is employed and exercised through a net-like organisation. And not only do individuals circulate between its threads; they are always in the position of simultaneously undergoing and exercising this power.'[14]

Prominent actors represent issues such as terrorism in a particular way, and this deliberate representation becomes the 'truth' as it is accepted by, replicated by and acted upon by the subjects of those actors' power.[15] It has, for example, become commonplace for Western media and the public to respond to terrorist attacks by demanding that governments close national borders and refuse entry to refugees, a clear result of the widespread understanding of terrorism as a foreign threat and, in recent times, one that is related to the presence of

[12] Richard Jackson, *Writing the War on Terrorism: Language, Politics and Counter-Terrorism* (Manchester University Press 2005) 8-9.
[13] See Lee Jarvis, *Times of Terror: Discourse, Temporality and the War on Terror* (Palgrave 2009).
[14] Foucault (n 8) 98.
[15] ibid 93: 'In a society such as ours, but basically in any society, there are manifold relations of power which permeate, characterise and constitute the social body, and these relations of power cannot themselves be established, consolidated nor implemented without the production, accumulation, circulation and functioning of a discourse.'

organisations like ISIL in the states from which the largest number of refugees originate. This conception of discourses is presupposed by a view of power as insidious; it constantly circulates through the body politic and becomes effective when unwittingly routinised by its subjects. Many, for example, are likely to use the term 'Islamic terrorism' without even questioning why it is that terrorism has come to be associated with Islam, and Islam with terrorism.[16] Yet every time the term 'Islamic terrorism' is used, its political power is enacted and reified. Thus, according to Foucault, the analysis of power 'should be concerned with power at its extremities, in its ultimate destinations… that is, in its more original and local forms.'[17]

Many critical international law scholars draw upon this Foucauldian conception of power. As noted in chapter 1,[18] critical international law scholarship is not methodologically homogenous, but comprises a 'variety of different, yet predominantly anti-instrumentalist styles.'[19] Despite its methodological and theoretical diversity, critical international law scholarship is broadly concerned with the relationship between international law and politics, particularly the way in which the former entrenches and encourages problematic international power structures. Critical international law scholarship is thus Foucauldian in two ways: it considers how the discourse of international law enables particular actors to exercise and consolidate their power, and it exposes how international legal discourse attempts to universalise particular worldviews. In this context, it is helpful to revisit Kennedy's characterisation of international law as 'nothing but a repetition of the relationship it posits between law and society.'[20] To study international law as a discourse is to approach it as a common language in which to speak about the world and a standard set of responses to international problems. Through the repetition of legal terminology, legal procedures and legal doctrine, international law presents as something separate from politics, perhaps superior to the political. International law thus promises, as all law does, to create stability

[16] Richard Jackson, 'Constructing Enemies: "Islamic Terrorism" in Political and Academic Discourse' (2007) 42(3) Government and Opposition 394.
[17] Foucault (n 8) 96.
[18] See ch 1, pt D.
[19] Martti Koskenniemi, 'Critical International Legal Studies: Letter to the Editors of the Symposium' (1999) 93 American Journal of International Law 351, 352.
[20] David Kennedy, 'A New Stream of International Law Scholarship' (1988) 7 Wisconsin International Law Journal 1, 8.

and predictability in the conduct of its subjects. Thus, when one thinks about international law, he or she might expect it to be all-encompassing, for it appears to regulate all that is between and above states. Yet through these rules, procedures and doctrines, international law actually defines what counts as 'international' and what is excluded from that sphere. For example, the concept of statehood and the relevant legal criteria perpetuate the structures and effects of colonialism by promoting a Eurocentric, Westphalian conception of international order, while marginalising non-European conceptions of the relationship between people, territory, government and sovereignty. Within this system, and most significantly to this thesis, vocabularies such as those of universal human rights, humanitarianism and the right of self-defence provide a pretext for Western military action, democracy promotion, development agendas and intervention.[21] The language of international human rights law allows us to argue that *we* have a responsibility to free women from the Afghan Taliban and that *we* opened a door to democracy and human rights by ridding Iraq of its tyrannical, terrorist-supporting leader.

Foucault's conception of power thus makes way for a significant methodological shift in the study of international law and organisations, challenging the scholar to disavow modes of analysis that see the sovereign state, international law and international organisations as sources of power unto themselves. Orford writes,

> 'A reconceptualization of power along the lines proposed by Foucault suggests that while sovereign states, international organisations, superpowers, the global market and at times international law are certainly effects of power, they are not the sources of power. The sense that these entities are omnipotent is itself an effect of power relations.'[22]

A critical, Foucauldian approach thus enables us to study international law at its extremities, considering the spaces and bodies upon which it operates. I argue that human rights were not simply invented by states or international organisations, and I do not approach them as

[21] Antony Anghie, *Imperialism, Sovereignty and the Making of International* Law (Cambridge University Press 2005) 300; Sundhya Pahuja, *Decolonising International Law: Development, Economic Growth and the Politics of Universality* (Cambridge University Press 2011); Sundhya Pahuja, 'The Postcoloniality of International Law' (2005) 46(2) Harvard International Law Journal 459.

[22] Anne Orford, *Reading Humanitarian Intervention: Human Rights and the Use of Force in International Law* (Cambridge University Press 2003) 75.

mere laws with which states do (or do not) comply. Rather, international human rights law provides a language that animates the actions and arguments of lawyers, states, international organisations and others. At the same time, the political actions enabled by the use of this vocabulary have continuous, local impacts, which I highlight in the substantive chapters of this thesis. For example, I show in chapter 4 that while UNSC Resolution 2178 on foreign terrorist fighters has been lauded for its recognition of the importance of human rights in countering terrorism and violent extremism, the Resolution's implementation has had the opposite effect, with states implementing laws that enable the revocation of citizenship and deprivation of liberty. Thus, Resolution 2178 acknowledges calls from certain states and UN branches for the UNSC's decisions to be more consistent with international human rights law, but simultaneously requires those states and UN organs to implement measures that violate the rights of the terrorist 'other.'

Human rights lexicon is, therefore, put to work in a number of ways, and by a number of actors, in the continual creation of the 'others' of international law and organisations: terrorists, those suppressed by terrorist organisations, state sponsors of terrorists, etc. At the same time, the language of human rights is enacted by some at the margins of international law and organisations, such as developing states, who recognise in their own subjugation the radical and transformative potential of human rights. Both international law and organisations thus contribute to the construction of an international order that is threatened by, and whose existence is necessitated by, something at its periphery.[23] Chapters 4 and 5 show how human rights are woven into, and read away from, this separation of international society and its margins. Terrorists are said to threaten, disrespect and even despise human rights. Meanwhile, as an imagined collective, 'we' are said to have a right to be free and safe from terrorism. Military counter-terrorism operations are justified as campaigns for human rights. International human rights law is said to be important yet states ultimately have the discretion to decide if and how it applies in the context of counter-terrorism. And states of the Global South, often criticised by Global North states and the UN for their human rights records, use the same language to decry the counter-terrorism policies of the United States and its allies. Human rights are, therefore, continually mobilised in attempts to define, expand

[23] Kennedy (n 20) 12.

and contest both the margins of international society and the acceptability of political violence.

Critical scholarship thus allows us to recognise the ways in which international law produces winners and losers, entrenching certain actors' power and access to resources, while marginalising others. This Foucauldian mode of analysing international law is undeniably valuable. It re-politicises the study of international law and thus provides an alternative to 'mainstream' international law scholarship, which emphasises the letter of the law while remaining distanced from the power relations to which law is conducive. The Foucauldian approach enables us to move beyond a conception of the international legal system as a monolithic, singular system in which power emanates downwards from law and organisations. Instead, it allows us to analyse the multiple modalities, forms and sources of power that are simultaneously at play within global politics. Speaking a common language, international law and organisations provide a number of actors – states, lawyers and international organisations themselves – with a way of exercising, asserting, contesting and negotiating power.

C. Why Human Rights?

As noted in the previous chapter, the war on terror has seen the construction of a false dichotomy between human rights and security, with states asserting that the protection of national security requires the curtailment of certain rights. Human rights and security are not simply competing objectives, however. Their relationship is far more complex and is contested within various areas of theoretical literature. Legal positivists might simply suggest that human rights are the law; under international human rights law, states have obligations not to violate individuals' human rights and to protect people from violations by private individuals or non-state actors such as terrorist organisations.[24] Thus, one can argue that human rights considerations should factor into discussions about terrorism and counter-

[24] See, for example, UN Human Rights Committee 'General Comment No. 31 [80]: The Nature of the General Legal Obligation Imposed on States Parties to the Covenant' (29 March 2004) UN Doc CCPR/C/21/Rev.1/Add.1326, para 8: 'The obligations on States Parties to ensure Covenant rights will only be fully discharged if individuals are protected by the State, not just against violations of Covenant rights by its agents, but also against acts committed by private persons or entities that would impair the enjoyment of Covenant rights in so far as they are amenable to application between private persons or entities.'

terrorism because states have agreed upon a certain set of standards that are universal and unqualified in their application and that they should, as subjects of the law that they have created, adhere to these standards.[25] To this, we might add that human rights issues should be considered within all discussions relating to all domains of state behaviour, as international law exists in order to create stability and predictability in states' actions. The notion that a state's national security might take precedence over its legal obligations in times of crisis would undermine both international law and the prospect of the formation of an international rule of law.[26]

The critical perspective is more complex. If one approaches the issue from a critical-discursive perspective, international law, human rights and national security are all discourses that actors mobilise when they assert or contest power. Thus, on its face, a critical approach to human rights law seems a critique of human rights themselves and a dismissal of law as a significant force. As Hunt points out, Foucault's circulatory conception of power leads him to conceive of law 'narrowly in terms of a system of commands or prohibitions.'[27] Hunt urges critical scholars to retrieve the law in their work by recognising the 'interpenetration' of law and discipline, the latter being the process by which subjects internalise and routinise norms, like respect or punctuality, through repetition.[28] According to this reconstruction of Foucault's work, international law and organisations are significant as a rhetorical project because they provide various actors, including UN organs and Member States, with a way of thinking about, speaking about and responding to issues in the world. It would follow that international law is powerful because its subjects repeatedly refer and (largely) adhere to legal rules, institutions, procedures and doctrines, all things that denote a shift away, or step up, from politics. Yet these very rules, institutions, procedures and doctrines enact a politics of inclusion and marginalisation, empowerment and subjugation. Thus, at best, Foucault's work allows critical scholars to approach human rights as a part of this rhetorical project of international law and institutions, as a vocabulary complicit in their perpetuation of certain power dynamics. This thesis is driven by that critical intuition insofar as it considers how the

[25] Vijay M Padmanabhan, 'Separation Anxiety? Rethinking the Role of Morality in Human Rights Lawmaking' (2014) 47 Vanderbilt Journal of Transnational Law 569.
[26] Ian Hurd, *How to Do Things with International Law* (Princeton University Press 2017) 4.
[27] Alan Hunt, 'Foucault's Expulsion of Law: Toward a Retrieval' (1992) 17(1) Law and Social Inquiry 1.
[28] ibid 21-23.

language of human rights is used to justify violent, discriminatory and repressive counter-terrorist measures. Yet the thesis is also driven by a normative commitment to the protection of individual rights and dignity.

Foucault's emphasis upon unseen, insidious forms of power and their effects leads him, and exponents of his work, to focus on problematisation. That is, Foucauldian scholars aim to draw attention to the ways in which power operates upon, and disciplines, its subjects. This gives rise to questions as to why one would study human rights from a critical, Foucauldian perspective. If human rights are nothing but a rhetorical construction, a way of justifying the exercise of power and the implementation of disciplinary practices, then the entire notion of human rights takes on a negative connotation. Speaking about his research agenda, Foucault once commented that,

> 'My point is not that everything is bad, but that everything is dangerous, which is not exactly the same as bad. If everything is dangerous, then we always have something to do. So my position leads not to apathy but to a hyper- and pessimistic activism.'[29]

Yet while Foucault claimed that the objective of his work was to prompt activism and not disenchantment or disengagement, his writings provide no concrete indication of what exactly we should resist, or what exactly activists should campaign for. This is reflected in much of the critical literature discussed in this chapter and in chapter 1. Critical scholars who espouse a Foucauldian approach[30] focus their efforts on showing how international law or counter-terrorism discourses are conducive to violence, discrimination, marginalisation and so on, but do not reflect upon how such practices might be challenged or changed.

By contrast, my critique of the way that human rights are spoken about in the context of counter-terrorism is based upon the conviction that security should not, and cannot, be pursued at the expense of human rights. My own reflection upon the relationship between human rights and security was driven by the work of Ulrich Beck, who calls upon scholars to reflect upon how people and societies can live together in an interconnected, yet divided, world. Beck argues that we are living in a cosmopolitan moment. Globalisation has led to the

[29] Michel Foucault, 'On the Genealogy of Ethics: An Overview of Work in Progress' in Paul Rainbow (ed), *The Foucault Reader* (Pantheon Books 1984) 343.
[30] For an outline, see ch 1, pt D.1.

emergence and recognition of risks such as transnational terrorism. This has, in turn, seen the formation of transnational communities, tied together by their members' risk perception and anticipation of catastrophe.[31] Because issues such as terrorism, environmental change and financial crisis affect people around the world, we find ourselves living in a 'world risk society'[32] in which both these risks and the actions taken to mitigate them have transnational effects. Global risks 'tear down national boundaries and jumble together the native with the foreign,' Beck writes.[33] 'We are all trapped in a shared space of threats – without exit.'[34] To Beck, therefore, the process of cosmopolitanisation is 'globalisation from within.' It is the process by which global issues like terrorism are becoming 'part of the everyday local experiences and the "moral life-worlds" of people living within national communities.'[35] We are no longer dissociated from the plight of a poor man in a distant country, because we live with him in an imagined community of risk. We are commonly vulnerable to improvised explosive devices planted by terrorists, rising surface temperatures and world economic crisis, albeit in different ways.

Unlike the philosophical cosmopolitanism espoused by Immanuel Kant and others, the sociological cosmopolitanism that grounds this thesis views the cosmopolitan as a social and political reality. Today, individuals live within national communities, but global issues and events are increasingly shaping our everyday lives. Beck describes cosmopolitanisation as the unseen, 'unwanted' and often-banal side of globalisation.[36] Cosmopolitanisation manifests in the emergence of 'international cuisine' in local areas, the outsourcing of work by transnational corporations, and the development of familial or romantic relations across

[31] Ulrich Beck, 'We Do Not Live in an Age of Cosmopolitanism but in an Age of Cosmopolitization: The "Global Other is in Our Midst"' in Ulrich Beck (ed), *Ulrich Beck: Pioneer in Cosmopolitan Sociology and Risk Society* (Springer 2014) 181.
[32] Ulrich Beck, 'Living in the World Risk Society' (2006) 55 Economy and Society 329.
[33] Ulrich Beck, 'Incalculable Futures: World Risk Society and Its Social and Political Implications' in Ulrich Beck (ed), *Ulrich Beck: Pioneer in Cosmopolitan Sociology and Risk Society* (Springer 2014) 86.
[34] ibid.
[35] Ulrich Beck, 'The Cosmopolitan Society and its Enemies' (2002) 19 Theory, Culture and Society 17, 17.
[36] Beck (n 31) 173: 'Cosmopolitan in Immanuel Kant's and Jürgen Habermas's philosophical sense means something active, a task, a conscious and voluntary choice, clearly the affair of an elite, a top-down issue. In reality today, however, a 'banal', 'coercive' and 'impure' cosmopolitization unfolds unwanted, unseen – powerful and confrontational beneath the surface or behind the façade of persisting national spaces, jurisdictions and labels. It extends from the top of the society down to everyday life in families, work situations and individual biographies.'

national boundaries.[37] On the largest scale, the process of globalisation, its erosion of national boundaries, its facilitation of international communication and the integration of 'the global' into our daily lives have led to the recognition of the significance and magnitude of global risks. This common recognition has, as stated above, led to the formation of transnational risk societies.

To Beck, there are two common responses to the formation of risk society: actions and policies that insulate local or national communities against the effects of globalisation and the realisation of the 'cosmopolitan imperative.' [38] Human rights play conflicting roles within these two responses. On one hand, human rights are particularly vulnerable to abuse, or are simply traded off, when the state is thought to be most threatened by global risks such as terrorism. According to exponents of the Copenhagen school of security studies, this is because of a broader tendency to think of security in terms of the need for ethnic, national and regional groups to be protected against threatening others.[39] When an 'in-group' is believed to face a looming, existential and global threat, the result is often xenophobia, renationalisation, reification of ethnic or national prejudices, and, ultimately, violent and discriminatory practices. The war on terror is an illustrative example; it has been justified through the construction of a trade-off between the ideals of security and freedom. The US and its allies have argued that in order to protect these ideals in the long term, we must, in the short term, prioritise 'our' security over 'others'' freedom. This logic has produced a range of policies that reject the idea that we live in a 'global community' in favour of a clear distinction between 'us' and 'them', with the implementation of draconian immigration policies, detention and interrogation practices at Guantanamo Bay, and the use of targeted killings outside of areas of active hostilities being some of the most significant examples.

While the global nature of threats such as terrorism leads some to draw new boundaries or resurrect old ones, it can lead others to realise the 'cosmopolitan imperative.' This is based upon the idea that it is impossible to generate nationalist solutions to global threats.

[37] ibid.
[38] Ulrich Beck, 'Cosmopolitanism as Imagined Communities of Global Risk' (2011) 55 American Behavioural Scientist 1346, 1352.
[39] Beck (n 31) 86.

September 11 gave impetus to the already-popular idea that 'the homeland' needs to be protected against international terrorist organisations, which in turn enabled the implementation of various policies including the surveillance of suspect communities, new immigration and border control laws, restrictions upon freedom of religion, and military action against 'state sponsors' of terrorism. Yet these measures, largely aimed at 'identifying and destroying the threat before it reaches our borders,'[40] have proven both ineffective and detrimental to the communities targeted by them. To Beck, global risks like terrorism highlight the cosmopolitan imperative, the need to recognise 'the link between the most fundamental interests of nations (and individuals) and the new, unbounded spaces and duties of a responsibility for the survival of all.'[41]

The cosmopolitan state '[emphasises] the necessity of combining self-determination with responsibility for others, strangers within and without the national borders.'[42] It does not simply seek to 'keep terrorists out' through invasion, detention and exclusion, but rather endeavours to address the political and socioeconomic root causes of terrorism around the world.[43] According to English, terrorism:

> 'Is not only inextricably political, but often emerges out of very serious problems regarding matters such as contested state legitimacy or ethnic or national disaffection… This, in no way, necessarily legitimises such violence, but it does explain it and points towards the vital lesson that ultimately the best way of removing the terrorist symptom is to address the political source.'[44]

Ní Aoláin, the UN Special Rapporteur for human rights and counter-terrorism, similarly argues that terrorism cannot effectively be combated through the implementation of oppressive, violent measures alone. She argues that we must, instead, seek to understand the true causes of terrorist violence, understanding that they vary in accordance with geography, culture and history:

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[40] The White House, 'The National Security Strategy of the United States of America' (*U.S. Department of State,* September 2002) <https://www.state.gov/documents/organization/63562.pdf> accessed 10 April 2019.
[41] Beck (n 38) 1352.
[42] Ulrich Beck, 'The Cosmopolitan State: Towards a Realistic Utopia' (*Eurozine,* 5 December 2001) <http://www.eurozine.com/the-cosmopolitan-state/> accessed 10 April 2019.
[43] ibid.
[44] Richard English, *Terrorism: How to Respond* (Oxford University Press 2009) 123.

> 'We should not circumvent the inevitable realisation that causalities overlap, and that there are intersectional explanations clarifying the phenomena of terrorism. Thus, identifying broad causes are a necessary but not sufficient means to explain the resort to terrorist violence in particular cases and geographies.'[45]

It is, then, absolutely necessary for human rights to factor into discussions of terrorism and counter-terrorism. Counter-terrorist policies that are not based upon consideration of the interests of those near and far merely reproduce the cycles of violence and marginalisation that lend organisations like al-Qaeda and ISIL their destructive capacity. 'Transnational Islamist terrorism operates, propagandises, and recruits across borders,' Burke writes, 'And violent and exceptionalist responses produce new autoimmunisation processes that undermine multiculturalism and the democratic rule of law and drive new forms of radicalisation and terror.'[46] This thesis thus proceeds from the assumption that terrorism can only effectively be addressed by the cosmopolitan states for which Beck advocated in the aftermath of September 11. 'Cosmopolitical realism,' he wrote, 'Basically means the recognition of the interests of others and their inclusion in the calculation of one's own interests… cooperate or fail! Human rights or human catastrophe!'[47]

My examination of human rights' role in UN counter-terrorism discourses is not only based upon the conviction that terrorism is best addressed by cosmopolitan states, but also the belief that the 'cosmopolitan reconfiguration of the international'[48] requires multilateralism. Specifically, this thesis is driven by hopes for the development of rights-based solutions to security threats, which are grounded in both international law and the frameworks provided by international organisations. As chapters 4 and 5 demonstrate, however, the UN's counter-terrorism institutions and frameworks are currently subject to the whims of Member States, as is the Organisation as a whole. My emphasis upon multilateralism and human rights is based upon the work of various scholars explicitly or implicitly developing Beck's concept of

[45] Fionnuala Ní Aoláin, 'The Complexity and Challenges of Addressing Conditions Conducive to Terrorism' in Manfred Nowak and Anne Charbord (eds), *Using Human Rights to Counter Terrorism* (Edward Elgar 2018) 167.
[46] Anthony Burke, 'Security Cosmopolitanism' (2013) 1 Critical Studies on Security 13, 19.
[47] Ulrich Beck, 'Living in and Coping with World Risk Society: The Cosmopolitan Turn' (Lecture delivered in Moscow, June 2012) < http://www.gorby.ru/userfiles/ulrich_beck_final_version_moscow.pdf> accessed 11 April 2019.
[48] Vivian Jabri, 'Cosmopolitan Politics, Security, Political Subjectivity' (2012) 18 European Journal of International Law 625, 631.

cosmopolitan states, namely Burke,[49] Booth,[50] Jabri[51] and Kaldor.[52] At the crux of each of these authors' work is a commitment to the resolution of security issues through emancipatory and cosmopolitan global governance. Unlike Beck, who sees the realisation of the cosmopolitan imperative as the inevitable outcome of globalisation,[53] these scholars each suggest that a cosmopolitan approach to security must be demanded by scholars and developed by states and international organisations. Burke writes:

> 'While the awareness of global risk is a powerful argument for cosmopolitanism, it is possible for transnational threats and risks to be conceptualised and addressed in strongly nationalist and self-regarding terms, for efforts at cooperation to be distorted by statist ontologies and *Realpolitik,* for the securitisation of such risks to go haywire… and for transnational security institutions to produce damaging and dysfunctional outcomes that are far from cosmopolitan. In short, we cannot place our trust in such a cosmopolitan dialectic of history. Security cosmopolitanism is not going to arrive; it must be *imagined* and *created* with a combination of creativity, agency and moral and strategic caution.'[54]

Burke thus argues that we should 'turn Beck's schema on its head.'[55] It is not the case that awareness of global risks naturally leads to the implementation of policies that pursue security through the promotion of human rights. In making this suggestion, Beck lapses into the Kantian idea, which he otherwise rejects, that humanity is predisposed to, and continually moving in the direction of, cosmopolitanism.[56] It is rather the case that the emergence and

[49] See Burke (n 46); Anthony Burke, 'Security Cosmopolitanism: The Next Phase' (2015) 3 Critical Studies on Security 190.
[50] See Ken Booth, 'Security and Emancipation' (1991) 17 Review of International Studies 313; Ken Booth, *Theory of World Security* (Cambridge University Press 2007).
[51] See Jabri (n 48).
[52] See Mary Kaldor, 'American Power: From "Compellance" to Cosmopolitanism?' (2003) 79 International Affairs 1; Mary Kaldor, *New and Old Wars: Organised Violence in a Global Era* (Stanford University Press 2001); Mary Kaldor, *Global Civil Society: An Answer to War* (Wiley-Blackwell 2003); Mary Kaldor, *Human Security: Reflections on Globalisation and Intervention* (Polity 2007).
[53] According to Beck, the formation of world risk society 'generates an unavoidable pressure to cooperate' and has an 'enlightening function.' Quoted by Burke (n 46) 20.
[54] ibid 20.
[55] ibid.
[56] Immanuel Kant, *Essays and Treatises on Moral, Political, and Various Philosophical Subjects: Volume I* (William Richardson tr, William Richardson Publishing 1798) 422. Kant argues that it is nature's will that – through wars and destruction – states will ultimately 'foresake the lawless state of savages.' He continues (at 426): 'The history of the human species in the gross may be considered as the execution of a hidden plan of

recognition of global risks such as terrorism has led to a situation in which 'the sources of such insecurity are seen to emanate from elsewhere, other populations.'[57] Contemporary security discourses have, as Jabri writes, become 'replete with distinctions between self and other, framed at times in identity terms, the West versus Islam, for example.'[58] It is because of this tendency to differentiate between 'self' and 'other' in security discourses that we must, according to Burke, actively pursue a cosmopolitan transformation of security discourses and practice. Beck's concept of a cosmopolitan state that pursues its own interests (national security, in this case) with an openness to others' interests must, then, be brought into existence.

Booth's work on emancipatory security is also a particularly significant contribution to literature on the creation of cosmopolitan states. Booth begins with the problem that as a result of the destructive capacity of modern weaponry, resource scarcity, poverty and environmental change, the world 'does not work for most of its inhabitants.'[59] He argues that thinking about security must move on from the outdated view of world politics as a Westphalian 'war system.' To him:

> 'Emancipation is the freeing of people... from those physical and human constraints which stop them carrying out what they would freely choose to do. War and the threat of war is one of those constraints, together with poverty, poor education, political oppression and so on. Security and emancipation are two sides of the same coin.'[60]

It follows from this that security 'can only be achieved by people and groups if they do not deprive others of it.'[61] Security can no longer be thought of in terms of the state's security as

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nature, in order to bring about an internal perfect constitution of state, and, to this end, an external one too, as the only state, in which she can full unfold all her predispositions in humanity.'

[57] Jabri (n 48) 627.

[58] ibid.

[59] Booth, *Theory of World Security* (n 50) 5. In 'Security and Emancipation' (n 50) at 315, Booth writes about the transformations that have brought us to this point: 'Thucydides would not find himself at a loss in an international relations seminar, as we talk about the role of power and prevalence of mistrust between states; but his mind would be completely blown by such forces shaping the context of world politics as the terrible destructiveness of modern weapons, the 3 million people a day who zigzag the world by air, the frightening destruction of natural life, and the working fax machine, which knows no country.'

[60] Booth, 'Security and Emancipation' (n 50) 319. Note that in *Theory of World Security* (n 50), Booth suggested that this description of security and emancipation was unclear and stated (at 115): 'A more effective way of explaining the relationship is to conceive security as the means and emancipation as the end.' For the purposes of this thesis, however, I treat Booth's approach to security and emancipation as consistent insofar as he sees the two as conducive to one another.

[61] Booth, 'Security and Emancipation' (n 50) 319.

against others. Rather, the state must be reconceptualised as the means to ensure individuals' security from the above-mentioned constraints. Burke's argument is conducive to the disavowal of a state-centric approach to counter-terrorism in favour of one that is consistent with, and indeed promotes, international human rights law. The author calls for the study of security to encompass 'the language and practice of human rights'[62] among other things, arguing that 'strategists should see military policy not simply in terms of serving the state but instead as serving a nascent world order.'[63]

Booth refers to the work of Hedley Bull in his discussion of security policy, suggesting that national strategists should work as 'local agents of the world common good.'[64] Like Beck and, to an extent, Burke,[65] Booth's notion of the 'common good' is based upon normative philosophical principles. What is, therefore, absent from his work is any substantive consideration of how international law and organisations can facilitate the realisation of the world common good through the promotion and enforcement of human rights. Kaldor's work is particularly significant in this regard; the author argues that terrorist organisations are able to recruit individuals by presenting themselves as the only viable alternative to a system that is otherwise conducive to discrimination, marginalisation and exclusion.[66] 'Religious fundamentalism and ultranationalism are rarely popular,' she writes. Rather, 'Their support depends on the weakness of alternatives. These ideologies are bred primarily but not only in "weak" or "failing" states, out of the despair of the excluded.'[67] Within this context, Kaldor advocates for a shift from the current emphasis upon national security, and projection of military power, to an emphasis upon human security. She writes:

[62] ibid 324.
[63] ibid.
[64] ibid.
[65] Although he discusses the role of multilateralism and international organisations, Burke (n 46) ultimately calls for the development of security policy in line with a 'global' version of Kant's categorical imperative (at 23): 'Act as if both the principles and consequences of your action will become global, across space and through time, and act only in ways that will bring a more secure life for all human beings closer.' Booth's argument in *Theory of World Society* (n 50) is also derived from Kantian philosophy insofar as he suggests that government exists in order to restrict individuals' freedom such that they can coexist in society (at 112): 'Emancipation seeks the securing of people from those oppressions that stop them carrying out what they would freely choose to do, compatible with the freedom of others. It provides a three-fold framework for politics: a philosophical anchor for knowledge, a theory of progress for society, and a practice of resistance against oppression.'
[66] Kaldor, 'American Power: From "Compellance" to Cosmopolitanism?' (n 52) 19.
[67] ibid.

> 'The war on terrorism is not working… The FBI has frozen millions of dollars in assets; thousands of known or suspected operatives have been arrested, and perhaps a third of the leadership has been killed. Attacks on aircraft are said to have been thwarted. Nevertheless, by all accounts the network known as Al Qaeda continues to grow. What is important is the ability to recruit young men to the cause.'[68]

Kaldor ultimately argues that contemporary sources of violence such as terrorism can only be contained through a commitment to human rights, global social justice and 'an international rule of law.'[69] Like Beck, therefore, Kaldor argues that our social and political realities do not allow for security to be pursued through the protection of particular groups or communities against others. While Beck asserts that this reality will inevitably lead to the realisation of the cosmopolitan imperative, Kaldor calls for a conscious, active reconceptualization of security based upon social justice, multilateralism and international law. 'A political, legal and social approach,' she writes, 'Is much more important as a way of dealing with terrorism.'[70]

Thus, while critical of the ways in which, and the ends to which, human rights arguments are deployed within the context of the UN's counter-terrorism decisions and deliberations, this thesis is motivated by Kaldor's call for an approach to security that is relevant to the global nature of contemporary violence and is based upon human rights. Specifically, the thesis is driven by a belief that international law and organisations *should* play an important role in the development of a rights-based approach to global security, even if they do not currently do so. I advance this argument because, if nothing else, international human rights law is valuable as an indicator of standards of conduct agreed upon by a large proportion of the international community. As Padmanabhan argues, all treaties, including multilateral human rights treaties, represent the culmination of negotiations among their states parties, suggesting that there exists some degree of inter-subjective agreement about their contents.[71] So, for example, the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) represents the international community's political recognition of, and awareness of a need to respond to, 'very specific threats, vulnerabilities and forms of

[68] Mary Kaldor, *Human Security: Reflections on Globalisation and Intervention* (n 52) 98.
[69] ibid.
[70] Kaldor, 'American Power' (n 52) 21.
[71] Padmanabhan (n 25).

oppression' faced by women.[72] This means that human rights, even if they are often subverted and invoked as justifications for discriminatory or violent practices, have at least gained recognition as claims about how people should treat one another that are pertinent enough to be written as law. Similarly, the UN Charter and the Organisation's continued significance in international affairs indicate that there existed, and perhaps still exists, some belief in the idea of an international organisation that promotes and protects universal human rights. In other words, international law and organisations are a starting point, representing a pre-existing recognition of the existence of a 'world common good,' and some commitment to its promotion. These forms of recognition and commitment are, in themselves, political.[73] My aim, therefore, is not just to explore the 'bad' of the politics of human rights, but rather to explore this politics as something that is multi-dimensional. While human rights are challenged, reinterpreted and subverted within security discourses, they also inform demands that security policies should respect and promote dignity, equality and freedom.

These demands are made against the backdrop of the UN's institutional architecture and international human rights law, outlined in chapter 3. As Habermas points out, the UN Charter already links the achievement of international peace with a global politics of human rights.[74] For example, the UNSC – although its mandate is to address threats to international peace and security – is theoretically bound to act in accordance with the UN's purposes and principles,[75] which include the promotion of human rights and fundamental freedoms.[76] Nineteen years into the war on terror, a new strand of academic literature is emerging that explores, and itself makes, these demands, arguing that counter-terrorism and human rights can be complementary and mutually reinforcing.[77] This thesis builds upon, and contributes to, that literature. Ultimately, however, even the acceptance of human rights as law, scholarly

[72] Regina Kreide, 'Between Morality and Law: In Defense of a Political Conception of Human Rights' (2016) 12(1) Journal of International Political Theory 10, 17.
[73] ibid.
[74] Jürgen Habermas, 'Does the Constitutionalisation of International Law Still Have a Chance?' in *The Divided West* (Polity 2006) 160.
[75] *Charter of the United Nations,* art 24(2).
[76] ibid art 1(3).
[77] See, for example, Manfred Nowak and Anne Charbord (eds), *Using Human Rights to Counter Terrorism* (Edward Elgar 2018); Stella Margariti, *Defining International Terrorism: Between State Sovereignty and Cosmopolitanism* (T.M.C. Asser Press 2017); Martin Scheinin, 'Human Rights and Counter-Terrorism: Lessons from a Long Decade' in David Jenkins, Amanda Jacobsen and Anders Henriksen (eds), *The Long Decade: How 9/11 Changed the Law* (Oxford University Press 2014).

reflection upon rights-based approaches to security, and rights-based critique of states' human rights are political acts. To characterise human rights activism as 'legal' and the rhetorical subversion of human rights as 'political' would be to replicate the core problem identified by critical legal theorists. Instead, I acknowledge that even calls for states and international organisations to respect human rights, like the one made in this thesis, are enactments of the global politics of human rights. As Ackerly writes:

> 'No one reaches for this language [of human rights] confident in the empirical fact of its historical success at securing justice for all individuals and groups who have made such appeals. Rather, in using this language, movement actors seek to affirm the moral and political legitimacy of their particular claims.'[78]

In making this argument, I draw upon the work of theorists who advocate for a political conception of human rights. Kreide, for example, espouses a discursive political conception, arguing that 'human rights grow out of concrete experiences of injustice and are the product of political struggles.'[79] To Kreide, human rights are not static once they have been recognised. Rather, they provide a mode of critique: 'Human rights are placeholders for the constantly renewed public thematization of humiliations and violations that are tolerated, permitted, or even committed by agencies of the state.'[80] She thus suggests that human rights ground demands for just political systems and a set of institutional obligations.[81] Similarly, Nickel enumerates a number of political roles played by human rights. These include the provision of standards for criticism of governments by citizens and a set of guidelines for international organisations' endeavours to promote human rights.[82] Human rights advocacy and promotion are, therefore, political; human rights provide a powerful, widely recognised language in which to engage with, criticise and make demands of political actors. They provide, as Allard-Tremblay argues, 'Goals that our political institutions (ought to) strive to enact and incite other political institutions to adhere to.'[83]

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[78] Brooke Ackerly, 'Human Rights Enjoyment in Theory and Activism' (2011) 12(2) Human Rights Review 221, 223-4.
[79] Kreide (n 72) 17.
[80] ibid 18.
[81] ibid 19-21.
[82] James W Nickel, 'Are Human Rights Mainly Implemented by Intervention?' in Rex Martin and David A Reidy (eds), *Rawls's Law of Peoples: A Realistic Utopia?* (Blackwell 2006) 270.
[83] Yann Allard-Tremblay, 'Human Rights, Specification and Communities of Inquiry' (2015) 4(2) Global Constitutionalism 254, 255.

This section has highlighted the value of exploring human rights from a critical perspective. While the Foucauldian approach enables us to expose how human rights arguments are discursively invoked in order to justify the use of violence, marginalisation and discrimination, both Foucault and critical scholars building upon his work fail to show how we might disrupt the sinister ways in which power works or what exactly we should advocate for. This thesis is, therefore, situated within, and builds upon, other areas of critical and cosmopolitan scholarship. The critique presented in the following chapters is driven by a view that security policies and practices, as well as discussions about security, should be based upon respect for human rights and dignity. This is, of course, political in itself. By arguing that the counter-terrorism policies implemented by states and international organisations should be respectful of human rights, this thesis draws upon and reifies the significance of human rights as a vocabulary for critique of, engagement with, and the articulation of demands of, political actors. The significance of the UN, which is at the centre of this politics of human rights, is discussed in the following section.

D. Why the UN?

As discussed in the previous section, the impetus for this project is Beck's work on risk society. We are living in an age in which global risks are blurring the lines between the local and foreign. The rise of transnational terrorism, the acceleration of climate change, and the continual increase in economic interdependence all show that the global is inescapable and continually shapes our daily lives. They also symbolise the emergence of a range of security threats that cannot effectively be addressed by 'national states' that seek to insulate themselves against, and secure themselves at the expense of, others. The research question is, therefore, presupposed by the belief that the fight against terrorism must be a coordinated, multilateral effort that is based upon respect for universal human rights. However, the project is also driven by an awareness that the language of human rights is often subverted within security discourses and is used to justify laws and policies conducive to human rights violations.

Another key claim driving this thesis is that international law and organisations should provide a basis for these multilateral, rights-based approaches to counter-terrorism. One reason for

this project's emphasis upon the UN is that the Organisation is already involved in counter-terrorism and has been since the late-twentieth century, with each of the sectoral counter-terrorism conventions deposited with the UN or one of its subsidiary organs and the UNSC taking a continual interest in the matter. The Organisation's engagement with issues relating to terrorism and counter-terrorism rapidly increased in the aftermath of September 11 and has continued to do so since. Research for this project is focussed upon the UNSC, UNGA and Secretariat, as each of these three principal organs is engaged in ongoing efforts to develop global frameworks and strategies for counter-terrorism. As I discuss in chapters 3 and 4, the UNSC has played an increasingly legislative function since the turn of the century, exercising its Chapter VII powers in order to require changes or developments in states' counter-terrorism laws. Meanwhile, the UNGA has served as a forum for states to agree upon the general parameters and ethos of a coordinated, global response to terrorism through the adoption and yearly review of the Global Counter-Terrorism Strategy. Finally, the Secretariat has attempted to coordinate other UN organs' responses to terrorism, promoting cooperation and cohesion both within the Organisation and among Member States. These three organs have, therefore, made significant attempts to shape global responses to terrorism.

However, it is not merely UN organs' extensive involvement in counter-terrorism that makes the Organisation a particularly interesting object for this research project. This thesis focuses upon the UN because of the disjuncture between its normative cosmopolitan promise and the political realities of the Organisation's function. The UN came into being at the end of World War II, promising to establish a new world order centred upon states' non-use of force and universal human rights. The Organisation's founding document and the International Bill of Rights – comprising the Universal Declaration of Human Rights (UDHR), the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social and Cultural Rights (ICESCR) – reflect the international community's determination to break with the patterns of interstate violence and war that characterised the first half of the twentieth century. Stark writes:

> '"Never again!" swore world leaders after World War II. Drawing on the political will that had been pooled long enough to win the war, they were able to "project… an imagined future upon reality" in the form of an international legal order. The words

> of the U.N. Charter and the Universal Declaration of Human Rights, along with the conventions which would be drafted to implement them, would assure that genocide and crimes against humanity never again took place.'[84]

Thus, the UN's founding documents read as a promise that a Kantian cosmopolitan world order, mentioned above, will come into being. In the eighteenth century, Kant argued that humankind could only be perfected when individuals' freedom was guaranteed through the establishment of a world republic.[85] States would cede sovereignty to a constitutionalised world organisation, allowing their nationals to become global citizens. Nation-states' importance would thus decline, the law of world people entirely replacing international politics. The outcome of this Kantian transformation would be the achievement of two interrelated goals: perpetual peace and 'law-governed freedom.'[86]

Observing states' determination to preserve their sovereignty, Kant ultimately concluded that a truly cosmopolitan world order is unlikely to come into being. Yet the World Wars and the UN's foundation led to the re-emergence of Kantian thinking on international affairs. Kantian cosmopolitanism first resurfaced with Wilson's vision for the League of Nations,[87] and, although the League ultimately failed, it set in motion a new tradition of Kantian thought. In the midst of World War II, Churchill famously campaigned for an international order that would allow for 'the enthronement of the rights of man.'[88] It was within this context that Lauterpacht wrote *An International Bill of the Rights of Man,* the UDHR's precursor.[89]

Some suggest that cosmopolitan ideals have since been one of the most significant influences upon the development of international law and organisations.[90] Habermas, for example, argues that the UN signifies the world's progression to a halfway point between classical international law, which specified rules for states' behaviour but preserved their right to

[84] Barbara Stark, 'After/word(s): "Violations of Human Dignity" and Postmodern International Law' (2002) 27 Yale Journal of International Law 315, 322.
[85] Immanuel Kant, *Perpetual Peace: A Philosophical Essay* (Cosimo Inc. 2010, first published 1795).
[86] Habermas (n 74) 121.
[87] ibid 156.
[88] Philippe Sands, 'Introduction' in Hersch Lauterpacht, *An International Bill of the Rights of Man* (first published 1945, OUP 2013) xvii.
[89] Hersch Lauterpacht, *An International Bill of the Rights of Man* (first published 1945, OUP 2013).
[90] See, for example, Margariti (n 77).

resolve disputes through war, and Kantian cosmopolitanism.[91] In some ways, he says, the UN functions like the head of a cosmopolitan world order. Firstly, its Charter resembles a cosmopolitan constitution, linking the prohibition of armed force with the threat of official sanction.[92] Secondly, the UN has established some direct links between individuals and the international human rights movement, [93] with the Optional Protocol to the ICCPR allowing for individuals to complain about alleged human rights violations to the Human Rights Committee.[94] Thus, in some respects, the UN acts as the enforcer of a law *above* states, as envisioned by Kant.

While traces of Kantian ideals can be found within the UN's institutional structure, they also resonate within the rhetoric of the Organisation's many branches. One of the clearest manifestations of Kantian cosmopolitanism is within human rights-related rhetoric. Human rights are one of the three pillars of the UN's work, alongside security and development. As Thérien and Joly point out, human rights:

> 'Have gradually emerged as a crosscutting issue constituting a cornerstone of UN activity… no other norm has been more important in guiding the discourse and practices of the organisation than the idea that the United Nations' mission is to promote "all human rights for all."'[95]

In other words, human rights have been mainstreamed at the UN such that they permeate the work of many of its branches, regardless of whether their mandates specifically relate to human rights. This notion of the universal and transcendent nature of human rights sustains the UN's cosmopolitan promise, enabling its various branches to speak as promoters of the common good of the world. Chapters 4 and 5 explore the ways in which the UNSC, UNGA and Secretariat's counter-terrorism discourses uphold the idea of human rights as a cornerstone of the UN's actions. The UNGA's Global Counter-Terrorism Strategy, for example, identifies human rights and the rule of law as one of the four essential pillars of Member States' individual and coordinated efforts to combat transnational terrorism.

[91] Habermas (n 74) 142.
[92] ibid 161-166.
[93] ibid.
[94] ibid.
[95] Jean-Philippe Thérien and Philippe Joly, '"All Human Rights for All": The United Nations and Human Rights in the Post-Cold War Era' (2014) 36 Human Rights Quarterly 373.

As shown in the foregoing paragraphs, two distinct forms of cosmopolitanism are relevant to this thesis. The first is Beck's conviction that we are living in a cosmopolitan moment; the globalisation of risk means that we now require multilateral, rights-based solutions for issues such as transnational terrorism and environmental change. The second is Kantian cosmopolitanism, based upon the idea that individuals' ability to act as morally autonomous beings will only be fully secured when they become citizens of the world, subject to a supranational authority that ensures universal human rights and perpetual peace. These two concepts (Beck's cosmopolitan moment and Kantian cosmopolitanism) overlap to an extent, insofar as both Beck and Kantian scholars advocate for an approach to global security that is based upon human rights. Yet while Kantian scholars proceed from high-level philosophical principles, Beck offers the model of the cosmopolitan state as the ideal way of living within present realities. He writes, 'In the case of [Kantian] cosmopolitanism there is no transition from the normative to the real. Let us then take the reverse path from the real to the normative.'[96] The objective of this project is to adopt Beck's cosmopolitan thinking as a methodology, that is, to consider how states and international organisations approach human rights in the context of global threats like terrorism. Yet an awareness of the influence of Kantian ideals upon the UN is key for a study such as this one. As I show in the chapters that follow, when states and UN branches make human rights arguments in the context of counter-terrorism, they appeal to the Organisation's historical association with philosophical cosmopolitanism.

Theoretically, the presence of cosmopolitan ideals within the UN's design ought to enable the organisation to ensure, through law and diplomacy, that global counter-terrorism efforts are multilateral and rights-based. The Organisation is, as Comras states, 'The central forum where the international community comes together to interact and to provide the political, moral, and legal basis for international action.'[97] Yet in reality, the UN is far more complex and multi-faceted. While the UNSC, UNGA and Secretariat often speak in a manner consistent with the Organisation's cosmopolitan objects and purposes, the measures they implement are

[96] Beck (n 38) 1348.
[97] Victor D Comras, *Flawed Diplomacy: The United Nations and the War on Terrorism* (Potomac Books 2010) xiii.

reflections of their specific mandates and of the political dynamics between the Member States by which they are influenced. Thus, I do not approach the UN as a monolithic organisation, but rather as a series of international actors. While these actors are tied together by the Organisation's founding documents and certain institutional apparatus,[98] they each have their own mandate, forms of legal authority and internal politics (which are, of course, based upon Member States' actions and attitudes). Thus, as the substantive chapters of this thesis show, the Organisation often complicates, rather than stabilises, our cosmopolitan condition by producing multiple overlapping or conflicting frameworks for the resolution of global issues.

Two aspects of this function are particularly relevant to the present research project. Firstly, while the UN's stated objectives are to facilitate peaceful international relations and protect human rights, its branches are influenced by, and entrench, global politics. As Habermas observes, the formation of an international coalition against terrorism after September 11 presented an opportunity for a transition to a cosmopolitan world order, led by the UN.[99] Habermas opines that instead, the 'narrow national interests' of European states and America's behaviour as a 'self-centred, obdurate superpower' have determined the trajectory of the war on terror.[100] Thus, just three weeks after September 11, Habermas concluded that a 'discrepancy between ought and can, between law and power,' continues to 'undermine…the credibility of the UN.'[101] The UN, he concluded, is 'little more than a paper tiger.'[102]

As an organisation founded upon the sovereign equality of its members,[103] the UN has always been subject to states' will and has thus reflected their political dynamics. As many scholars have pointed out, however, this has particularly been the case since the beginning of the war on terror. Anghie, for example, argues that this 'war' is based upon 'a new international

[98] See ch 3 for discussion within the context of counter-terrorism.
[99] Habermas (n 74) 5.
[100] ibid.
[101] ibid.
[102] ibid 20.
[103] *Charter of the United Nations,* art 2(1): 'The Organisation is based on the principle of the sovereign equality of all its Members.'

jurisprudence, of "national security."'[104] The war on terror has seen the UNSC co-opted to serve American interests; the Council's authorisation was not sought prior to the invasion of Iraq, but the US and its allies have relied upon its legal authority to mandate a wide range of counter-terrorism measures. The US, he observes, 'Continues to attempt to use the Security Council as an international legislative power even while asserting its right to disregard the Council and the United Nations when it thinks right.'[105] This tendency, observed by Anghie and many others, has wider implications for international lawmaking; the UNSC's exercise of its Chapter VII powers has replaced state consent to treaties as the primary mode of rule-making relating to counter-terrorism.[106]

The UNSC's new 'super legislative'[107] role reflects the complex, politicised nature of counter-terrorism at the UN, and the way in which Member States harness the power of its various branches in order to pursue particular agendas. The Organisation, Comras writes, 'Can be no more effective than its members allow it to be.'[108] Chapters 4 and 5 paint a picture in which there is, on one hand, the UNSC, which has, at the behest of the US and its allies, exercised its Chapter VII powers to require extensive reforms in states' domestic counter-terrorism legislation. On the other hand, the UNGA has become a forum for states to commit to the general ethos of a coordinated, global struggle against terrorism, one that is posited as a direct response to the UNSC's decisions and the actions of the United States and its allies. Counter-terrorism has, within this context, been tied to the broader projects of sustainable development, democracy promotion, peacebuilding and human rights. Thus, the object of this study is not a cohesive, monolithic UN acting in pursuit of its stated goals, but rather an Organisation comprising multiple branches, whose aims and actions intersect and oppose. The question is not simply one of how international human rights law provides a legal framework for counter-terrorism, but rather how human rights are understood and spoken

[104] Anghie (n 21) 300.
[105] ibid 305.
[106] ibid; Fionnuala Ní Aoláin, 'The UN Security Council's Outsized Role in Shaping Counter Terrorism Regulation and Its Impact on Human Rights' (*Just Security,* 19 October 2018) < https://www.justsecurity.org/61150/security-council-mainstream-human-rights-counter-terrorism-regulation/> accessed 19 March 2019; Jacob Katz Cogan, 'The Regulatory Turn in International Law' (2011) 52 Harvard International Law Journal 321.
[107] Ní Aoláin (n 106).
[108] Comras (n 97) xvi.

about within this complex institutional context: what role they are assigned, how important they are considered, and how they are thought to relate to other relevant legal frameworks.

Similar studies relating to the UN, human rights and counter-terrorism have tended to focus on the UNSC. This is presumably because the Council is the primary body that responds to threats to international peace and security, but also because it possesses formal legal authority. As discussed in chapter 3, the UN Charter allows the UNSC to mandate a range of actions to address threats to or breaches of international peace and security,[109] and those decisions taken under the UNSC's Chapter VII powers are binding upon Member States.[110] The UNSC is also most prominent within existing studies because of its symbolic power, with scholars observing that the Council is not only authoritative because of the power granted to it by the UN Charter, but also because it has gradually developed a 'high social status' within international society.[111] Because of the social capital it has accrued, the UNSC is thought to serve as a setting for international rules to be 'defined, debated, interpreted and reinterpreted.'[112] This might lead one to believe that the UNSC's decisions are of greater gravity than, for example, UNGA resolutions or plans of action authored by the Secretariat. Yet this approach does not sufficiently account for the ways in which the various outputs of UN branches might shape states' behaviour, clarify the scope and application of international law, help to identify the relevant legal frameworks, or indicate the coalescence of international opinion around certain claims about what the law should be (arguments *de lege ferenda*). Thus, this thesis considers three UN principal organs, as each plays a role in the definition of human rights' relationship to counter-terrorism. In doing so, each UN branch speaks the language of international law and organisations, acts in accordance with its mandate, and is shaped by the states it comprises. It is not, therefore, satisfactory to suggest that a study relating to human rights and counter-terrorism should be restricted to the UNSC merely because it possesses the legal authority and political power to make decisions relating

[109] *Charter of the United Nations,* ch VII.
[110] Under *Charter of the United Nations,* art 103, a state's obligations under the UN Charter prevail over any conflicting obligations arising from any other international agreement.
[111] Ian Hurd, 'Legitimacy, Power, and the Symbolic Life of the UN Security Council' (2002) 8(1) Global Governance 35, 35. See also, Ian Hurd, *After Anarchy: Legitimacy and Power in the United Nations Security Council* (Princeton University Press 2007).
[112] Ian Johnstone, 'Discursive Power in the UN Security Council' (2005-6) 2 Journal of International Law & International Relations 73, 73.

to the latter. Rather, various UN branches are involved in the construction of multiple legal and political frameworks for global counter-terrorism. As Schreuer writes:

> 'We should adjust our intellectual framework to a multi-layered reality consisting of a variety of authoritative structures. Under this functionalist approach what matters is not the formal status of a participant… but its actual or preferable exercise of functions.'[113]

Drawing upon Schachter's work, I approach each UN body as an international actor that identifies and attempts to address particular global challenges. 'The task faced by most UN bodies,' he writes, 'Is practical and instrumental – that is, to prepare a plan of action or to recommend state behaviour to achieve a goal… Problems are analysed, proposed solutions negotiated, decisions reached.'[114] Law and politics intermingle in this process of generating solutions; UN bodies exercise legal authority, are required to identify rules applicable in certain situations and often provide forums for states to demand the development or evolution of the law. Yet their decisions are also shaped by the political dynamics between states or groups thereof, with legal frameworks and discourses selectively invoked as justification for essentially political decisions that reflect Member States' will. Schachter writes:

> 'The concepts and principles of international law… are a conspicuous feature of UN debates. As the Secretary-General recently observed, "political discourse and the vocabulary of law mix cheerfully with one another… the dialectic between law and diplomacy is constantly at work. Perhaps it is not always "cheerful." The Secretary-General went on to say that "the United Nations shows, better than any other organisation, the competition States engage in to try and impose a dominant language and control the juridical ideology it expresses." We are thus reminded that legal discourse is not divorced from political conflict. On the one hand, the concepts of international law provide a necessary code of communication, and therefore greatly facilitate the institutionalisation of international society. On the other hand,

[113] Christoph Schreuer, 'The Waning of the Sovereign State: Towards a New Paradigm for International Law?' (1993) 4 European Journal of International Law 447.
[114] Oscar Schachter, 'United Nations Law' (1998) 4 American Journal of International Law 1, 6.

> international law is often relied upon by states to resist the transfer of their power to international authority."[115]

Thus, I analyse each UN body as an actor that navigates issues of global politics by reference to legal rules and often its own legal authority. When it comes to human rights, UN actors interchangeably refer to human rights law and more abstract concepts such as internationally accepted human rights 'standards', further complicating this relationship between the law and its political life. Each UN branch thus produces certain forms of 'legal output.' As mentioned above, the UNSC legislates on matters pertaining to international peace and security and has increasingly done so in the context of transnational terrorism. The UNGA has, meanwhile, become 'the world's clearing house for ideas and sentiments with an agenda covering practically all matters of international legal concern.'[116] As discussed in chapters 3 and 5, this entails the establishment of committees for the drafting of treaties, the negotiations of treaties themselves, and the adoption of these treaties as part of UNGA Resolutions.[117] At the same time, the declarations, resolutions, plans of action and strategic documents adopted by the UNGA (and, to an extent, the Secretariat) are important indicators of the coalescence of states' opinions on the legal frameworks that ought to apply in particular situations. These documents can be articulations of existing customary international law,[118] and are also indicators of what large sections of the international community believe the law *should* be. For example, in its Advisory Opinion on the *Legality of the Threat or Use of Nuclear Weapons*, the ICJ interpreted a series of UNGA resolutions as an indicator that a majority of the international community, bar those states in possession of nuclear weapons, believes that the threat or use of nuclear weapons *should* be unlawful.[119]

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[115] ibid 21.
[116] Schreuer (n 113) 453.
[117] Schachter (n 114) 2.
[118] ibid 4. Schachter uses the example of the 1970 *Declaration on Principles of International Law concerning Friendly Relations and Co-Operation among States in Accordance with the Charter of the United Nations.*
[119] *Legality of the Threat or Use of Nuclear Weapons* (Advisory Opinion) [1996] ICJ Rep 226, para 73: 'Having said this, the Court points out that the adoption each year by the General Assembly, by a large majority, of resolutions recalling the content of resolution 1653 (XVI), and requesting the member States to conclude a convention prohibiting the use of nuclear weapons in any circumstance, reveals the desire of a very large section of the international community to take, by a specific and express prohibition of the use of nuclear weapons, a significant step forward along the road to complete nuclear disarmament. The emergence, as *lex lata,* of a customary rule specifically prohibiting the use of nuclear weapons as such is hampered by the continuing tensions between the nascent *opinio juris* on the one hand, and the still strong adherence to the practice of deterrence on the other.'

Thus, the subsequent chapters illustrate the divergence in opinions of states, particularly those controlling the UNSC and developments within the UNGA, about the role and importance of human rights in global counter-terrorism.

In summary, what makes the UN an interesting and important object of study is the fact that it is the epicentre of the global politics of human rights. It represents both aspects of Beck's cosmopolitan work: the 'normative' aspect that calls for a cooperative and rights-based approach to global security and the 'realistic' aspect that calls for the study of violent and nationalistic responses to global challenges. There is, in other words, tension between the UN's cosmopolitan promise and the manner in which it upholds and entrenches structures of global politics. On one hand, the UN was designed as an institution that would secure human rights and peace among states through the promotion of international law. The Organisation's founding documents clearly reflect the hope that international law and organisations can contribute to a better world, and as shown in the subsequent chapters, this image is upheld and recreated in contemporary UN rhetoric. This rhetoric envisions a world order that is durable and capable of responding to the challenges posed by globalisation, particularly the emergence of territorially unbounded threats such as terrorism, as this world order is based upon a commitment to multilateralism and the formulation of pacific, rights-based solutions for problems. Yet on the other hand, the UN is driven by various layers and forms of politics among states and between its branches. Schachter thus lays out a helpful 'architectural metaphor' for the Organisation:

> 'On its ground floor, I place the actions of States – including the demands and goals of the governments and other organised groups in furtherance of their needs, wishes and expectations. On the second level are the activities of a legal character – the formation and invoking of legal norms, and their application to particular situations. On the third level, I would place the broad policy goals, aspirations and ideals that influence governments and other actors.'[120]

This study adds to Schachter's architectural metaphor a fourth floor, comprising the aspirations and ideals that the UN embodies, and that have taken on a life of their own within

[120] Schachter (n 114) 22.

the Organisation's institutional structures. Although it problematises the conflicting and political ways in which human rights are invoked within rhetoric relating to counter-terrorism, this study does not approach the UN as problematic in and of itself. Rather, I take the UN as an organisation that is aspirational in its design but is, in the way it functions, the sum total of its Member States. Thus, in reality, the Organisation symbolises and sustains the conflicting responses to cosmopolitisation – insularity and rights-based cooperation – outlined by Beck. Nevertheless, as Slaughter argues, if the Organisation 'cannot accomplish everything, it once again represents a significant repository for hopes of a better world.' She continues, 'Even as its current failures are tabulated… the almost-universal response is always to find ways to strengthen it.'[121] Thus, in the final chapter of this thesis, I return to this theoretical framework, reflecting upon the relationship between the UN's aspirations and the ways in which it operates.

E. How was Analysis Carried Out?

Analysis was carried out through an examination of UNSC, UNGA and Secretariat documents pertaining to the war on terror, which began in the immediate aftermath of September 11. These documents include, but are not limited to, resolutions, meeting records, transcripts of speeches, plans of action and strategies relating to global counter-terrorism, communications to Member States (such as documents regarding counter-terrorism committees' provision of technical legal assistance to states), reports of counter-terrorism committees, and the drafts or final texts of treaties annexed to UNGA resolutions. Various pre-September 11 documents were also included because of their direct relevance or application to the war on terror, with examples including UNSC Resolution 1267 (1999) which introduced the sanctions regime now applicable to al-Qaeda and ISIL, the sectoral conventions and protocols on the criminalisation of acts conducive to international terrorism, and various UNODC documents relating to transnational and organised crime.

Firstly, I sought to understand how human rights factor into these three organs' decisions, strategies and plans of action relating to counter-terrorism. Secondly, I examined how states,

[121] Anne-Marie Slaughter, 'International Law and International Relations Theory: A Dual Agenda' (1993) 87 American Journal of International Law 205, 205.

through the UNSC and UNGA, use the language of human rights in order to justify, call for, or challenge particular approaches to counter-terrorism. The following questions were considered in relation to each document examined:

1. Are human rights mentioned in this particular document?
2. Are human rights discussed specifically within the context of international human rights law or in broader, abstract terminology such as 'widely accepted standards' of human rights?
3. What exactly is being said about human rights? For example, does the document discuss the human rights implications of states' counter-terrorism measures or lay out a rights-based framework for counter-terrorism?
4. If the document is legally binding, are human rights mentioned within its operative part or the preamble?
5. What other international legal issues, if any, are considered within the document? Here, specific interest was taken in references to refugee law, international humanitarian law, use of force and the UN Charter, and in any discussion of the interaction between these legal regimes.
6. Does the document refer to any other UN documents that explicitly discuss the relationship between human rights and security? Examples include the UNGA's Global Counter-Terrorism Strategy, the Secretary-General's Plan of Action to Prevent Violent Extremism, and reports of the Human Rights Council's Special Rapporteurs on arbitrary detention and counter-terrorism and human rights.
7. If the document is a transcript of a UNSC or UNGA meeting, which states were represented in that meeting and which states, if any, explicitly spoke about human rights? What did the comments relate to and how, if at all, were they reflected in the outcome of the meeting?

Where possible, the documentary output of each individual branch was considered in chronological order, so as to allow an understanding of how approaches to human rights have evolved, if at all, over the time period in question. Insofar as intersections, oppositions and systems of reference between the work of various branches were observed, these observations are presented in the final chapter. While chapters 4 and 5 largely present the findings of the documentary analysis, the discussion in chapter 6 returns to the theoretical framework presented in this chapter, considering whether the work of these three branches

represents a progression toward a rights-based approach to global counter-terrorism within the context of Beck's cosmopolitan moment.

F. Conclusion

This chapter has laid out the theoretical framework for the research project. The project builds upon the strands of both critical international law scholarship and CTS that focus upon discourses. My primary interest is in how human rights frame arguments that demand, justify, advocate for, contest and criticise national and multilateral counter-terrorism policies and practices. That is, I am interested in how international human rights law is invoked, and often subverted, in order to support or resist particular *political* outcomes relating to counter-terrorism.

While this project is based upon a view of both human rights and security as discursive practices, it also attempts to address lacunae in critical scholarship that is based upon Foucault's conception of power. Part C of this chapter argued that while Foucault's writings provide an invaluable way of exposing states' invocation and manipulation of human rights in service of their own political agendas, they do not tell us why we should undertake this work or what, if anything, we should envision for the world. By contrast, this thesis is driven by the conviction that security policies and practices should be multilateral and should respect the rights and dignity of individuals near and far. This view, which I derived from the work of Beck and of advocates of emancipatory security, is not inconsistent with an awareness and critique of the way that human rights are politically manipulated within forums such as those provided by the UN. Rather, it motivates and provides a purpose for such a critique.

Part D showed that the UN is a particularly relevant area of research because it is at the crossroads of international human rights law and the politics of human rights. On one hand, the UN embodies the Kantian ideals that resurfaced at the end of World War II. The UN Charter promises a world in which human rights and peace are the law, and this promise resonates within both the decisions and proceedings of its organs. As a result, scholars and practitioners still look to the UN to fulfil its promise to bring about a better world. Yet the UN is also driven by its Member States and preserves their sovereign equality. Its organs are thus driven by the will of, and politics among, states. The language of international law and

organisations, which entails the vocabulary of human rights, provides states with a common lexicon, a way of talking about, understanding and proposing solutions to global problems. When states use the language of human rights to justify certain counter-terrorist measures, to demand that others implement particular laws and policies, or to criticise others' actions, they enact and entrench the politics of human rights. While the next chapter outlines the UN's legal and institutional frameworks for counter-terrorism, the remainder of this thesis explores and criticises the operation of this politics of human rights within the UN.

Chapter 3: Institutional and Legal Frameworks

A. Introduction

As discussed in chapters 1 and 2, the discourse of the war on terror was deliberately and meticulously constructed by the United States and its allies in the aftermath of September 11. This was, however, enabled by the emergence of terrorism as a matter of international concern over the course of the twentieth century. The issue of terrorism has, therefore, long been addressed in the subject matter of international law and the work of international organisations. The first act of international terrorism to be recognised as such by an international organisation was the assassination of King Alexander of Yugoslavia, while he was on a state visit to Marseilles in 1934.[1] In response, the League of Nations established a committee for the suppression of terrorism. The committee, Comras writes, 'Quickly took on a life of its own, attracting the interest and participation of some of Europe's best international jurists.'[2] An international convention for the suppression and punishment of political terrorism was opened for signature in 1937, but did not enter into force before the League collapsed and World War II commenced. Then, the Geneva Conventions, concluded at the end of World War II, addressed terrorist violence within the context of armed conflict; the Fourth Convention prohibits 'measures of intimidation or terrorism,' while both Additional Protocols prohibit 'acts or threats of violence' carried out by parties to an armed conflict, 'The primary purpose of which is to spread terror among the civilian population.'[3] The latter prohibition is considered to be part of the corpus of customary international humanitarian law relating to distinction, applicable to both international and non-international armed conflicts.[4]

Terrorism outside the context of armed conflicts re-emerged as a concern for both international lawyers and organisations in the late-twentieth century, a result of attacks

[1] Victor D Comras, *Flawed Diplomacy: The United Nations and the War on Terrorism* (Potomac 2010) 8.
[2] ibid.
[3] Geneva Convention Relative to the Protection of Civilian Persons in Time of War (adopted 12 August 1949, entered into force 21 October 1950) 75 UNTS 287 (GCIV) art 33; Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (adopted 8 June 1977, entered into force 7 December 1978) 1125 UNTS 3 (API) art 51(2); Protocol Additional to the Geneva Conventions of 12 August 1949 and Relating to the Protection of Victims of Non-International Armed Conflicts (adopted 8 June 1977, entered into force 7 December 1978) 1125 UNTS 609 (APII) art 13(2).
[4] Jean-Marie Henckaerts, 'Study on Customary International Humanitarian Law: A Contribution to the Understanding and Respect for the Rule of Law in Armed Conflict' (2005) 87 International Review of the Red Cross 175 (ICRC Customary IHL Study) 198.

including the hijacking of Air France Flight 139, the Munich massacre and the Lockerbie bombing. Many of these attacks were somehow transnational, in the sense that their conception, planning, funding, commencement and completion often occurred across different jurisdictions. This led to the adoption of a series of international conventions and protocols that promote domestic criminalisation of terrorist attacks and mutual legal assistance in the investigation of terrorist activity. These attacks, as well as al-Qaeda's emergence in the 1990s, also saw the UN begin to take an interest in the issue. As discussed in chapters 1 and 2, however, it was September 11 that led to the proliferation of the vast international institutional apparatus for counter-terrorism that exists today, with the beginning of the war on terror giving rise to widespread debate about the international laws applicable to counter-terrorism operations.

This chapter outlines the institutional and legal frameworks for global counter-terrorism. As a comprehensive account of all of these institutions and laws is beyond the scope of this thesis, I focus upon those actors and legal frameworks most relevant to, and explored throughout, this research project. Part B provides an overview of the mandates and roles of the various UN actors involved in counter-terrorism, detailing the nature of their work. It considers the UN's principal organs as well as the counter-terrorism committees they have established, all of which are involved in the development of frameworks and strategies for global counter-terrorism. What emerges from this outline is an image of the theoretical framework discussed in chapter 2; the UN comprises a range of international actors, each with its own mandate, structure, membership and approach to counter-terrorism.

Part C considers the international legal frameworks applicable to terrorism. It begins with an outline of the nineteen 'sectoral conventions' that provide a framework for the domestic criminalisation of terrorist activity and facilitate mutual legal assistance among the states parties. It also considers the Draft Comprehensive Convention on International Terrorism, which remains under negotiation. Thirdly, part C discusses terrorism under international criminal law, including the question of its inclusion in the Rome Statute of the International Criminal Court (ICC) and the Special Tribunal for Lebanon's decision relating to terrorism's status as a crime under customary international law. Part C demonstrates that while there have been significant developments in international law relating to terrorism over the past

forty years, neither terrorist attacks nor terrorist activity have been established as *sui generis* international crimes. While the existing legal framework enables the worldwide criminalisation of terrorism by establishing 'prosecute or extradite' (*aut dedere aut judicare*) requirements for offences conducive to terrorism, the political disagreements that have led to the stagnancy of both the Draft Comprehensive Convention and international criminal law relating to terrorism have also manifested in the politics of the UN; these issues are discussed in chapters 4, 5 and 6.

Finally, part D draws the sprawling legal and institutional frameworks for counter-terrorism together, outlining the nature of states' obligations relating to counter-terrorism and discussing the evolving roles of international law and organisations. Part D also discusses the relationship between the institutional framework outlined below, the theoretical framework outlined in chapter 2, and the substantive chapters of this thesis. I argue that while the past two decades have seen the proliferation of a vast legal and institutional apparatus for global counter-terrorism, these laws and institutions do not always work in tandem, as a cohesive whole. Rather, they overlap, intersect and oppose. The sprawling and messy nature of the institutional and legal frameworks for counter-terrorism results from and exacerbates the politics among states and UN organs, creating an environment in which competing counter-terrorism strategies – with inconsistent approaches to the relationship between human rights and counter-terrorism – can coexist.

B. UN Institutional Framework

B.1. The Security Council

Tasked with the maintenance of international peace and security, the UNSC is extensively involved in the formation and implementation of global counter-terrorism measures. In accordance with Chapter VII of the Charter, the Council can identify the 'existence of any threat to the peace, breach of the peace, or act of aggression,' and can recommend both non-forceful and forceful measures that should be taken to restore international peace and security.[5] All UN Member States bear an obligation under the UN Charter to carry out the UNSC's Chapter VII decisions,[6] and, as is well known, states' obligations arising from the

[5] *Charter of the United Nations,* arts 39, 41, 42.
[6] ibid art 25.

Charter take precedence over any conflicting obligations arising from another international agreement.[7] As discussed in chapters 1 and 2, the UNSC's power under the Charter has allowed it to play an increasingly legislative function in the context of the war on terror.[8] Its Chapter VII powers, which were seldom used before September 11, are now harnessed by its permanent members in order to require the worldwide implementation of sweeping counter-terrorism measures. Many of the Council's decisions mirror the content of the sectoral conventions, outlined below. This means that the Security Council's decisions have removed the need for state consent in the making of international law relating to counter-terrorism. The measures mandated by the Council can be divided into four interlocking categories: suppression and prevention of terrorist activity, financial and travel restrictions upon known terrorists, prevention of terrorists' acquisition of weapons of mass destruction (WMDs), and, most recently, criminalisation of the activities of foreign terrorist fighters.

The UNSC's efforts to prevent and suppress terrorism are based upon Resolution 1373, which was passed in the immediate aftermath of September 11.[9] Adopted under the Council's Chapter VII powers, the Resolution required states to prevent the financing of terrorism,[10] freeze the assets of persons involved in terrorism,[11] refrain from materially supporting persons involved in terrorist activity,[12] share intelligence with other states, assist states in the investigation of terrorist acts,[13] deny safe haven to individuals involved in terrorist activity,[14] bring individuals with any involvement in terrorism to justice through prosecution or extradition, establish terrorist acts as serious crimes under their domestic law,[15] and prevent the movement of terrorists through effective border controls and monitoring of travel

[7] *Charter of the United Nations,* art 103: 'In the event of a conflict between 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.'
[8] Antony Anghie, 'On Making War on the Terrorist: Imperialism as Self-Defence' in *Imperialism, Sovereignty and the Making of International Law* (Cambridge University Press 2005) 305; Jacob Katz Cogan, 'The Regulatory Turn in International Law' (2011) 52 Harvard International Law Journal 321. Katz Cogan suggests that we are seeing a 'regulatory turn' in international law, in which international law, organisations and states have greater regulatory power vis-à-vis individuals and entities. He cites the UNSC's 1267 sanctions regime (below) as an example, among other things.
[9] UNSC Res 1373 (28 September 2001) UN Doc S/RES/1373.
[10] ibid para 1(a).
[11] ibid para 1(c).
[12] ibid para 2(a).
[13] ibid paras 2(b), 2(f).
[14] ibid para 2(c).
[15] ibid para 2(d).

documentation.[16] The Resolution also encouraged states to implement the sectoral conventions and protocols relating to terrorism.[17] The UNSC established the 1373 Committee (also known as the Counter-Terrorism Committee or 'CTC') to oversee states' implementation of the Resolution,[18] as well as those measures mandated in subsequent resolutions. In 2004, the UNSC established the CTC Executive Directorate (CTED) to assist the CTC in fulfilling its role.[19]

While Resolution 1373 mandated the implementation of a range of domestic counter-terrorism measures, it also recognised states' inherent right to self-defence and allowed them to take 'necessary steps to prevent the commission of terrorist acts.'[20] The actions authorised by this Resolution 'arguably included the use of force for the very broad purpose of preventing terrorism'[21] – an issue that I discuss in greater detail below – but the document's substantive text focused upon interstate cooperation and the implementation of the domestic counter-terrorism measures outlined above. In terms of the breadth of the measures and law reforms it mandated, the Resolution remains the most far-reaching adopted in the Council's history. The Resolution also laid the foundations for the UNSC's constant recourse to its Chapter VII powers in order to shape an internationally uniform approach to counter-terrorism. Notably, Resolution 1624, adopted in 2005, called upon states to 'prohibit by law incitement to commit a terrorist act or acts' and to deny safe haven to persons thought to be guilty of having done so.[22] Resolution 1624 was the first UNSC resolution that, in one of its operative paragraphs, called upon states to implement counter-terrorism measures in a manner consistent with their other obligations under international law, particularly international human rights, humanitarian and refugee law.[23] While it is encouraging that the Council recognised the

[16] ibid para 2(g).
[17] ibid Preamble para 7. See below for outline.
[18] ibid para 6.
[19] UNSC Res 1535 (26 March 2004) UN Doc S/RES/1535, para 2.
[20] UN Doc S/RES/1373 (2001) Preamble para 4, para 2(b). The Council also recognised states' inherent right to self-defence in Resolution 1368, adopted immediately in response to 9/11. See UNSC Res 1368 (12 September 2001) UN Doc S/RES/1368.
[21] Anghie (n 8) 299. See below for further discussion on issues relating to the use of force.
[22] UNSC Res 1624 (14 September 2005) UN Doc S/RES/1624, para 1.
[23] ibid para 4. The statement was, however, limited to the scope of this particular Resolution: 'States must ensure that any measures taken to implement paragraphs 1, 2 and 3 of the Resolution comply with all of their obligations under international law, particularly international human rights law, refugee law, and humanitarian law.' This mirrored part of a declaration adopted by the UNSC following a meeting of Ministers for Foreign Affairs in 2003: UNSC Res 1456 (20 January 2003) UN Doc S/RES/1456, Annex, para 6. See also Fionnuala Ní

importance of respecting human rights while countering terrorism, the Resolution marked the beginning of a new pattern in the Council's decisions, which regularly call upon states to respect human rights while mandating the implementation of measures that are likely to have the opposite effect. The criminalisation of incitement to commit an act of terrorism and material support for terrorism, for example, allows states to prohibit the expression of political opposition, and has enabled the prosecution of human rights advocates, humanitarian organisations and lawyers involved in the defence of terrorist suspects.[24] These issues are discussed in chapter 4.

The second element of the UNSC's counter-terrorism framework is the targeted sanctions regime, established in 1999.[25] The sanctions regime was initially aimed at associates of Osama bin Laden and the Taliban,[26] but was expanded to include al-Qaeda and IS in 2000 and 2015 respectively.[27] Resolution 1267 required states to freeze the assets of individuals or entities designated as members or supporters of the proscribed organisations.[28] It established the Sanctions Committee to oversee the implementation of the asset freeze[29] and to designate individuals or entities as members or associates of the above-mentioned organisations.[30] The names of these persons are placed on the 'Consolidated List,' which is regularly updated and forwarded to states.[31] Travel bans were introduced in 2002, with Resolution 1390 requiring states to prevent the entry into and transit through their territories of listed individuals and to prevent the departure from their territories of any listed individuals who are their

Aoláin, 'The UN Security Council's Outsized Role in Shaping Counter-Terrorism Regulation and its Impact on Human Rights' (*Just Security Blog*, 19 October 2018) <https://www.justsecurity.org/61150/security-council-mainstream-human-rights-counter-terrorism-regulation/> (accessed 23 May 2019).

[24] See Justin Fraterman, 'Criminalising Humanitarian Relief: Are U.S. Material Support for Terrorism Laws Compatible with International Humanitarian Law?' (2012) 106 Proceedings of the Annual Meeting: American Society of International Law 257; Brandon J Smith, 'Protecting Citizens and Their Speech: Balancing National Security and Free Speech when Prosecuting the Material Support of Terrorism' (2013) 59(1) Loyola Law Review 89; Brent Tunis, 'Material-Support-To-Terrorism Prosecutions: Fighting Terrorism by Eroding Judicial Review' (2012) 49 American Criminal Law Review 269.

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

[26] ibid para 4(b).

[27] UNSC Res 1333 (19 December 2000) UN Doc S/RES/1333, para 8(c); UNSC Res 2253 (17 December 2015) UN Doc S/RES/2253, para 1.

[28] UN Doc S/RES/1267 (1999) para 4(b). This included, at the time, Osama bin Laden and the Taliban.

[29] ibid para 6.

[30] ibid para 4(b).

[31] UNSC, 'Guidelines of the Committee for the Conduct of its Work' (5 September 2018) §5, para (b) <https://www.un.org/securitycouncil/sites/www.un.org.securitycouncil/files/guidelines_of_the_committee_for_the_conduct_of_its_work_0.pdf> accessed 23 May 2019.

nationals.[32] Resolution 1390 also introduced an arms embargo, requiring states to prevent the sale or supply of arms or military equipment to listed individuals and entities, both within their territories and by their nationals abroad.[33] Thus, the scope of the sanctions regime has evolved over time, such that states are now required to impose a travel ban, arms embargo and assets freeze upon each individual and entity placed on the Consolidated List.

The sanctions regime initially lacked a formalised mechanism for individuals or entities to appeal or request a review of their inclusion on the Consolidated List. The regime thus became the subject of widespread criticism, with scholars and human rights advocates calling for greater transparency, procedural fairness and respect for human rights standards.[34] The UNSC has attempted to address these concerns through the gradual reform of the sanctions regime, establishing procedures for the release of assets on humanitarian grounds, exceptions to travel bans and delisting.[35] Resolution 1267 initially granted the Sanctions Committee and states limited discretion to release frozen assets 'on the grounds of humanitarian need.'[36] Although the Committee makes major decisions on a case-by-case basis,[37] states are authorised to release enough assets to allow listed individuals to pay for basic expenses such as medicine, rent, food and legal counsel.[38] Meanwhile, in 2011, the

[32] UNSC Res 1390 (16 January 2002) UN Doc S/RES/1390, para 2(b).
[33] ibid para 2(c).
[34] See, for example, Ní Aolaín (n 23); Devika Hovell, *The Power of Process: The Value of Due Process in Security Council Decision-Making* (Oxford University Press 2016); Devika Hovell, 'The Deliberative Deficit: Transparency, Access to Information and UN Sanctions' in Jeremy Farall and Kim Rubenstein (eds), *Sanctions Accountability and Governance in a Globalized World* (Cambridge University Press 2009); Ian Johnstone, 'The UN Security Council, Counterterrorism and Human Rights' in Andrea Bianchi and Alexis Keller (eds), *Counterterrorism: Democracy's Challenge* (Hart 2008); Bardo Fassbender, 'Targeted Sanctions and Due Process' (*UN Office of Legal Affairs*, 20 March 2006) <https://www.un.org/law/counsel/Fassbender_study.pdf> accessed 23 May 2019; UN Human Rights Council 'Report of the Special Rapporteur on the Promotion and Protection of Human Rights and Fundamental Freedoms while Countering Terrorism' (21 February 2017) UN Doc A/HRC/34/61, paras 17-20.
[35] However, it should be noted that some remain concerned about the human rights implications of the 1267 sanctions regime. For example, as Special Rapporteur on human rights and counter-terrorism, Fionnuala Ní Aoláin has drawn attention to the possibility that the international sanctions regime introduced by Resolution 1267 and the national and regional sanctions mandated by Resolution 1373 may result in the imposition of sanctions on humanitarian workers and civil society actors on spurious grounds of 'material support' for terrorism. See UN Human Rights Council 'Report of the Special Rapporteur on the Promotion and Protection of Human Rights and Fundamental Freedoms while Countering Terrorism' (18 February 2019) UN Doc A/HRC/40/52, paras 20-22, 73(g). For further discussion, see ch 4.
[36] UN Doc S/RES/1267 (1999) para 4(b).
[37] ibid.
[38] UN Office on Drugs and Crime (UNODC), 'Frequently Asked Questions on International Law Aspects of Countering Terrorism' (*United Nations,* 2009) 33 <https://www.unodc.org/documents/terrorism/Publications/FAQ/English.pdf> accessed 18 May 2019.

UNSC established criteria for exemptions from the travel ban.[39] The Council stressed that individuals cannot be denied entry into or expelled from their state of nationality based upon their inclusion on the Consolidated List. The UNSC also decided that travel embargoes are inapplicable where entry into, or transit through, a state's territory is necessary for the fulfilment of a judicial process, or where the Sanctions Committee otherwise determines that entry or transit is necessary.[40] As above, these determinations are made on a case-by-case basis.[41] The delisting mechanism, meanwhile, was established in 2006,[42] but initially allowed only states to submit delisting requests. This system was revised in 2009, when the UNSC established the Office of the Ombudsperson to receive individual requests for delisting.[43] The delisting mechanism is seldom used by states or individuals on the Consolidated List. By February 2020, 83 delisting requests had been resolved through the Ombudsperson's procedure; 59 of those requests were approved, resulting in the delisting of 54 individuals and 28 entities.[44]

In the aftermath of September 11, many came to fear that terrorists might acquire and deploy WMDs. These fears were not entirely unfounded; as van de Velde points out, several members of al-Qaeda's leadership – including bin Laden, al-Zawahiri and Khalid Shaikh Muhammad – sought to recruit scientists to the organisation for the purposes of acquiring or developing a WMD for use in a future attack.[45] This possibility greatly concerned world leaders, with Presidents Bush and Obama both describing nuclear terrorism as the leading threat to the United States' security, and the Bush administration establishing an American partnership with Russia to launch the Global Initiative to Combat Nuclear Terrorism.[46] The

[39] UNSC Res 1989 (17 June 2011) UN Doc S/RES/1989 para 1(b).
[40] ibid.
[41] UNSC (n 31) §12, para (a).
[42] UNSC Res 1730 (19 December 2006) UN Doc S/RES/1730.
[43] UNSC Res 1904 (17 December 2009) UN Doc S/RES/1904, para 20. The Ombudsperson's mandate was extended in subsequent resolutions: UN Doc S/RES/1989 (2011); UNSC Res 2083 (17 December 2012) UN Doc S/RES/2083; UNSC Res 2161 (17 June 2014) UN Doc S/RES/2161; UN Doc S/RES/2253 (2015). The Ombudsperson's current mandate expires in December 2021: UNSC Res 2368 (20 July 2017) UN Doc S/RES/2368, para 60.
[44] UNSC 'Report of the Office of the Ombudsperson Pursuant to Security Council Resolution 2368 (2017)' (6 February 2019) UN Doc S/2020/106, para 6.
[45] James R van de Velde, 'The Impossible Challenge of Deterring "Nuclear Terrorism" by Al Qaeda' (2010) 33 Studies in Conflict & Terrorism 682, 684.
[46] Siegfried S Hecker, 'Questions for the Presidential Candidates on Nuclear Terrorism, Proliferation, Weapons Policy, and Energy' (2016) 72 Bulletin of the Atomic Scientists 276, 276.

need to prevent nuclear terrorism soon became a priority at the UN. The perceived urgency of this threat was reflected in the 2004 Report of the High-level Panel on Threats, Challenges and Change:

> 'Experts estimate that terrorists… [could] create an improvised nuclear device that could level a medium-sized city. Border controls will not provide adequate defence against this threat. To overcome the threat of nuclear terrorism requires the cooperation of States, strong and weak, to clean up stockpiles of HEU,[47] better protect shipping containers at ports and agree on new rules regulating the enrichment of uranium.'[48]

The UNSC has, therefore, introduced a range of measures to prevent non-state actors' acquisition, manufacture or transportation of WMDs or requisite parts thereof. In 2004, the Council adopted a Resolution requiring states to refrain from providing support to non-state actors that develop or acquire WMDs.[49] The Council decided that states must legally prohibit non-state actors from accessing, possessing or developing WMDs,[50] and must sufficiently safeguard nuclear materials within their territories.[51] The 1540 Committee was established in order to oversee and assist in states' implementation of these measures.[52] The Council has also encouraged states to assist others' efforts to safeguard nuclear materials by making contributions to the UN Trust Fund for Global and Regional Disarmament Activities.[53]

The fourth, and most recent, element of the UNSC's counter-terrorism framework is its work relating to 'foreign terrorist fighters.' Thousands of individuals from around the world have travelled to Syria and Iraq in order to support, train with or fight alongside non-state armed groups involved in conflicts in the region.[54] These organisations, including the Al-Nusra Front and ISIL, recruit individuals by disseminating propaganda via the internet, but must also rely upon individuals and entities who are willing to fund or facilitate foreign fighters'

[47] Highly enriched uranium.
[48] Secretary-General 'A More Secure World: Our Shared Responsibility – Report of the High-Level Panel on Threats, Challenges and Change' (2 December 2004) UN Doc A/59/565, 21.
[49] UNSC Res 1540 (28 April 2004) UN Doc S/RES/1540, para 1.
[50] ibid para 2.
[51] ibid para 3.
[52] ibid para 4.
[53] UNSC Res 2325 (16 December 2016) UN Doc S/RES/2325.
[54] Lisa Ginsborg, 'One Step Forward, Two Steps Back: The Security Council, "Foreign Terrorist Fighters", and Human Rights' in Manfred Nowak and Anne Charbord (eds), *Using Human Rights to Counter Terrorism* (Edward Elgar 2018) 217.

international travel.[55] There are, therefore, various multinational dimensions to this issue. One of the most significant is the fear of the 'blowback effect'; this is the possibility that foreign terrorist fighters will eventually return to their states of nationality having been indoctrinated with extremist ideology and trained in terrorist tactics.[56] These concerns will, no doubt, continue to escalate within the context of the supposed defeat of ISIL in Iraq and Syria and its loss of territory in the region. As the threat of nuclear terrorism did around the turn of the millennium, the threat posed by foreign terrorist fighters has become a focal point at the UN. In 2015, for example, the Secretary-General stated:

> 'Violent extremists have been able to recruit over 30,000 foreign terrorist fighters from over 100 Member States… Some of them will no doubt be horrified by what they see and anxious to put the experience behind them, but others have already returned to their home countries – and more will undoubtedly follow – to spread hatred, intolerance and violence in their own communities.'[57]

Unsurprisingly, then, the UNSC has implemented a range of measures relating to foreign terrorist fighters. This began with Resolution 2178, adopted in 2014. The Resolution required states to criminalise individuals' travel to the territory of another state for the purposes of perpetrating, preparing or participating in terrorist attacks, or acquiring terrorist training.[58] In accordance with Resolution 1373, outlined above, Resolution 2178 also required states to criminalise financial support for individuals who travel, or plan to travel, overseas for the purposes of partaking in terrorist activity.[59] The adoption of this Resolution led to the implementation of new laws in various states, many of which entail amendments to criminal codes, stricter border controls and tighter citizenship or immigration policies.[60] Since its

[55] See Mia Bloom and Chelsea Daymon, 'Assessing the Future Threat: ISIS's Virtual Caliphate' (2018) 62(3) Orbis 372; Imran Awan, 'Cyber-Extremism: Isis and the Power of Social Media' (2017) 54(2) Society 138.
[56] Cerwyn Moore and Paul Tumelty, 'Foreign Fighters and the Case of Chechnya: A Critical Assessment' (2008) 31 Studies in Conflict and Terrorism 412; Daniel Byman, 'The Homecomings: What Happens When Arab Foreign Fighters in Iraq and Syria Return?' (2015) 38 Studies in Conflict and Terrorism 518.
[57] UNGA 'Plan of Action to Prevent Violent Extremism: Report of the Secretary-General' (2015) UN Doc A/70/674, para 3.
[58] UNSC Res 2178 (24 September 2014) UN Doc S/RES/2178, para 6(a).
[59] ibid paras 5, 6(b).
[60] See Ní Aoláin (n 35); Aaron Y Zelin and Jonathan Prohov, 'How Western Non-EU States are Responding to Foreign Fighters: A Glance at the USA, Canada, Australia, and New Zealand's Laws and Policies' in Andrea de Guttry et al. (eds), *Foreign Fighters under International Law and Beyond* (Springer 2016); Christoph Paulussen and Eva Entenmann, 'National Responses in Select Western European Countries to the Foreign Fighter Phenomenon' in Andrea de Guttry et al. (eds), *Foreign Fighters under International Law and Beyond* (Springer 2016); Amos Toh, 'Australia's Draconian Response to the Security Council's Resolution on Foreign Terrorist Fighters (*Just Security*, 7 October 2014) <https://www.justsecurity.org/15937/australias-draconian-response-

adoption of Resolution 2178, the UNSC has continually emphasised the importance of the criminalisation of foreign terrorist fighters' actions, as well as interstate cooperation in the suppression and punishment of their behaviour.[61] In 2017, the Council significantly expanded the range of measures that states are required to take in relation to foreign terrorist fighters. Specifically, Resolution 2396 required states to bolster their abilities to detect, suppress and respond to foreign terrorist fighters' international travel. The Council decided that states must, by law, require international airlines to share advanced passenger information with relevant national authorities,[62] develop systems to collect passenger name record (PNR) data and biometric data,[63] and to maintain national terrorist watchlists and databases.[64] Chapter 4 discusses the UNSC's decisions relating to foreign terrorist fighters at length. It shows that, while resolutions about foreign terrorist fighters explicitly engage with human rights issues, many have led to states' hasty implementation of criminal laws and data collection requirements that endanger the rights to privacy, freedom from arbitrary detention and a fair trial. More broadly, I problematise the concept of a 'foreign terrorist fighter,' which is repeatedly used in the UNSC's decisions and has become commonplace in counter-terrorism vernacular. The term is, however, political. It associates the conflicts in Syria and Iraq with the 'Islamic terrorist' threat to Western countries, encouraging the assumption that young people who travel to Syria and Iraq will return with the intent to maliciously harm their home countries. Thus, directly relating to the discussion of language presented in chapter 2, the term 'foreign terrorist fighter' is used by and within the UNSC in order to dictate how individuals who have travelled to Syria and Iraq should be perceived, spoken of and treated within law and policy.

security-councils-resolution-foreign-terrorist-fighters/> accessed 23 March 2019; CTED, 'Implementation of Security Council Resolution 2178 (2014) by States Affected by Foreign Terrorist Fighters: A Compilation of Three Reports (Reports S/2015/338, S/2015/683 and S/2015/975, 2015)' (*United Nations,* 2016) <https://www.un.org/sc/ctc/wp-content/uploads/2016/09/FTF-Report-1-3_English.pdf> accessed 24 May 2019.

[61] See UNSC Res 2195 (19 December 2014) UN Doc S/RES/2195; UNSC Res 2249 (20 November 2015) UN Doc S/RES/2249; UN Doc S/RES/2253 (2015); UNSC Res 2309 (22 September 2016) UN Doc S/RES/2309; UNSC Res 2322 (12 December 2016) UN Doc S/RES/2322; UNSC Res 2354 (24 May 3017) UN Doc S/RES/2354; UNSC Res 2379 (21 September 2017) UN Doc S/RES/2379; UNSC Res 2462 (28 March 2019) UN Doc S/RES/2462.

[62] UNSC Res 2396 (21 December 2017) UN Doc S/RES/2396, para 11.

[63] ibid paras 12, 15.

[64] ibid para 13.

The UNSC has, therefore, been extensively involved in international counter-terrorism efforts since 1999. This is not to say that terrorism is a new concern for the Council; for example, the Council exercised its Chapter VII powers in 1992 in relation to the bombing of Pan Am Flight 103 over Lockerbie, Scotland, demanding that Libya comply with UK and US requests for extradition of the suspects and imposing international sanctions on Libya in order to induce its compliance with the Resolution.[65] However, the frequency of the UNSC's exercise of its Chapter VII powers has greatly increased since September 11, such that it now 'exists permanently in a Chapter VII mode and… purport[s] to legislate in all manner of international activities.'[66] Through the continual use of its emergency powers, the Council has internationally replicated the prolonged states of emergency imposed by states including France and the United States, two of its permanent members, in response to terrorist attacks.[67] Unsurprisingly, the Council's continuous recourse to these powers has given rise to significant human rights implications, which are discussed at length in chapter 4.

B.2. The General Assembly

The UNGA is responsible for the elaboration of the international framework for counter-terrorism.[68] Launched in 2006, its 'Global Counter-Terrorism Strategy' ('the Strategy') was designed as a guide for all other UN actions relating to terrorism.[69] The Strategy is, in other words, an attempt to harmonise all UN branches' counter-terrorism efforts. It is based upon the recommendations of Kofi Annan's High-level Panel on Threats, Challenges and Change,[70] which, in 2004, called for the establishment of a comprehensive, UN-wide counter-terrorism strategy that addresses root causes of terrorism, facilitates cooperation between states, ensures that states' counter-terrorism measures respect human rights and the rule of law and

[65] UNSC Res 731 (21 January 1992) UN Doc S/RES/731; UNSC Res 748 (31 March 1992) UN Doc S/RES/748. See also UNSC Res 883 (11 November 1993) UN Doc S/RES/883.
[66] Anghie (n 8) 305.
[67] See Cécile Guérin-Bargues, 'The French Case or the Hidden Dangers of a Long-Term State of Emergency' in Pierre Auriel, Oliver Beaud and Carl Wellman (eds), *The Rule of Crisis: Terrorism, Emergency Legislation and the Rule of Law* (Springer 2018); Jennifer Daskal and Stephen I Vladeck, 'After the AUMF' (2014) 5 Harvard National Security Journal 115, 116; Kent Roach, 'The Continued Exceptionalism of the American Response to Daesh' in Pierre Auriel, Oliver Beaud and Carl Wellman (eds), *The Rule of Crisis: Terrorism, Emergency Legislation and the Rule of Law* (Springer 2018) 76.
[68] UNODC, 'Frequently Asked Questions on International Law Aspects of Countering Terrorism' (2009) 17.
[69] UNGA 'Global Counter-Terrorism Strategy' (20 September 2006) UN Doc A/RES/60/288, Annex ('UN Global Counter-Terrorism Strategy').
[70] Comras (n 1) xvi.

stops the proliferation of dangerous materials.[71] The Strategy is a living document, which is biannually reviewed and updated to reflect new trends or developments in the field.[72] The Strategy comprises four 'pillars' of action, the first aiming to address the conditions conductive to the spread of terrorism.[73] It highlights the importance of resolving prolonged violent conflicts, promoting intercultural dialogue, encouraging international development, ensuring religious and cultural inclusiveness around the world, protecting universal human rights and the rule of law, and humanising victims of terrorism.[74] Meanwhile, Pillar II outlines a range of measures to 'prevent and combat' terrorism, urging states to refrain from financing or supporting terrorism, provide one another with mutual legal assistance, share intelligence with one another, and ensure that the perpetrators of terrorist acts are apprehended and prosecuted.[75] Pillar III considers international actors' roles in building states' capacity to counter terrorism.[76] It focuses on the roles of the CTC, UN Office on Drugs and Crime (UNODC), International Monetary Fund (IMF), World Bank, International Atomic Energy Agency (IAEA), World Health Organisation (WHO), International Maritime Organisation (IMO), International Civil Aviation Organisation (ICAO) and other bodies in providing states with technical legal assistance.[77] Finally, Pillar IV outlines a number of measures to ensure that the international fight against terrorism is based upon respect for human rights and the rule of law.[78] It reminds states that their counter-terrorism measures must be consistent with their human rights obligations, urges them to become parties to the core human rights treaties, and considers the roles of the Human Rights Council, its special procedures and the human rights treaty bodies.[79]

[71] Report of the High-level Panel on Threats, Challenges and Change (2004) para 148.
[72] UNGA 'The United Nations Global Counter-Terrorism Strategy Review' (2 July 2018) UN Doc A/RES/72/284; UNGA 'The United Nations Global Counter-Terrorism Strategy Review' (1 July 2016) UN Doc A/RES/70/291; UNGA 'The United Nations Global Counter-Terrorism Strategy Review' (13 June 2014) UN Doc A/RES/68/276; UNGA 'The United Nations Global Counter-Terrorism Strategy Review' (29 June 2012) UN Doc A/RES/66/282; UNGA 'The United Nations Global Counter-Terrorism Strategy Review' (8 September 2010) UN Doc A/RES/64/297; UNGA 'The United Nations Global Counter-Terrorism Strategy Review' (5 September 2008) UN Doc A/RES/62/272.
[73] UN Global Counter-Terrorism Strategy, pt I.
[74] ibid.
[75] ibid pt II.
[76] ibid pt III.
[77] ibid.
[78] ibid pt IV.
[79] ibid.

Various committees of the UNGA also contribute to its efforts to implement the Strategy. The most significant is the Ad Hoc Committee established by Resolution 51/210,[80] which was mandated to elaborate international conventions relating to terrorist bombings, financing of terrorism and nuclear terrorism.[81] In 2000, the Committee was asked to develop a comprehensive convention regarding international terrorism, a draft of which was completed in 2005.[82] The Third Committee (Social, Humanitarian and Cultural Committee) and Sixth Committee (Legal Committee) also contribute to the UNGA's counter-terrorism efforts. While the former considers international terrorism as it relates to crime prevention and criminal justice, the Legal Committee addresses a variety of legal issues arising from international terrorism. Most notably, the Legal Committee's 1994 'Declaration on Measures to Eliminate International Terrorism' – a response to the 'rapid expansion of the spread of acts of terrorism in many regions of the world,'[83] including the 1988 Lockerbie bombing and 1993 World Trade Center bombing – defined terrorism as an international crime, regardless of where it occurs.[84]

Chapter 5 discusses the UNGA's proceedings and decisions relating to counter-terrorism, especially the Global Strategy and its reviews. I argue that much of the UNGA's work is a direct answer to the UNSC's decisions, the former being more consistently and explicitly in line with existing international frameworks, including human rights law. I suggest, however, that the human rights content of the UNGA's decisions largely reflects the will of states of the Global South. Chapter 5 suggests that the UNSC's and UNGA's differing approaches to the relationship between human rights and counter-terrorism are a manifestation of the broader political relationship between those two UN organs and of the fault line between states of the Global South and North, whose visions for – and expectations of – the UN differ.

B.3. Secretariat

[80] UNGA Res 51/210 (16 January 1997) UN Doc GA/RES/51/210; UN Office of Legal Affairs (OLA), 'Ad Hoc Committee Established by General Assembly Resolution 51/210 of 17 December 1996' (*United Nations,* 16 February 2017) <http://legal.un.org/committees/terrorism/> accessed 24 May 2019.
[81] These are outlined in section C, below.
[82] UNGA 'Draft Comprehensive Convention against International Terrorism' (12 August 2005) UN Doc A/59/894 ('Draft Comprehensive Convention').
[83] Rohan Perera, 'Introductory Note to the Declaration on Measures to Eliminate International Terrorism' (*UN Audiovisual Library of International Law*, 2020) <https://legal.un.org/avl/ha/dot/dot.html> accessed 20 April 2020.
[84] Declaration on Measures to Eliminate International Terrorism, UNGA Res 49/60 (9 December 1994) UN Doc A/RES/49/60, Annex.

Led by the Secretary-General (SG), the Secretariat has a symbiotic relationship with the UNGA, its primary role being the execution of UNGA decisions including the Strategy. Until 2018, the Secretariat primarily fulfilled this role through the Counter-Terrorism Implementation Task Force (CTITF), which was established by Kofi Annan in 2005.[85] The CTITF was a 'coordinating and information-sharing body' that aimed to ensure consistency and cooperation in the actions of the various UN branches involved in counter-terrorism.[86] Following the UNGA's adoption of the Strategy in 2006, the CTITF established various working groups to undertake operational counter-terrorism work. These working groups focused on 'special substantive' areas including human rights and counter-terrorism, victims of terrorism, counter-radicalisation and use of the internet for the purposes of terrorism.[87] Many of these working groups engaged with human rights issues. The Strategy also called for the creation of an 'international centre to fight terrorism,'[88] which led to the SG's establishment of the UN Counter-Terrorism Centre (UNCCT) as part of the CTITF in 2011.[89] The UNCCT aims to enrich the UN's technical counter-terrorism expertise, to assist in the development of national and regional counter-terrorism plans, and to promote interstate cooperation.

In 2017, the UNCCT and CTITF were moved from the UN Department of Political Affairs to the newly established Office of Counter-Terrorism (UNOCT),[90] with Vladimir Voronkov appointed as Under-Secretary-General of the UNOCT soon after.[91] The UNOCT and the Under-Secretary-General provide leadership on UNGA counter-terrorism mandates entrusted to the SG, aiming to coordinate between the UNSC, UNGA, their counter-terrorism committees and

[85] Counter-Terrorism Implementation Task Force (CTITF), 'About the Task Force' (*United Nations,* 2017) <https://www.un.org/counterterrorism/ctitf/en/about-task-force> accessed 27 February 2017.
[86] ibid.
[87] UNODC, 'Frequently Asked Questions on International Law Aspects of Countering Terrorism' (2009) 23.
[88] UN Global Counter-Terrorism Strategy, 6.
[89] UN Counter-Terrorism Centre (UNCCT), 'Background' (*United Nations,* 2017) <https://www.un.org/counterterrorism/ctitf/en/uncct/background> accessed 28 February 2017.
[90] Strengthening the Capability of the United Nations System to Assist Member States in Implementing the United Nations Global Counter-Terrorism Strategy, UNGA Res 71/291 (19 June 2017) UN Doc A/RES/291, paras 1-2. See also: UNGA 'Capability of the United Nations System to Assist Member States in Implementing the United Nations Global Counter-Terrorism Strategy: Report of the Secretary-General' (3 April 2017) UN Doc A/71/858, paras 62-68; UN Office of Counter-Terrorism (UNOCT), 'Coordination and Coherence of the Counter-Terrorism Efforts of the United Nations' (*United Nations,* 2019) <https://www.un.org/counterterrorism/ctitf/en> accessed 25 May 2019.
[91] UN Secretary-General, 'Mr. Vladimir Ivanovich Voronkov of the Russian Federation: Under-Secretary-General of the United Nations Counter-Terrorism Office' (*United Nations,* 21 June 2017) < https://www.un.org/sg/en/content/sg/personnel-appointments/2017-06-21/mr-vladimir-ivanovich-voronkov-russian-federation-under> accessed 25 May 2019.

various UN counter-terrorism working groups. In 2018, the CTITF was replaced by the UN Global Counter-Terrorism Coordination Compact ('Counter-Terrorism Compact'), which, like its predecessor, primarily aims to ensure coordination between the various actors involved in the implementation of the Strategy.[92] Thirty-eight committees, working groups, offices and organisations are now members of the Counter-Terrorism Compact.[93] The Secretariat also facilitates the implementation of the Strategy through the Terrorism Prevention branch of the UNODC, which provides technical legal assistance to international bodies and states involved in counter-terrorism.[94]

While the Secretariat mainly assists in the implementation of the UNGA's Strategy, it also aims to guide the Organisation's agenda, priorities and thematic focus. The Secretariat is a significant office within and beyond the UN, providing leadership and shaping the Organisation's rhetoric. The UNGA's 2006 Strategy was, for example, based upon the Secretariat's recommendations in the 2004 Report of the High-Level Panel on Threats, Challenges and Change,[95] as well as a 2006 report, 'Uniting against Terrorism.'[96] Recently, the Secretariat has been particularly vocal about the need for the UN to drive global responses to foreign terrorist fighters. In 2015, the Secretariat presented to the UNGA the 'Plan of Action to Prevent Violent Extremism,'[97] a document that has since influenced various UN efforts to address the issue.[98] The document pointed out that foreign terrorist fighters are generally 'easy prey to simplistic appeals and siren songs,'[99] calling upon the Organisation and its Member States to address the conditions – including human rights violations – that lead to

[92] UNGA 'Activities of the United Nations System in Implementing the United Nations Global Counter-Terrorism Strategy: Report of the Secretary-General' (20 April 2018) UN Doc A/72/840; UN, 'UN Global Compact' (*United Nations,* 2019) <https://un.org/en/counterterrorism/hlc/un-global-compact.shtml> accessed 25 May 2019.
[93] UNOCT, 'Entities' (*United Nations,* 2018) <https://www.un.org/counterterrorism/ctitf/en/structure> accessed 29 May 2019.
[94] UNODC, 'Frequently Asked Questions on International Law Aspects of Countering Terrorism' (2009) 23-24.
[95] Report of the High-Level Panel on Threats, Challenges and Change (2004).
[96] UNGA 'Uniting Against Terrorism: Recommendations for a Global Counter-Terrorism Strategy' (27 April 2006) UN Doc A/60/825.
[97] UNGA 'Secretary-General's Plan of Action to Prevent Violent Extremism' (24 December 2015) UN Doc A/60/674.
[98] See, for example, UN Doc A/RES/70/291 (2016).
[99] Ban Ki-Moon, 'UN Secretary-General's Remarks at General Assembly Presentation of the Plan of Action to Prevent Violent Extremism' (*United Nations,* 15 January 2016) < https://www.un.org/sg/en/content/sg/statement/2016-01-15/un-secretary-generals-remarks-general-assembly-presentation-plan> accessed 25 May 2019.

the recruitment of foreign fighters to organisations like ISIL and Boko Haram. The Secretariat also acknowledged the existence of a cycle of violence and human rights violations, pointing out that these organisations are responsible for flagrant violations of international human rights and humanitarian law, including the deliberate targeting of women and children, sexual slavery and forced marriage.[100] The Secretariat also influences the institutional structure of UN counter-terrorism efforts, and the establishment of the UNOCT was the first major reform implemented under the leadership of SG António Guterres.[101]

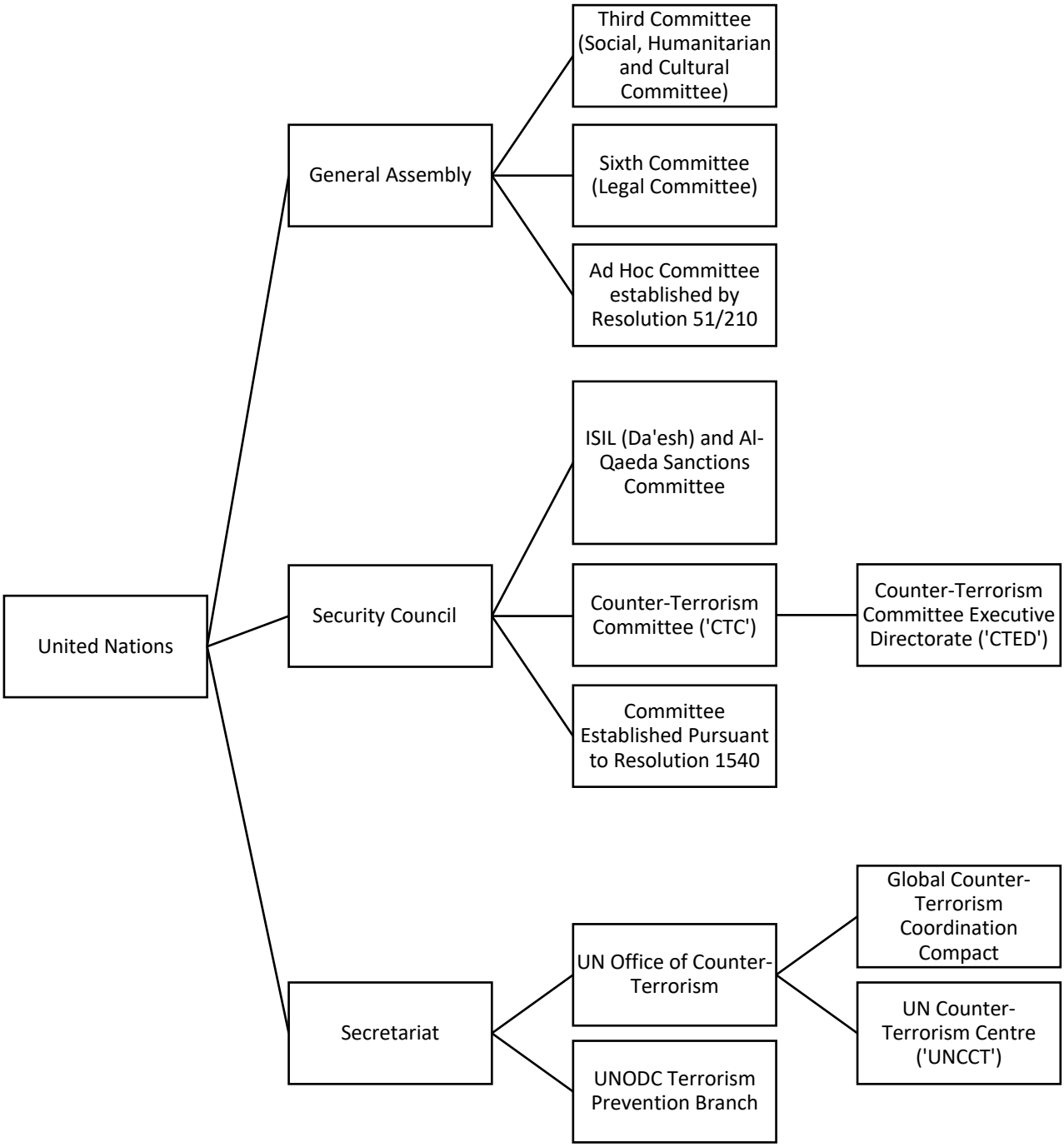
Chapter 5 discusses the role of the office of the Secretary-General, focusing upon its symbiotic relationship with the UNGA. It explores the way in which these two bodies often work in tandem in order to call for counter-terrorism strategies that respect and promote international human rights and humanitarian law. Chapter 5 also suggests that the role of the Secretariat is unique in the sense that, unlike the UNGA and UNSC, it is not a deliberative body comprised of various UN Member States. The Secretariat thus speaks as both an international leader and an impartial enforcer of international law. In this sense, the language of international human rights law enables the Secretariat to intervene in the politics of the UNGA and UNSC, a dynamic that I explore in chapter 5 and discuss further in the concluding chapter.

B.4. Summary

The UNSC, UNGA and Secretariat are all extensively involved in the UN's counter-terrorism efforts, with each spawning various regimes and global frameworks. While the Organisation ultimately relies upon states for the implementation of counter-terrorism measures, it is undeniable that the three principal organs discussed above have become more active in relation to counter-terrorism and have introduced more detailed, prescriptive legal and 'soft law' measures in recent years. Unsurprisingly, the number of UN branches and sub-branches involved in counter-terrorism has dramatically increased since 2001. The growth and increasing complexity of the Organisation's institutional framework for counter-terrorism has, in recent times, prompted a move toward streamlining and coordination, reflected in the UNGA's Strategy and the Secretariat's reports, many of which aim to bridge the UNSC's

[100] ibid.
[101] See UN Doc A/71/858 (2017).

decisions, the Strategy, the sectoral conventions and the reports of Special Procedures of the Human Rights Council. Meanwhile, the Counter-Terrorism Compact attempts to harmonise counter-terrorism activities across the Organisation based upon the Strategy. The UN's institutional structure for counter-terrorism has, therefore, evolved such that one might expect a more coordinated, consistent global approach to counter-terrorism to have come into being, one that is, in accordance with the UNGA's and Secretariat's recommendations, based upon human rights. This evolution is animated by, and sustains the promise of, the cosmopolitan ideals that led to the Organisation's foundation, discussed in chapter 2. However, as discussed in the previous chapter and shown throughout the remainder of this thesis, the UN functions according to the will of its Member States, particularly those that wield disproportionate power in the UNSC. This leads to a disjuncture between the image of a seemingly organised, coordinated, rights-based institutional framework for counter-terrorism, a diagram of which is below, and the UN's operation in reality.


United Nations
General Assembly
Third Committee (Social, Humanitarian and Cultural Committee)
Sixth Committee (Legal Committee)
Ad Hoc Committee established by Resolution 51/210
Security Council
ISIL (Da'esh) and Al-Qaeda Sanctions Committee
Counter-Terrorism Committee ('CTC')
Counter-Terrorism Committee Executive Directorate ('CTED')
Committee Established Pursuant to Resolution 1540
Secretariat
UN Office of Counter-Terrorism
Global Counter-Terrorism Coordination Compact
UN Counter-Terrorism Centre ('UNCCT')
UNODC Terrorism Prevention Branch

C. Legal Framework

C.1. Terrorism in treaty law: Mutual Legal Assistance and Domestic Criminalisation

Introduction: The Significance of the League of Nations' Response to Terrorism

As mentioned above, terrorism was first treated as a discrete international legal issue in the mid-1930s, when the League of Nations established a special committee on international terrorism in response to the assassination of King Alexander of Yugoslavia. The outcome of the committee's work was the 1937 Convention for the Prevention and Punishment of Terrorism.[102] The Convention self-referentially 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, a group of persons or the general public.'[103] It required state parties to establish as criminal offences the perpetration of, conspiracy to commit, incitement of, wilful participation in, or knowing assistance in the commission of, a terrorist act.[104] The Convention further required states parties to establish terrorist acts as extraditable offences in any existing or new arrangements between them,[105] and where extradition was not possible, to prosecute individuals who had committed a terrorist offence, regardless of where it took place.[106] The Convention's focus was, therefore, on facilitating the domestic criminalisation and punishment of terrorism.

Although it never entered into force, the 1937 Convention was significant for a number of reasons. Firstly, it was one of the few instances in which an international instrument specifically defined an act of terrorism. This contrasts with both the UNSC's resolutions relating to terrorism and the sectoral conventions, none of which define international terrorism.[107] Secondly, it is the earliest example of an attempt to establish a legal requirement that states either prosecute or extradite individuals responsible for terrorist offences, an attempt that has been repeated in the sectoral conventions. Thus, it will be shown in this

[102] Convention for the Prevention and Punishment of Terrorism (adopted 16 November 1937). Preserved at the UN Office at Geneva and available online via the Library of Congress <https://www.wdl.org/en/item/11579/> accessed 25 May 2019. See also Ben Saul, 'The Legal Response of the League of Nations to Terrorism' (2006) 4 Journal of International Criminal Justice 78.
[103] Convention for the Prevention and Punishment of Terrorism (1937) art 1.
[104] ibid arts 2-3.
[105] ibid art 8.
[106] ibid arts 9-10.
[107] However, the Terrorist Financing Convention, Nuclear Terrorism Convention and Terrorist Bombing Convention, outlined below, each define terrorism, specifically for the purposes of giving substance to the acts established as offences under those conventions.

section that while the status of terrorism as a *sui generis* international crime remains controversial, the overlapping regimes introduced by UNSC Resolution 1373 and the nineteen conventions have effectively established prosecute or extradite requirements for a range of crimes conducive to international terrorism.

The Sectoral Conventions

Since the 1960s, nineteen international conventions and protocols relating to terrorism have been developed under the auspices of the UN, its specialised agencies and the IAEA. These conventions and protocols aim to provide a framework for the domestic criminalisation of acts conducive to international terrorism. Many of these instruments lack wide membership, however, and some have yet to enter into force. This absence of a universal treaty regime for counter-terrorism accounts for the expansiveness of the UNSC's work, the legal substance of which overlaps with the sectoral conventions. Each of the sectoral conventions, outlined below, is similar in structure and content, prescribing the circumstances under which states must establish jurisdiction over a particular offence and specifying the circumstances under which they have the option to do so. These rules are derived from customary international law relating to the exercise of criminal jurisdiction.[108] As in the League's 1937 Convention, each of the sectoral conventions requires states to prosecute individuals who have committed an offence, or alternatively to extradite them. This is known as 'prosecute or extradite' or *aut dedere aut judicare.*

<u>Civil Aviation</u>

- *1963 Convention on Offences and Certain Other Acts Committed on Board Aircraft ('Aircraft Convention')*

  Deposited with the ICAO, the Aircraft Convention relates to acts that jeopardise the safety of an aircraft that is in flight, the safety of others on board the aircraft or 'good order and discipline' on board the aircraft.[109] The Convention authorises aircraft commanders to use 'reasonable measures including restraint' against any individual

[108] For an overview, see Martin Dixon, *Textbook on International Law* (7th edn, Oxford University Press 2013) 148-161.

[109] Convention on Offences and Certain Other Acts Committed on Board Aircraft (adopted 14 September 1963, entered into force 4 December 1969) 705 UNTS 220 (Aircraft Convention) art 1.

believed to have committed, or be about to commit, any of these offences.[110] If an aircraft is unlawfully seized (hijacked), state parties must take 'appropriate measures' to restore the aircraft to the control of its Commander[111] and to take the individual(s) responsible into custody for the purposes of prosecution or extradition.[112]

- *1970 Convention for the Suppression of Unlawful Seizure of Aircraft ('Hijacking Convention')*

  The Hijacking Convention adds to the regime created by the Aircraft Convention by requiring states parties to establish, within their domestic law, the forcible seizure of an aircraft as an offence 'punishable by severe penalties.'[113]

- *1971 Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation ('Montreal Convention')*

  The Montreal Convention required states parties to establish the perpetration of, or attempt to commit, various acts as offences under their domestic law. These include acts of 'violence against a person on board aircraft if that act is likely to endanger the safety of that aircraft,'[114] destruction of an aircraft in flight,[115] causing damage to a flight that renders it incapable of flying or endangers its safety in flight,[116] placing a destructive substance or device on board the flight,[117] destroying or interfering with navigation facilities in a way that endangers the aircraft's safety,[118] or deliberately communicating false information that endangers an aircraft's safety.[119] The Montreal Convention was replaced by the Beijing Convention (below) in 2010.

[110] ibid art 6.
[111] ibid art 11.
[112] ibid art 13.
[113] Convention for the Suppression of Unlawful Seizure of Aircraft (adopted 16 December 1970, entered into force 14 October 1971) 860 UNTS 105 (Hijacking Convention) arts 1-2.
[114] Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation (adopted 23 September 971, entered into force 26 January 1973) 974 UNTS 177 (Montreal Convention) art 1(a).
[115] ibid art 1(b).
[116] ibid.
[117] ibid art 1(c).
[118] ibid art 1(d).
[119] ibid art 1(e).

- *1988 Protocol for the Suppression of Unlawful Acts of Violence at Airports Serving International Civil Aviation ('1988 Convention')*

  The 1988 Convention expands upon the regime established by the Montreal Convention, addressing similar criminal acts committed at international airports.[120]

- *2010 Convention on the Suppression of Unlawful Acts Relating to International Civil Aviation ('Beijing Convention')*

  The Beijing Convention replaced the Montreal Convention. The new Convention reflects the altered perception of threats to aviation safety after September 11, specifically addressing the risk of nuclear terrorism, discussed above. It adds several new offences to the Montreal Convention, including: the use of an aircraft to cause death, injury or damage to property or to the environment;[121] release of biological, chemical or nuclear weapons or radioactive material from a civil aircraft in a manner likely to cause death, serious injury, damage to property or environmental harm;[122] and the transportation of various chemical, biological, nuclear and radioactive materials or weapons on board civil aircraft with the intention or knowledge that they might be used for terrorist purposes.[123] The Convention requires states parties to establish jurisdiction over any offences committed by one of their nationals.[124] Its provisions do not apply to acts committed on board civil aircraft by members of a state's armed forces in times of armed conflict.[125]

- *2010 Protocol Supplementary to the Convention for the Suppression of the Unlawful Seizure of Aircraft ('Beijing Protocol')*

  The Beijing Protocol expanded the Hijacking Convention to include the unlawful and

[120] Protocol for the Suppression of Unlawful Acts of Violence at Airports Serving Civil Aviation (adopted 24 February 1988, entered into force 6 August 1989) 1589 UNTS 474, art II.
[121] Convention on the Suppression of Unlawful Acts Relating to International Civil Aviation (adopted 10 September 2010, entered into force 1 July 2018) 974 UNTS 177 (Beijing Convention) art II. Note that, at the time of writing, only 22 States have ratified this Convention.
[122] ibid art 1(1)(g).
[123] ibid arts 1(1)(i), 7.
[124] ibid art 4(1)(e).
[125] ibid art 6.

intentional seizure of an aircraft using 'technological means.'[126]

- *2014 Protocol to Amend the Convention on Offences and Certain Other Acts Committed on Board Aircraft ('Montreal Protocol')*

  The Montreal Protocol amended the Aircraft Convention. It expanded jurisdiction over unlawful acts committed on board aircraft to include the state of registration, aircraft operator and landing, and added new requirements of interstate cooperation in criminal investigations. The Convention allowed for the appointment of inflight security officers pursuant to bilateral or multilateral agreements with other states parties. These officers would have the power to take 'reasonable preventive measures' to protect the safety of the aircraft and passengers onboard.[127]

Internationally protected persons

- *1973 Convention on the Prevention and Punishment of Crimes Against Internationally Protected Persons ('Diplomatic Agents Convention')*

  The Diplomatic Agents Convention aims to protect heads of state, ministers for foreign affairs and other state agents from 'any attack on his person, freedom or dignity.'[128] It requires states parties to establish various acts as offences under their domestic law, including murder, kidnap and attacks against the person or liberty of an internationally protected person.[129] The Convention also requires states to establish as an offence the act of violently attacking the official premises, private accommodation or transportation of an internationally protected person.[130]

Hostages

- *1979 Convention against the Taking of Hostages ('Hostages Convention')*

[126] Protocol Supplementary to the Convention for the Suppression of the Unlawful Seizure of Aircraft (adopted 10 September 2010, entered into force 1 January 2018) ICAO Doc 9959 (Beijing Protocol) art II.
[127] Protocol to Amend the Convention on Offences and Certain Other Acts committed on Board Aircraft (adopted 4 April 2014, not yet in force) art 2.
[128] Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons Including Diplomatic Agents (adopted 14 December 1973, entered into force 20 February 1977) 1035 UNTS 167 (Diplomatic Agents Convention) art 1.
[129] ibid art 2(1)(b).
[130] ibid art 2(1)(b).

Adopted by the UNGA, the Hostages Convention requires states parties to establish both the act of taking hostages and attempts to do so as serious crimes, punishable by appropriate penalties.[131] If a hostage situation is underway on the territory of a state party, that state is required to take adequate measures to 'ease the situation' of the hostage by securing their release.[132] The Convention also requires states parties to cooperate in order to prevent hostage situations and to take individuals suspected of having committed an offence into custody for the purposes of prosecution or extradition.[133]

Safety of Nuclear Materials

- *1980 Convention on the Physical Protection of Nuclear Material ('Nuclear Materials Convention')*

  Deposited with the IAEA, the Nuclear Materials Convention has two main purposes. Firstly, it aims to ensure that states parties follow certain procedures in order to safely transport nuclear materials overseas.[134] Secondly, it requires states parties to establish a variety of acts conducive to nuclear terrorism as crimes under their domestic legislation. These include: the possession or handling of nuclear materials in a way likely to cause death, injury or damage to property;[135] theft or robbery of nuclear material;[136] issuing a demand for nuclear material by threatening or using force;[137] and threatening to commit theft or robbery of nuclear material in order to compel a legal person, state or international organisation to do or refrain from doing any act.[138]

- *2005 Amendments to the Convention on the Physical Protection of Nuclear Material*

[131] International Convention against the Taking of Hostages (adopted 18 December 1979, entered into force 3 June 1983) 1316 UNTS 205 (Hostages Convention) arts 1-2.
[132] ibid art 3.
[133] ibid arts 4-6.
[134] Convention on the Physical Protection of Nuclear Material (adopted 3 March 1980, entered into force 8 February 1987) INFCIRC/274/Rev.1 (Nuclear Materials Convention) arts 1-6.
[135] ibid art 7(1)(a).
[136] ibid art 7(1)(b).
[137] ibid art 7(1)(d).
[138] ibid art 7(e).

These amendments require states parties to establish and maintain regimes for the physical protection of any nuclear materials or facilities used for peaceful purposes.[139] It requires states parties to develop the capability to implement 'comprehensive and rapid' measures to recover lost nuclear material,[140] and to cooperate with other states for the protection of nuclear material.[141] States are, furthermore, required to establish as an offence, under their domestic law, any act directed against a nuclear facility where the person intentionally causes damage to the facility, death or serious injury to any person, or damage to the environment as a result of exposure or release of radioactive substances.[142]

Maritime Navigation

- *1980 Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation ('Maritime Convention')*

  Deposited with the IMO, the Maritime Convention establishes a legal regime that is parallel to the regime for international aviation. It provides a framework for the domestic criminalisation of various acts, including seizing control over a ship by the use or threat of force,[143] and undertaking various acts – including violence against persons on board a ship, destruction of or damage to a ship or destruction of navigational facilities – that are likely to endanger the safe navigation of a ship.[144]

- *2005 Protocol to the Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation*

  This Protocol added various offences to the 1988 Convention, including the use of a ship to cause death, serious injury, or damage to property[145] or to transport nuclear,

[139] Amendment to the Convention on the Physical Protection of Nuclear Material (adopted 8 July 2005, entered into force 8 May 2016) U.S. Treaty Doc 110-24 (Amendment to the Nuclear Materials Convention) para 6.
[140] ibid para 6.
[141] ibid paras 7-8.
[142] ibid para 9.
[143] Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation (adopted 10 March 1998, entered into force 1 March 1992) 1678 UNTS 221 (Maritime Convention) art 3(1)(a).
[144] ibid art 3.
[145] Protocol to the 1988 Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation (adopted 14 October 2005, entered into force 28 July 2010) IMO Doc LEG/CONF.15/21 (Protocol to the Maritime Convention) para 5.

radioactive, or other dangerous materials knowing that they might be used to cause death or serious injury.[146]

- *1988 Protocol for the Suppression of Unlawful Acts against the Safety of Fixed Platforms Located on the Continental Shelf*
  This Protocol establishes a criminal regime similar to the Conventions regarding civil aviation and maritime navigation, specifically relating to fixed platforms on the continental shelf.[147]

- *2005 Protocol to the Protocol for the Suppression of Unlawful Acts against the Safety of Fixed Platforms Located on the Continental Shelf*
  This Protocol implements the provisions of the 2005 Protocol to the Maritime Convention in the context of fixed platforms located on the continental shelf.[148]

<u>Plastic Explosives</u>

- *1991 Convention on the Making of Plastic Explosives for the Purpose of Detection ('Plastic Explosives Convention')*
  Adopted in the aftermath of the bombing of Pan Am Flight 103 in 1988, the Plastic Explosives Convention requires states to prohibit and prevent the manufacture of unmarked explosives within their territories,[149] to take measures to prevent the transportation of unmarked explosives into or out of their territories[150] and to destroy any unmarked explosives not held by the police or military in the exercise of their official functions.[151]

[146] ibid para 5.
[147] Protocol for the Suppression of Unlawful Acts against the Safety of Fixed Platforms Located on the Continental Shelf (opened for signature 10 March 1988, entered into force 1 March 1992) 1678 UNTS 304 (Fixed Platform Protocol).
[148] Protocol to the 1988 Protocol for the Suppression of Unlawful Acts against the Safety of Fixed Platforms Located on the Continental Shelf (adopted 14 October 2005, entered into force 28 July 2010) IMO Doc LEG/CONF.15/22.
[149] Convention on the Making of Plastic Explosives for the Purpose of Detection (adopted 1 March 1991, entered into force 21 June 1998) ICAO Doc S/22393 (Plastic Explosives Convention) art II.
[150] ibid art III.
[151] ibid art IV(2).

The Terrorism Conventions

- *1997 Convention for the Suppression of Terrorist Bombings ('Terrorist Bombing Convention')*

  Adopted by the UNGA, the Terrorist Bombing Convention requires states to establish as an offence, under their domestic law, the unlawful and intentional placement or detonation of an explosive device 'in, into or against a place of public use, a state or government facility, a public transportation system or an infrastructure facility.'[152] Unlike the two other terrorism conventions and the Draft Comprehensive Convention (discussed below), the Terrorist Bombing Convention does not require that, in order to constitute a terrorist offence, an act must have been taken with the specific intent to intimidate or coerce a government or population. Rather, an act constitutes the offence of terrorist bombing if it was carried out with the intent to cause serious bodily injury, or to cause destruction to a place that leads to major economic loss.[153] The Convention requires states parties to prosecute or extradite individuals responsible for the offences outlined above.[154]

- *1999 International Convention for the Suppression of the Financing of Terrorism ('Terrorist Financing Convention')*

  The Terrorist Financing Convention defines the financing of terrorism as the wilful and unlawful provision of funds with the intention or knowledge that they will be used in order to carry out an offence as defined in another one of the sectoral conventions or any other act 'intended to cause death or serious bodily injury to a civilian… when the purpose of such act, by its nature or context, is to intimidate a population, or to compel a government or an international organisation to do or abstain from doing any act.'[155] This definition also appears *mutatis mutandis* in the Nuclear Terrorism Convention (below) and the Draft Comprehensive Convention. It was also referred to by the Special Tribunal for Lebanon (STL) in its interlocutory

[152] International Convention for the Suppression of Terrorist Bombings (adopted 15 December 1997, entered into force 23 May 2001) 2149 UNTS 256 (Terrorist Bombing Convention) art 2.
[153] ibid art 2.
[154] ibid art 6.
[155] International Convention for the Suppression of the Financing of Terrorism (adopted 9 December 1999, entered into force 10 April 2002) 2178 UNTS 197 (Terrorist Financing Convention) art 2(b).

decision on applicable law (discussed below). The Convention establishes obligations to prosecute or extradite,[156] identify and freeze funds used to commit terrorist acts,[157] and to assist other states in the investigation and prosecution of financing of terrorism.[158]

- *2005 International Convention for the Suppression of Acts of Nuclear Terrorism ('Nuclear Terrorism Convention')*
  The Nuclear Terrorism Convention requires states parties to establish the possession, production or use of radioactive materials or devices as punishable offences under their domestic law.[159] According to the Convention, these acts constitute terrorist offences if carried out with the intent to cause death, serious bodily injury, substantial damage to property or the environment,[160] or, where a nuclear device is actually deployed, with the intent to 'compel a person, international organisation or State to do or refrain from doing an act.'[161] The Convention also requires states parties to cooperate in the prevention of nuclear terrorism,[162] to protect nuclear materials in accordance with the IAEA's recommendations,[163] and to prosecute or extradite individuals responsible for the listed offences.[164]

This extensive body of treaty law is cited and discussed throughout the remainder of this thesis. Chapter 4, for example, notes that the UNSC regularly calls upon UN Member States to ascend to the sectoral conventions, but that the Council's decisions have ultimately supplanted these conventions and protocols, becoming the primary international legal framework for counter-terrorism. The absence of widely inclusive deliberation and negotiation in the UNSC has allowed for the hasty development of international counter-

[156] ibid arts 7, 10-11.
[157] ibid art 8.
[158] ibid art 12.
[159] Convention for the Suppression of Acts of Nuclear Terrorism (adopted 13 April 2005, entered into force 7 July 2007) 2445 UNTS 89 (Nuclear Terrorism Convention) art 2.
[160] ibid arts 2(1)(a), 2(1)(b).
[161] ibid art 2(1)(b).
[162] ibid art 7.
[163] ibid art 8.
[164] ibid arts 9, 11.

terrorism measures that are often inconsistent with other legal frameworks, including international human rights law. I also argue in both chapter 4 and the concluding chapter that while the sectoral conventions provide a robust transnational criminal law framework for counter-terrorism, their piecemeal nature, combined with the absence of a comprehensive convention, has enabled the UNSC to continually pass resolutions that require states to implement far-reaching counter-terrorism measures, but do not define 'terrorism' itself. The fact that international law and institutions attempt to criminalise and combat terrorism without defining, and thus limiting, the use of the term ultimately means that there is no limitation upon what states can justifiably do in the name of counter-terrorism.

The Draft Comprehensive Convention

In 2000, the Ad Hoc Committee established by UNGA Resolution 51/210 was tasked with the development of a comprehensive convention relating to international terrorism. A draft of the Comprehensive Convention was presented to the UNGA in 2005.[165] The draft does not attempt to define terrorism within international law;[166] rather, it is a 'technical, legal, criminal law instrument that would facilitate police and judicial cooperation in matters of extradition and mutual assistance.'[167] Thus, much like the sectoral conventions, the Draft Comprehensive Convention aims to provide a framework for the domestic criminalisation, investigation and prosecution of terrorist acts. Much like the three terrorism conventions, the definition of a terrorist offence proposed in the Draft Comprehensive Convention comprises three elements: the act is intentional and unlawful,[168] it causes death or serious injury to any persons or property,[169] and its purpose was 'to intimidate a population, or to compel a government or an international organisation to abstain from doing any act.'[170]

As well as requiring states parties to establish terrorist acts as punishable offences under their domestic law, the Draft Comprehensive Convention would establish obligations to prosecute

[165] Draft Comprehensive Convention (2005).
[166] UNGA 'Letter dated 3 August 2005 from the Vice-Chairman of the Sixth Committee Addressed to the Chairman of the Sixth Committee' (12 August 2005) UN Doc A/59/894, Annex I.
[167] ibid.
[168] Draft Comprehensive Convention (2005) art 2(1).
[169] ibid art 2(1)(a)-(c).
[170] ibid art 2(1).

or extradite perpetrators[171] and to afford other states parties mutual legal assistance in the investigation of terrorist acts.[172] The Draft Comprehensive Convention explicitly addresses the human rights of those accused of terrorist offences, including the right to consular access and a swift trial.[173] The proposed Convention has not yet been adopted, primarily because delegates have been unable to agree upon a definition of terrorism that will meet with the approval of states parties.

C.2. Terrorism in International Criminal Law

As mentioned above, terrorism was characterised as an international crime by the UNGA's Legal Committee in 1994. However, this view has not garnered widespread support and, today, the main avenue for the prosecution of terrorist acts is domestic criminal law. The UNSC's adoption of Resolution 1373 (and subsequent resolutions) accelerated the ratification of the sectoral conventions and the development of counter-terrorism laws around the world, such that terrorist acts are now criminalised in most domestic systems alongside the more general, longstanding offences of murder, infliction of grievous bodily harm and serious damage to public or private property. Thus, while terrorism is a 'crime of international concern' that states have an obligation to criminalise, there is no specific 'core crime' (*crimina juris gentium*) of terrorism under international law.[174] This section briefly outlines the ways in which terrorism may nevertheless amount to an international crime, considering the categories of war crimes, genocide, aggression and crimes against humanity. This is followed by a discussion of the omission of terrorism from the Rome Statute of the ICC and the STL's decision relating to terrorism under customary international criminal law.

War Crimes

As mentioned above, intentional acts of violence calculated to spread fear amongst a civilian population are international crimes when committed within the context of armed conflict. This is recognised in the Geneva Conventions[175] as well as the Statutes of the International

[171] ibid art 7.
[172] ibid art 14.
[173] ibid arts 11(3), 12. Fair trial rights are recognised, for example, in ICCPR arts 9, 14.
[174] Helen Duffy, *The 'War on Terror' and the Framework of International Law* (2nd edn, Cambridge University Press 2015) 141. See also, Ben Saul, *Defining Terrorism in International Law* (Oxford University Press 2008) 140-142.
[175] GCIV, art 33(1); API, art 51(2); APII, art 13(2).

Criminal Tribunal for Rwanda (ICTR) and the Special Court for Sierra Leone (SCSL).[176] While acts of terrorism were not included in the statute of the International Criminal Tribunal for the former Yugoslavia (ICTY),[177] the tribunal was the first in history to prosecute an individual for inflicting terror on a civilian population. Furthermore, both the ICTY and SCSL have held, on several occasions, that the war crime of terrorism has the status of customary international law.[178] It is, therefore, 'Well established that the deliberate infliction of terror on the civilian population in armed conflict is a war crime under treaty or customary international law.'[179] As Duffy points out, it is unlikely that al-Qaeda constitutes an 'organised armed group' whose actions, including on September 11, can themselves trigger the application of international humanitarian law.[180] This is, however, contested by the United States Government, which contends that the United States has been in an ongoing non-international armed conflict[181] with al-Qaeda since 1996, when Osama bin Laden declared war against Americans.[182] In any case, it is uncontroversial that international humanitarian law is applicable to specific aspects of the war on terror, such as the invasions of Iraq and Afghanistan and current conflicts in Syria and Iraq involving ISIL and the al-Nusra Front, among

[176] Statute of the International Criminal Tribunal for Rwanda, UNSC Res 955 (8 November 1994) UN Doc S/RES/955, Annex (ICTR Statute) art 4(d); UNSC, 'Statute of the Special Court for Sierra Leone' (*Special Court for Sierra Leone,* 16 January 2002) art 3(d) < http://www.rscsl.org/Documents/scsl-statute.pdf> (SCSL Statute) accessed 28 May 2019.

[177] United Nations, 'Updated Statute of the International Criminal Tribunal for the Former Yugoslavia' (*International Criminal Tribunal for the Former Yugoslavia,* September 2009) < http://www.icty.org/x/file/Legal%20Library/Statute/statute_sept09_en.pdf> (ICTY Statute) accessed 28 May 2019.

[178] *Prosecutor v Galič* (Appeal) ICTY-98-29-A (30 November 2006) paras 79-109; *Prosecutor v Dragomir Milošević* (Judgment (Trial Chamber)) IT-92-29-1T (12 December 2007) para 873 *et seq.* The customary status of the prohibition of acts of terrorism in armed conflict has also been upheld by the Special Tribunal for Sierra Leone. See, for example, *Prosecutor v Brima, Alex Tamba et al.* (Judgment (Trial Chamber)) SCSL-04-16-T (20 June 2007) para 666; *Prosecutor v Fofana, Moinina and Kondewa* (Judgment (Trial Chamber)) SCSL-04-14-T (2 August 2006) para 169; *Prosecutor v Sesay Kallon and Gbao* (Judgment (Trial Chamber)) SCSL-04-15-G (2 March 2009) para 112.

[179] Duffy (n 174) 136. For elements of the war crime of inflicting terror, see Duffy (n 174) 136; *Prosecutor v Dragomir Miloševič* (Judgment) paras 102, 882-886.

[180] Duffy (n 174) 135.

[181] A non-international armed conflict (NIAC) exists when there is fighting between a state and a non-state armed group, or two or more armed groups on the territory of a state. In the *Tadic* case, the ICTY held that a NIAC exists when the conflict reaches a minimum threshold of intensity, and where the non-state armed groups party to the conflict possess organised armed forces: *Prosecutor v Dusko Tadic* (Judgment) IT-94-1-T (7 May 1997) paras 561-568. NIACs are governed by Geneva Conventions, Common Art 3 and APII (where applicable).

[182] Benjamin R Farley, '21 Years of War with Al Qaeda?' (*Just Security,* 6 November 2017) < https://www.justsecurity.org/46746/21-years-war-al-qaeda/> accessed 22 June 2020.

others. The actions of ISIL in Syria and Iraq may, therefore, amount to the war crime of terrorism.

Genocide, Aggression and Crimes Against Humanity

While there is no specific international crime of terrorism outside the context of armed conflict, terrorist acts may amount to crimes of genocide, aggression or crimes against humanity. While terrorism may amount to genocide, this would only be the case in situations where the terrorist acts in question were committed with the 'intent to destroy, in whole or in part, a national, ethnical, racial or religious group.'[183] This would, at least according to the approach taken by the ICC, require that the terrorist attack in question 'took place in the context of a manifest pattern of similar conduct.'[184] The circumstances in which terrorist acts might amount to the crime of aggression are similarly narrow; according to the definition adopted at the 2010 ICC Review Conference, the crime of aggression involves an unlawful use of force 'by or on behalf of a state, as opposed to non-state actors.'[185] Thus, in the majority of situations, an act of terrorism would not amount to the crime of aggression as defined in the Rome Statute, with the only clearly identifiable exception being the Lockerbie bombings, widely known to have been directed by the Libyan government.[186]

There is some academic support for the idea that terrorist acts may amount to crimes against humanity.[187] The prohibition of crimes against humanity developed in customary

[183] Convention on the Prevention and Punishment of the Crime of Genocide (opened for signature 9 December 1948, entered into force 12 January 1951) art 2 (Genocide Convention); Rome Statute of the International Criminal Court (opened for signature 17 July 1998, entered into force 1 July 2002) 2187 UNTS 3, art 6 (Rome Statute).

[184] ICC, 'Elements of Crimes' (*International Criminal Court,* 2011) 2-4 < https://www.icc-cpi.int/nr/rdonlyres/336923d8-a6ad-40ec-ad7b-45bf9de73d56/0/elementsofcrimeseng.pdf> accessed 28 May 2019.

[185] Duffy (n 174) 138. See also, ICC, 'Review Conference of the Rome Statute of the International Criminal Court' (*International Criminal Court,* 2010) <https://asp.icc-cpi.int/iccdocs/asp_docs/ASP9/OR/RC-11-Part.I-ENG.pdf> accessed 28 May 2019.

[186] Aviv Cohen, 'Prosecuting Terrorists at the International Criminal Court: Re-evaluating an Unused Legal Tool to Combat Terrorism' (2012) 20 Michigan State International Law Review 219, 250.

[187] ibid; Christian Much, 'The International Criminal Court (ICC) and Terrorism as an International Crime' (2006) 14 Michigan State Journal of International Law 121; Neil Boister, 'Treaty Crimes, International Criminal Court?' (2009) 12 New Criminal Law Review 341; Pouyan A Mazandaran, 'An International Legal Response to an International Problem: Prosecuting International Terrorists' (2006) 6 International Criminal Law Review 503; Richard J Goldstone and Janine Simpson, 'Evaluating the Role of the International Criminal Court as a Legal Response to Terrorism' (2003) 15 Harvard Human Rights Journal 13.

international law.[188] While the prohibition has been discussed in the jurisprudence of various courts and tribunals, its clearest definition can be found in the Rome Statute, which defines a crime against humanity as a 'widespread or systematic attack directed against any civilian population' that was 'pursuant to or in furtherance of a State or organisational policy to commit such an attack.'[189] The Statute lists a number of acts that may amount to crimes against humanity, including murder, extermination and 'persecution against any identifiable group.'[190] While the definition of crimes against humanity clearly excludes isolated incidents (such as a single attack carried out by a 'lone wolf' terrorist), it is possible that a terrorist attack may amount to a crime against humanity if it is sufficiently widespread, systematic and part of an organisational policy to carry out such attacks.[191] To date, no member of a terrorist organisation has been prosecuted for genocide or crimes against humanity; any discussion of terrorism within the context of these international crimes is, therefore, speculative.

The Rome Statute

The ICC does not have jurisdiction over a specific crime of terrorism. The possibility of including terrorism in the Rome Statute was discussed by the Preparatory Committee for the ICC, but was ultimately abandoned.[192] According to Cohen, the omission of terrorism from the Rome Statute 'is no accident but rather the express intention of states parties to the Rome Conference.'[193] Cohen highlights a number of reasons for this decision: the lack of a widely accepted definition of an international crime of terrorism, a belief that terrorism does not rise to the same 'level of international concern' as the core crimes enumerated in the Rome Statute, and fears of overloading and politicising the ICC.[194] The ICC, therefore, can only prosecute individuals for acts of terrorism insofar as they amount to war crimes, crimes

[188] Duffy (n 174) 125.
[189] Rome Statute (1998) arts 7(1), 7(2)(a). See also ILC, 'Draft Code of Crimes against the Peace and Security of Mankind' (*International Law Commission,* 1996) art 18 <http://legal.un.org/ilc/texts/instruments/english/commentaries/7_4_1996.pdf> accessed 28 May 2019.
[190] Rome Statute (1998) art 7(1).
[191] UNODC, 'Frequently Asked Questions on International Law Aspects of Countering Terrorism' (2009) 43; Duffy (n 174) 128; Darryl Robinson, 'Developments in International Criminal Law: Defining "Crimes against Humanity" at the Rome Conference' (1999) 93 American Journal of International Law 43; Saul (n 174) 221. Saul provides the example of a series of political assassinations in Lebanon, including the attack that killed Prime Prime Minister Rafik Hariri.
[192] See the Report of the Preparatory Committee on the Establishment of an International Criminal Court (14 April 1998) UN Doc A/CONF.183/2/Add.1, 27-8.
[193] Cohen (n 186) 223.
[194] ibid 224-228.

against humanity, genocide or aggression. From 2014 to 2015, the Office of the Prosecutor (OTP) reviewed reports of atrocities committed by IS members in Iraq and Syria, with a view to establishing whether there existed a jurisdictional basis for a preliminary examination to be opened. As Syria and Iraq are not parties to the Rome Statute, the scope of the ICC's investigation would be limited to crimes committed by foreign fighters who are nationals of states parties to the Rome Statute.[195] The Chief Prosecutor concluded, on this basis, that the 'jurisdictional basis for opening a preliminary examination into this situation is too narrow.'[196]

The STL: Customary International Law

In 2007, the UNSC established the STL to hold trials for those accused of carrying out a series of assassinations and assassination attempts, including the 14 February 2005 attack that killed former Lebanese Prime Minister Rafiq Hariri and 21 others.[197] The STL's establishment was driven by the finding of the UNSC-established independent investigation commission (UNIIIC) that 'there was a distinct lack of commitment on the part of the Lebanese authorities to investigating the crime effectively,'[198] as well as a written request from the Lebanese Government that the UNSC establish 'a tribunal of an international character' to investigate the attacks.[199]

The STL is presided over by a combination of Lebanese and international judges.[200] Though described as the first international tribunal with 'jurisdiction over the crime of terrorism in times of peace,'[201] the Tribunal's statute imports the provisions of the Lebanese Criminal

[195] Rome Statute (1998) art 12: The ICC can exercise jurisdiction if the conduct in question occurred on the territory of a state party (territorial jurisdiction), or the person accused of the crime is the national of a state party (personal jurisdiction).
[196] Fatou Bensouda, 'Statement of the Prosecutor of the International Criminal Court, Fatou Bensouda, on the Alleged Crimes Committed by ISIS' (*International Criminal Court,* 8 April 2015) <https://www.icc-cpi.int/Pages/item.aspx?name=otp-stat-08-04-2015-1> accessed 28 May 2019.
[197] UNSC Res 1757 (30 May 2007) UN Doc S/RES/1757, para 1; Nicholas Michel, 'The Creation of the Tribunal in its Context' in Amal Alamuddin, Nidal N. Jurdi and David Tolbert (eds), *The Special Tribunal for Lebanon: Law and Practice* (Oxford University Press 2014) 11-14.
[198] ibid 13.
[199] ibid 14-15; Saul (n 174) 221; UNSC 'Letter dated 13 December 2005 from the Chargé d'affaires a.i. of the Permanent Mission of Lebanon to the United Nations addressed to the Secretary-General' (13 December 2005) UN Doc S/2005/783.
[200] Agreement between the United Nations and the Lebanese Republic on the Establishment of a Special Tribunal for Lebanon, UNSC Res 1757 (30 May 2007) UN Doc S/RES/1757, Annex (STL Statute) art 2.
[201] STL, 'STL Close-Up' (*Special Tribunal for Lebanon,* 2009) <http://www.stl-tsl.org/images/stories/About/STL_Close-up_EN.pdf> accessed 28 May 2019.

Code relating to 'the prosecution and punishment of acts of terrorism, [and] crimes and offences against life and personal integrity.'[202] Nevertheless, in its interlocutory decision on the applicable law, the Tribunal held that in interpreting Lebanese criminal law, it would refer to relevant international law. Within this context, the Tribunal held that 'there exists a crime of terrorism under customary international law.'[203] According to the Tribunal, this crime comprises three elements: (i) the perpetration of a criminal act, (ii) the intention to spread fear among the population or to coerce a national or international authority to follow a particular course of action, and (iii) some transnational element.[204] The Tribunal held that those states taking exception to this definition of terrorism can be considered persistent objectors, potentially in breach of UNSC resolutions calling upon states to prevent and punish terrorist acts.[205] While the STL based its decision upon a reading of international treaties, UNSC resolutions and decisions of national courts, it should be noted that its findings remain controversial.[206] This is because, first, the Tribunal did not clearly show that the requirement of *opinio juris* is satisfied; that is, it did not show that states have criminalised terrorism because they believe they are under an international obligation to do so. Secondly, and relatedly, the omission of terrorism from the Rome Statute and the international community's inability to agree upon a definition of terrorism for the purposes of the Draft Comprehensive Convention would suggest that there is a lack of clarity about what an international crime might entail. Thus, the status of terrorism as a crime under international law is unlikely to be settled until it is considered further by other international courts and tribunals.

C.3. Terrorism and International Human Rights Law

Given that they often involve the indiscriminate killing of civilians, terrorist acts clearly have implications for the enjoyment of basic human rights such as the rights to life and bodily integrity. The UNSC has, on various occasions, recognised that terrorism endangers and

[202] STL Statute (2007) art 2(a).
[203] *Prosecutor v. Ayyash et al.* (Interlocutory Decision on the Applicable Law) STL-11-01/I (16 February 2011) para 86.
[204] ibid para 85.
[205] ibid para 110.
[206] Duffy (n 174) 140.

impairs the enjoyment of human rights.[207] More recently, the Council has condemned 'violations and abuses of international human rights law' by IS, calling for those responsible to be held accountable.[208] While the UNSC periodically characterises terrorist acts as human rights violations, the primary means of holding perpetrators responsible is through the enforcement of domestic criminal law, or through a relevant international court or tribunal insofar as the attack amounts to an international crime. This is because international human rights law generally does not provide a framework for responding to terrorism, as non-state actors are incapable of being parties to human rights treaties.

International human rights law may, nevertheless, be relevant in three unusual situations. Firstly, terrorist organisations may incur international responsibility for violations of international human rights law insofar as they exercise control over territory,[209] as ISIL did over its former 'Caliphate' based in Raqqa, Syria from 2014 to 2017. Secondly, if a terrorist organisation were to succeed in establishing a state or becoming the government of an existing state, it could, under the law of state responsibility, be held responsible for human rights violations committed while operating as a non-state actor.[210] However, the new state would only incur international responsibility for violations of customary international human rights law, as it could not have ratified relevant human rights treaties at the time of the breach. Finally, terrorist attacks may have implications for states' human rights obligations, insofar as states parties to the ICCPR bear an obligation to protect individuals against 'acts committed by private persons or entities that would impair the enjoyment of Covenant rights.'[211] This obligation is, however, of due diligence;[212] the mere occurrence of a terrorist

[207] See, for example, UNSC Res 1566 (8 October 2004) UN Doc S/RES/1566, Preamble para 8; UN Doc S/RES/1624 (2005) Preamble para 5: 'Incitement of terrorist acts motivated by extremism and intolerance poses a serious and growing danger to the enjoyment of human rights.'
[208] UN Doc S/RES/2379 (2017) para 1.
[209] This is, however, rather controversial, and, at most, non-state armed groups may incur international responsibility for violations of international human rights law insofar as they operate as the *de facto* government of a territory and the violation occurred outside the context of an armed conflict. For a discussion, see Andrew Clapham, 'Human Rights Obligations of Non-State Actors in Conflict Situations' (2006) 88 International Review of the Red Cross 491; Liesbeth Zegveld, 'Legal Restraints on Armed Groups as Such' in Liesbeth Zegveld, *Accountability of Armed Opposition Groups in International Law* (Cambridge University Press 2002).
[210] UNGA Res 56/83 (28 January 2002) UN Doc A/RES/56/83, Annex (ILC Draft Articles on the Responsibility of States for Internationally Wrongful Acts) art 10(1)-(2).
[211] UN Human Rights Committee 'General Comment No. 31 [80] on the Nature of the General Legal Obligation Imposed on States Parties to the Covenant' (26 May 2004) UN Doc CCPR/C/21/Rev.1/Add.1326, para 8.
[212] ibid.

attack in the territory of a state party to the ICCPR would not signify that state's violation of its human rights obligations. Thus, while terrorist attacks have clear human rights implications, international human rights law is not an apparently relevant legal framework for responding to them. It should be noted, however, that the occurrence of a terrorist attack may trigger certain human rights obligations relating to victims, such as their rights to adequate compensation, rehabilitation and justice.[213]

D. Conclusion: Do the Pieces Fit Together?

This chapter has considered the institutional and legal frameworks that are relevant to the UN's contemporary counter-terrorism efforts. As is evident, there has been a dramatic increase in the number of actors involved in counter-terrorism since September 11, as well as in the number of relevant international legal instruments and UNSC measures. These developments have occurred alongside the commitment of states, through the UNGA's soft-law output, to the ethos and parameters of the global fight against terrorism. From this overview, one might derive a sense that the international legal and institutional frameworks for counter-terrorism are sprawling and that it is rather difficult to distil a common international approach to combating terrorism. This is, to an extent, the case; as discussed in chapter 2, a variety of UN branches and sub-branches are involved in counter-terrorism, each drawing upon their specific mandate and power in order to influence state or organisational approaches to security. The frameworks developed by these actors and through the legal instruments outlined in this chapter intersect at times and oppose at others, and one of the ways in which they do so is in their engagement with the human rights implications of counter-terrorism practices and policies. It is, however, important to note several general elements of, and trends in the development of, the international legal and institutional framework for counter-terrorism.

Firstly, there is presently no accepted definition of terrorism under international law. This is with the exception of acts of terrorism committed within the context of armed conflict, the meaning of which has gradually developed in both customary and treaty law. The lack of a

[213] Reparation for Individuals for Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law, in 'Report of the International Law Commission on the Work of its 71st Session' (29 April to 9 August 2019) UN Doc A/74/10, Annex.

general definition has two significant implications. Firstly, when states are required to implement particular counter-terrorism measures, they have the discretion to do so in accordance with domestic definitions or understandings of the term. This often enables the implementation of sweeping counter-terrorism measures, ostensibly in order to carry out decisions of the UNSC.[214] It is in the context of the UNSC's tendency to mandate specific counter-terrorism measures without defining what exactly they relate to, or how they should be implemented, that acute human rights issues arise. This is discussed at length in chapter 4. Secondly, the international community's inability to agree upon a definition of terrorism means that there is neither a general international terrorism convention nor, according to most, a specific international crime of terrorism. While the Draft Comprehensive Convention reflects some progress towards both a common definition of terrorism and a common approach to counter-terrorism, the UNGA's adoption of that convention remains unlikely.

While terrorism is not a *sui generis* crime under international law, it can be considered an issue of international concern that states have an obligation to criminalise under their domestic law. International law relating to terrorism can, therefore, be compared to law relating to transnational and organised crime, such as drug trafficking. States' obligation to criminalise terrorist offences arises, first, from the sectoral conventions and protocols relating to particular acts conducive to international terrorism. While only three of these instruments – the Terrorist Financing Convention, the Terrorist Bombing Convention and the Nuclear Terrorism Convention – explicitly refer to terrorism, the nineteen documents jointly cover a vast majority of criminal acts that might be committed by terrorist organisations. These instruments require not only the criminalisation of particular acts, but also interstate cooperation in their investigation and prosecution. The sectoral conventions thus establish obligations to prosecute or extradite those responsible for terrorist acts, to afford other states mutual legal assistance in countering terrorism, and for states to share intelligence with one another.

Although ratification of the sectoral conventions accelerated after September 11, few have neared universal participation. It is for this reason that the UNSC has also adopted a range of

[214] Ní Aoláin (n 23).

resolutions requiring criminalisation, intelligence-sharing and mutual legal assistance. The similarity in the subject matter of the sectoral conventions and the UNSC's counter-terrorism measures shows that the Council's exercise of its Chapter VII powers has replaced states' negotiation of, and consent to, treaties as the primary form of international decision-making relating to counter-terrorism. Unlike the lengthy process of negotiation and ratification of treaties, the UNSC's legislative decisions are emergency measures and have immediate effect. This means that the UNSC is particularly effective in responding to changes in the nature of terrorist threats, but also that it is more likely that reactionary measures will be approved and implemented without proper consideration of their human rights and humanitarian implications. This issue is discussed in chapter 4.

International courts and tribunals play a limited role in the development of approaches to counter-terrorism or the prosecution of terrorist acts, but they have contributed to – and complicated, at times – our understanding of how international law applies to terrorism. For example, in 2011, the STL held that there indeed exists a customary international law crime of terrorism. Meanwhile, the International Court of Justice (ICJ) has the jurisdiction to settle disputes arising from the sectoral conventions. In 1992, Libya instituted proceedings against the United States and United Kingdom, claiming that both had breached their obligations under the Montreal Convention by pressuring the Libyan government to extradite the Libyan nationals responsible for the 1988 Lockerbie Bombing. While Libya contended that the Convention required it to establish its own jurisdiction over the perpetrators, who were present on its territory, the United States and United Kingdom contended that UNSC resolutions requiring Libya to extradite the suspects rendered the claim inadmissible.[215] The case was withdrawn by the parties before it proceeded to the merits. More recently, the Ukraine instituted proceedings against Russia in respect of the shooting down of Malaysia Airlines flight MH17, claiming that Russia breached its obligations under the Terrorist

[215] *Questions of Interpretation and Application of the 1971 Montreal Convention Arising from the Aerial Incident at Lockerbie (Libyan Arab Jamahiriya v United States of America)* (Preliminary Objections) [1998] ICJ Rep 115.

Financing Convention by funding rebel groups in Eastern Ukraine.[216] Hearings are due to be held in the near future.

International courts' decisions relating to counter-terrorism have left many questions unanswered. For example, it remains to be seen how the STL's decision on customary international law might be applied by the tribunal, other international courts and domestic courts in the future. Furthermore, an ICJ decision on the merits in the *Libya v USA and UK* dispute might have clarified the nature of legal obligations arising from the sectoral conventions, as well as their relationship to UNSC decisions taken under Chapter VII of the Charter. Similarly, the UN's institutional framework for counter-terrorism is continually evolving and certain changes may significantly affect the way the Organisation's branches function. For example, Guterres has prioritised streamlining and coordinating UN counter-terrorism efforts, and particularly increasing commitment to the Strategy across the entire Organisation. This may lead to an increased emphasis upon the role of human rights in countering terrorism. Meanwhile, as discussed in chapter 2, the political dynamics within and between UN branches are continually changing and may also impact upon their respective approaches to counter-terrorism. The increasing prominence of human rights in UNSC counter-terrorism decisions may, for example, be a result of changes in the Council's composition, as well as the Special Rapporteur's increasing calls for the UNSC's work to comply with international human rights standards. It is, therefore, a challenge for the counter-terrorism researcher to respond to the continual evolution of both terrorist threats and responses. In considering the work of various UN bodies, the following chapters aim to reflect the pace of change in the nature of terrorism, in power dynamics at the UN, and in the concrete measures implemented by its branches.

Ultimately, the state is the main actor in international counter-terrorism; states determine whether or not to become parties to the sectoral conventions and how exactly to implement UNSC decisions.[217] Most significantly, the UNGA and UNSC are comprised of states, and their

[216] International Court of Justice, 'Ukraine Institutes Proceedings Against the Russian Federation and Requests the Court to Indicate Provisional Measures' (Press release no. 2017/2, 17 January 2017) < https://www.icj-cij.org/files/case-related/166/19310.pdf> accessed 29 May 2019.

[217] They are, however, constrained by other factors, such as regional human rights mechanisms. See, for instance: Anthony Aust, 'Kadi: Ignoring International Legal Obligations' (2009) 6 International Organisations

counter-terrorism frameworks are the outcomes of states' political interactions and decisions. What lies beneath the surface of this complex legal and institutional apparatus for counter-terrorism is an ongoing process of negotiation and contestation among states and, by extension, between the UN's principal organs. As I noted in chapters 1 and 2, international law and organisations are rhetorically constructed as things that are separate from and above politics. One might, then, expect that the extensive codification and institutionalisation of international counter-terrorism leaves little room for politics, yet the reality is quite the opposite. The following two chapters depict a political dialogue between the UN's principal organs and the states of which they are comprised. In particular, they show how the language of human rights is woven, in many different ways and to a number of political ends, into these dialogues, enabling the justification, condemnation and implementation of various counter-terrorism measures.

Law Review 3; Filippo Fontanelli, 'Kadieu: Connecting the Dots – From Resolution 1267 to Judgment C-584/10 P' in Matej Avbelj, Filippo Fontanelli and Giuseppe Martinico (eds), *Kadi on Trial: A Multifaceted Analysis of the Kadi Trial* (Routledge 2014).

Chapter 4: The Security Council

A. Introduction

As discussed in the previous chapter, September 2014 saw the UNSC's adoption of Resolution 2178, requiring Member States to take measures to prevent individuals' travel for the purposes of perpetrating terrorist acts or receiving terrorist training.[1] Adopted under the Council's Chapter VII powers, the Resolution, which was a response to the threat of foreign terrorist fighters, required states to implement counter-terrorism laws in a manner consistent with their international obligations, particularly those arising from international humanitarian and human rights law.[2] The preamble to that Resolution also recognised that 'human rights, fundamental freedoms and the rule of law are complementary and mutually reinforcing with effective counter-terrorism measures, and are an essential part of a successful counter-terrorism effort.'[3]

In some ways, the text of Resolution 2178 reads as a call for the international community to develop a rights-based approach to counter-terrorism, recognising human rights as necessary limitations upon the scope of states' counter-terrorism measures, and as positive tools in preventing violent extremism. This chapter shows, however, that human rights are not fully integrated into the UNSC's work. To the contrary, it argues that the UNSC's power and authority have been harnessed by its permanent members and their allies in order to globalise the othering discourses and practices of the war on terror. These states have utilised the UNSC as a means to garner international support for a particular narrative of the war on terror. According to this narrative, terror is a foreign threat to democracy and human rights, and 'we', an imagined global community under threat, have a right to be free from terrorism. Thus, as noted in chapters 1 and 2, the United States and its allies have turned to the UNSC to advance their vision of a new international order that operates within and against the things situated at its margins: terror, violence and disorder.[4] 'These things are treated as at

[1] UNSC Res 2178 (24 September 2014) UN Doc S/RES/2178, para 5.
[2] ibid, Preamble.
[3] ibid, Preamble.
[4] David Kennedy, 'A New Stream of International Law Scholarship' (1988) 7 Wisconsin International Law Journal 1, 12.

once frightening and fascinating,' Kennedy writes. 'And most importantly, they are treated as *real* things, capable of signification within public culture.'[5]

The UNSC has played conflicting roles in the war on terror. On one hand, the apparent need to use pre-emptive military force against terrorists has seen the United States and its allies circumvent the UNSC's authority and assert an unconditional, unilateral right to wage war against terrorists.[6] Yet on the other hand, the construction of a terrorist 'other' that is at the margins of, and continually threatens, the global community has allowed these same states to turn the UNSC into a body that continually adopts emergency counter-terrorism resolutions, demanding that states implement an array of repressive counter-terrorism measures. Anghie's observations, made in 2005, still ring true today:

> 'Not least of the consequences of the [war on terror] is the possibility that it will establish an imperial Security Council that exists permanently in a Chapter VII mode and that will purport to legislate all manner of international activities in the name of the [war on terror].'[7]

The UNSC's decisions have brought about an international state of affairs that mirrors domestic states of emergency that have come about in the context of counter-terrorism; the implementation of 'exceptional' measures that threaten or directly violate human rights is now routine.

This chapter observes, however, that the UNSC's decisions and legal frameworks for counter-terrorism have evolved such that they now recognise the importance of respecting human rights in the context of counter-terrorism. Yet as with Resolution 2178, mentioned above, these resolutions ultimately leave it to states to implement the UNSC's decisions in accordance with their own human rights obligations. As shown throughout this chapter, states' implementation of these decisions often results in counter-terrorism policies and practices that limit or directly violate human rights. While the resolutions suggest that the UNSC has developed a stronger commitment to human rights, they ultimately represent an

[5] ibid.
[6] Antony Anghie, *Imperialism, Sovereignty and the Making of International Law* (Cambridge University Press 2005) 300.
[7] ibid.

attempt to appease states of the Global South, which have long called for the Council to redevelop its counter-terrorism frameworks such that they are consistent with, and promote, international human rights law. Thus, as I argued in chapter 2, the UN's organs are the sum totals of the Member States they comprise. While the UNSC's recent decisions suggest that the Council has become more cognizant of the human rights implications of its decisions, those decisions continue to erode human rights. This disjuncture between the Council's amplified human rights rhetoric and the substance of its decisions shows how states, through the Council itself, seek to manipulate the relationship between human rights and counter-terrorism in the pursuit of particular political agendas.

The remainder of this chapter proceeds as follows. Part B places the chapter within its broader context by providing a brief overview of the construction of the menacing, foreign terrorist enemy within domestic counter-terrorism discourses following September 11. These discourses have been echoed by states within the UNSC's meetings and have been internationalised and institutionalised through the UNSC's resolutions. Part B also gives an overview of the implementation of the Authorisation for Use of Military Force (AUMF) in the United States following September 11 and of the imposition of a prolonged state of emergency in France following the November 2015 attacks. This provides a backdrop to the argument that the UNSC's power has been harnessed to bring about a prolonged international state of emergency that mirrors domestic emergency responses to acts of terror. I contend that the representation of terrorism as an urgent threat justifies, and renders as necessary, the suspension of human rights considerations in favour of extensive security measures. By placing the UNSC's work within the context of domestic discourses regarding counter-terrorism, I also further the genealogical approach to the study of discourses, espoused by the critical scholars discussed in chapters 1 and 2. I demonstrate that the UNSC does not exist within, or fill, a political void, but is rather involved in the furtherance of broader political lexica and dialogue. The UNSC is thus embedded within wider structures of power, perpetuating them through its work.

Part C discusses the UNSC's role in the construction of a global terrorist 'other.' The section advances several arguments. Firstly, the UNSC's approach to terrorism as a 'foreign' threat predates its response to September 11 and can be traced back to the 1988 Lockerbie

bombing. I show that states called upon the UNSC to further the construction of, and response to, terrorism as a threat that emanates from the non-democratic world (at that stage, the government of Libya). Secondly, Part C discusses the introduction of the counter-terrorism sanctions regime in 1999. It shows that while Global South states represented on the Council characterised the sanctions regime as a punitive measure that would ultimately harm the Afghan people, the sanctions regime initially involved limited humanitarian and human rights provisions. Its effect was, then, to dehumanise the Afghan people and to focus upon curtailing the Taliban. Ironically, this was reversed in the aftermath of the invasion of Afghanistan, with the United Nations Assistance Mission in Afghanistan (UNAMA) focusing its efforts on bringing about a new constitutional order centred upon the rights of women and children. Thirdly, Part C explores the UNSC's responses to September 11. The Council's meetings and decisions show that, largely at the behest of the permanent five members and their allies, human rights were woven into the body's counter-terrorism discourse, with the construction of terrorism as a threat to human rights and a concomitant, collective 'right' to be free from terror. Thus, Part C concludes that the effect of the UNSC's response to September 11, introduced through Resolution 1373 and related decisions, was to globalise the state of emergency declared by the United States and its close allies. This allowed for the Council to mandate the implementation of measures conducive to the violation of human rights, and for counter-terrorism to be spoken of as a potential limit upon the protections of international human rights law.

Part D charts the UNSC's gradual recognition of the importance of respecting human rights in the context of counter-terrorism. It explores this process through consideration of the slow reform of the counter-terrorism sanctions regime, and of changes to the wording of resolutions relating to counter-terrorism. However, based upon records of the UNSC's meetings, I contend that the piecemeal changes to the Council's counter-terrorism frameworks and decisions are a recognition of certain states' frustration with the deleterious effects of its counter-terrorism work. The changes to the UNSC's work have not been led by the permanent five members but have rather been pushed by states of the Global South and, at times, rotational members. These differences in states' approaches to the relationship between human rights and counter-terrorism are pertinent to the theoretical approach outlined in chapter 2. They not only show that the UNSC is a setting in which states contest

the relationship between human rights and counter-terrorism, but also demonstrate that human rights are invoked in order to justify and challenge a range of counter-terrorism measures.

Finally, part E discusses the latest phase of the UNSC's counter-terrorism work, which relates to ISIL and foreign terrorist fighters. This part of the chapter responds to recent scholarship, which suggests that the UNSC's decisions relating to ISIL and foreign fighters indicate that the body intends to move in new directions in its work relating to human rights and security. I evaluate this claim by exploring the Council's recent decisions, which aim to ensure accountability for ISIL's violations of international human rights and humanitarian law, emphasise the integration of gender and children's rights perspectives into counter-terrorism, and emphasise the prevention of violent extremism. However, this ostensible commitment to the integration of human rights into counter-terrorism, declared at the insistence of a small segment of the Council's rotating membership, is not reflected in the substance and implementation of its decisions. The chapter thus ends as it begins, detailing the human rights violations – revocations of citizenship, detention of youth without trial and retention of private data – that have resulted from the Council's most recent wave of counter-terrorism decisions.

B. Enmity and Emergency in Domestic Discourses

Chapter 2 argued that we are living in a cosmopolitan moment, an age in which everyday life within states is shaped by global issues. Globalisation and increased telecommunications have collapsed pre-existing boundaries to knowledge and awareness, such that our life-worlds, though firmly rooted in our experiences as members of a national community, are moulded by our encounters with 'global' issues such as environmental change, financial crisis, the spread of communicable diseases and transnational terrorism. This condition's development, which has most clearly been traced by Beck[8] and was discussed in chapter 2, coincided with September 11, and was exemplified by responses to the attacks. The world witnessed the attacks as they took place and relived them many times over in the following weeks, with

[8] See, for example, Ulrich Beck, 'Critical Theory of World Society: A Cosmopolitan Vision' (2009) 16(1) Constellations 3, 4.

images of the jets crashing into the Twin Towers interspersed with footage of Osama bin Laden and supposed al-Qaeda training camps in Afghanistan and elsewhere. Coverage of the attacks thus exposed both the inescapability of suffering and 'our' common vulnerability to attack by a foreign enemy. 'The global other is here in our midst.'[9]

The war on terror thus began at a time in which the distinction between foreign and local was diminishing:

> 'The nation-state is increasingly besieged and permeated by a planetary network of interdependencies, for example, by ecological, economic and terrorist risks, which connect the separate worlds of developed and underdeveloped countries.'[10]

States were suddenly united by their collective fear that, just like the United States, they were in danger of suffering an attack from a terrorist organisation like al-Qaeda. Yet this global community of states, menaced by the terrorist 'other', did not come about as a result of an objective calculation of the level of threat posed by transnational terrorist organisations, or an evaluation of al-Qaeda's capacity to successfully plan and perpetrate another attack as significant as September 11. Instead, as argued in chapters 1 and 2, it was based upon a political and social construction, one based upon the differentiation between a threatened, imaginary community and their common enemy. As Beck and Sznaider observe:

> 'Cultural risk perceptions and definitions also draw new boundaries. Cultures or societies that share perceptions of threat feel that they "belong to" a transnational risk community, while those who do not perceive such a threat are outside it.'[11]

The formation of this global risk society was, however, contingent upon the initial construction of enmity and otherness within domestic counter-terrorism discourses. The discourse of the *global* war on terror followed from domestic political rhetoric in which the United States was characterised as both civilised and victimised, and terrorists were constructed as uncivilised, savage and inhumane. This did not naturally result from the September 11 attacks, but was rather a part of a deliberate, politically biased discourse that

[9] Ulrich Beck, 'Incalculable Futures: World Risk Society and its Social and Political Implications' in Ulrich Beck (ed), *Ulrich Beck: Pioneer in Cosmopolitan Sociology and Risk Society* (Springer 2014) 86.
[10] Ulrich Beck and Natan Sznaider, 'Unpacking Cosmopolitanism for the Social Sciences: A Research Agenda' (2010) 61(1) The British Journal of Sociology 381, 391.
[11] ibid 391.

aimed to dehumanise and alienate the terrorist enemy. According to this discourse, 'Terrorists behave as they do not because they are rationally calculating political actors, but simply because it is in their nature to be evil.' By contrast, Jackson writes, 'The United States acts to bring terrorists to justice and to secure freedom because that is what America is like – Americans are a freedom-loving and dependable nation.'[12]

From the outset, domestic counter-terrorism discourse in America referred to freedom, democracy and human rights. Just hours after the attacks on September 11, George W Bush gave an address from the Oval Office, in which he said, 'America was targeted for attack because we're the brightest beacon for freedom and opportunity in the world.'[13] He continued, 'Today our nation saw evil – the worst of human nature – and we responded with the best of America.'[14] America's position as a bastion of democracy, freedom and human rights has been repeated throughout the discourse of the war on terror. The need to promote freedom and human rights was cited as one of many justifications for the invasions of Afghanistan and Iraq, even though the military operations that took place in both states saw the prioritisation of swift victory over the protection of civilian populations.[15] Furthermore, as Anghie observes, human rights were also invoked by the United States in the aftermath of the Iraq invasion. The United States' attempt to build a new state apparatus based upon democracy, the rule of law, transparency and human rights was provided as a new justification for a war that was miscalculated to begin with, and that had fast become unwinnable. 'Through the invocation of human rights,' Anghie argues, 'What might have been seen as an illegal project of conquest is transformed into a legal project of salvation and redemption.'[16]

The meaning and application of human rights have also been reimagined and subverted within the United States' domestic counter-terrorism discourses. State officials and policy

[12] Richard Jackson, *Writing the War on Terrorism: Language, Politics and Counter-Terrorism* (Manchester University Press 2005) 59.
[13] George W Bush, 'Address to Nation on Terrorist Attacks (*US National Archives Catalog,* 11 September 2001) <https://catalog.archives.gov/id/6171390> accessed 7 January 2020.
[14] ibid.
[15] Francesca Klug, 'Introduction' in Kasey McCall-Smith, Andrea Birdsall and Elisenda Casanas Adam (eds), *Human Rights in Times of Transition* (Hart 2020).
[16] Anghie (n 6) 303.

documents have consistently suggested that there exists a right to security, and, by extension, to combat terrorism. This assertion has not been made by reference to existing international human rights law, which protects the individual's security of person and freedom from fear.[17] Rather, the United States government suggests that the American people have a collective right to be free from terrorism, and that the government has a concomitant right and duty to take actions to protect the 'homeland.' For example, nine years after September 11, Koh argued that 'al-Qaeda has not abandoned its intent to attack the United States, and indeed continues to attack us.' The United States, he concluded, 'Has the authority… and the responsibility to its citizens, to use force, including lethal force, to defend itself.'[18] With these remarks, Koh, a legal advisor to the Obama administration, associated the United States' use of tactics such as lethal drone strikes with the American people's right to be free from terrorism. In this narrative of the war on terror, human rights are not constraints upon the use of repressive measures against terrorists; they are a way of life that must be *defended* against terrorists. As the United States government clearly stated in its 2002 National Security Strategy:

> 'In the war against global terrorism, we will never forget that we are ultimately fighting for our democratic values and way of life. Freedom and fear are at war, and there will be no quick or easy end to this conflict.'[19]

Ironically, states have claimed that the war against global terror – characterised as a 'fight for democratic values' – necessitates the suspension or limitation of human rights. As Koh's comments, quoted above, suggest, terrorists are said to pose a continuous threat to the United States and its allies. This assumption that terrorists are unendingly planning and preparing new attacks has justified the imposition of prolonged states of emergency and the continual implementation of exceptional measures. As Johns observes in relation to Guantanamo Bay, states' law and legal institutions have been subverted such that, in the

[17] International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171 (ICCPR) preamble and Art 9(1).
[18] Harold Hongju Koh, 'The Obama Administration and International Law' (Speech at the ASIL Annual Meeting, Washington DC 2010) < https://2009-2017.state.gov/s/l/releases/remarks/139119.htm> accessed 18 March 2019.
[19] The White House, 'The National Security Strategy of the United States of America' (*U.S. Department of State*, September 2002) < https://www.state.gov/documents/organization/63562.pdf> accessed 18 March 2019.

context of counter-terrorism, the exception is now the norm.[20] Since 2001, the United States government has justified its counter-terrorism operations by reference to the AUMF,[21] which granted the president *carte blanche* authority to use 'appropriate force against those nations, organisations, or persons he determines planned, authorised, committed, or aided' the September 11 attacks.[22] Introduced just one week after September 11, the AUMF supposedly authorised the executive branch of the United States government to implement a range of counter-terrorism measures, ranging from detention at Guantanamo Bay to the use of lethal drones.[23] The French government, meanwhile, declared a national state of emergency following the November 2015 Paris attacks, a declaration that was then renewed a number of times.[24] This state of emergency conferred almost unlimited powers upon the French government, allowing authorities to conduct searches without warrant, place individuals suspected of posing a threat to security under house arrest, limit the freedom of movement of people and their vehicles, disperse gatherings that might threaten public order, search bags and cars, and issue orders for the temporary closure of venues including bars and theatres.[25] As Vauchez observes, the main features of the measures implemented under the French state of emergency:

> 'Lost their exceptional nature and became part and parcel of normal legislation, [making] the recent situation in France a textbook example of the normalisation thesis that many legal and political theorists point to as critical evidence of a negative trend in contemporary responses to terrorism.'[26]

[20] Fleur Johns, 'Guantanamo Bay and the Annihilation of the Exception' (2005) 16(4) The European Journal of International Law 613.
[21] Joint Resolution to Authorize the Use of United States Armed Forces Against Those Responsible for the Recent Attacks Launched Against the United States (18 September 2001) 50 USC 1541 (USA).
[22] ibid s 2(a).
[23] Fiona de Londras, 'Guantanamo Bay, the Rise of the Courts, and the Revenge of Politics' in David Jenkins, Amanda Jacobsen and Anders Henriksen (eds), *The Long Decade: How 9/11 Changed the* Law (Oxford University Press 2014) 157.
[24] Decree no. 2015-1475 of 14 November 2015, implementing law no. 55-385 of 3 April 1955, JORF no. 0264 (14 November 2015) (France); Cécile Guérin-Bargues, 'The French Case or the Hidden Dangers of a Long -Term State of Emergency' in Pierre Auriel, Olivier Beaud and Carl Wellman (eds), *The Rule of Crisis: Terrorism, Emergency Legislation and the Rule of Law* (Springer 2018) 214.
[25] ibid 215.
[26] Stéphanie Hennette Vauchez, 'The State of Emergency in France: Days Without End?' (2018) 14(4) European Constitutional Law Review 700, 702.

The cases of France and the United States are just two examples of the suspension or restriction of human rights in democratic states in the name of a state of emergency precipitated by terrorists.[27] These states of emergency and the accompanying permanency of the exceptional dovetail with domestic counter-terrorism discourses in which terrorists are characterised as a menacing outside enemy. They entrench the 'us' and 'them' discourses driving counter-terrorism policy and practice, heightening the sense that terrorism constitutes an existential threat to democracy and human rights. Faced with the 'emergency' of terrorism, leaders and their constituents ultimately overemphasise security, thus undervaluing human rights.[28]

The prominence of attacks like September 11 and the November 2015 Paris attacks has provided an opportunity for these domestic counter-terrorism discourses and states of emergency to be globalised. Indeed, September 11 immediately awakened a new global consciousness, most famously expressed by French newspaper *Le Monde* in its 12 September 2001 headline, 'We are all Americans now.'[29] As the world came to fear that the horror of September 11 would be repeated elsewhere, the United States and its allies set about constructing a division between an imagined 'we' threatened by terrorism and a loathsome terrorist 'other.' As discussed in chapter 2, the attacks gave rise to a global risk community. 'Every nation, in every region, now has a decision to make,' said President Bush. 'Either you are with us, or you are with the terrorists.'[30] This rallying call was not only addressed to states, however. 'Will the UN serve the purpose of its founding,' President Bush asked, 'Or will it be irrelevant?'[31] Thus, as I show in the remainder of this chapter, the United States and its allies

[27] See Pierre Auriel, Olivier Beaud and Carl Wellman (eds), *The Rule of Crisis: Terrorism, Emergency Legislation and the Rule of Law* (Springer 2018).
[28] Oren Gross, 'Security vs. Liberty: On Emotions and Cognition' in David Jenkins, Amanda Jacobsen and Anders Henriksen (eds), *The Long Decade: How 9/11 Changed the* Law (Oxford University Press 2014) 46.
[29] Quoted by Gérome Truc, *Shell Shocked: The Social Response to Terrorist Attacks* (Andrew Brown tr, Polity 2018) 34.
[30] George W Bush, 'Address to a Joint Session of Congress and the American People' (Address at the United States Capitol, Washington DC, 20 September 2001) < https://georgewbush-whitehouse.archives.gov/news/releases/2001/09/text/20010920-8.html> accessed on 18 March 2019.
[31] George W Bush, quoted by Richard A Falk, 'What Future for the UN Charter System of War Prevention?' (2003) 97 American Journal of International Law 590, 590.

deliberately engaged with and co-opted the United Nations in their endeavour to wage both rhetorical and physical war against the global terrorist other.[32]

C. Constructing the 'Global Other': The UNSC in the Aftermath of September 11

Chapter 3 provided an overview of the UN's institutional and legal framework for counter-terrorism. It noted that the UNSC has played a quasi-legislative role, regularly adopting Chapter VII resolutions that require states to implement far-reaching counter-terrorism policies and practices. As noted in Chapter 3, the UNSC began to perform a legislative role in relation to counter-terrorism in 1999, when it introduced the targeted sanctions regime, and the frequency and extent of these resolutions increased in the aftermath of September 11. Ní Aoláin observes that the Council's performance of a 'super legislative' role has had 'a negative effect on the overall advancement of meaningful protection for human rights and humanitarian law.'[33] This section argues that while the UNSC's decisions relating to counter-terrorism have tangibly impacted upon the enjoyment of human rights, they have also advanced the othering discourses discussed in section B. I argue that as both a deliberative forum and a decision-making body, the UNSC has been harnessed by the United States and its allies in order to entrench a global, rhetorical project that designates terrorists as alien and uncivilised, and represents the international community as besieged and threatened by terror.

C.1. Lockerbie

While this project is primarily concerned with the UN's work from 1999 onwards, it is important to note that the UNSC's involvement in counter-terrorism predates this. International terrorism has deliberately and actively been represented as something associated with non-democratic states – particularly within the Middle East and North of Africa (MENA) – since the 1990s, with these acts of representation creating the conditions that allowed for domestic and international understandings of September 11 as an affront upon democracy and human rights. In January 1992, the UNSC condemned the destruction

[32] Michael Byers, 'Terrorism, the Use of Force, and International Law After 11 September' (2002) 51(2) International and Comparative Law Quarterly 401.

[33] Fionnuala Ní Aoláin, 'The UN Security Council's Outsized Role in Shaping Counter Terrorism Regulation and Its Impact on Human Rights' (*Just Security,* 19 October 2018) < https://www.justsecurity.org/61150/security-council-mainstream-human-rights-counter-terrorism-regulation/> accessed 19 March 2019.

of Pan Am flight 103 over Lockerbie, Scotland and UTA flight 772 in Niger.[34] Resolution 731 expressed concern 'over the results of investigations which implicate[d] officials of the Libyan government' in the bomb blasts that destroyed both aircraft.[35] The UNSC urged Libya to cooperate with France, the United Kingdom and the United States, all of which demanded that the Gaddafi regime extradite the Libyan nationals responsible for the attacks.[36] Gaddafi refused to hand over the suspects, arguing that Libya had established jurisdiction over the offences in accordance with the 1971 Montreal Convention and was entitled to try the suspects itself.[37] Thus, in Resolution 748, adopted in March 1992, the Council declared that 'the suppression of acts of international terrorism, including those in which states are directly or indirectly involved, is essential for the maintenance of international peace and security.'[38] Exercising its Chapter VII powers, the UNSC required Libya to comply with the extradition requests made by the United Kingdom, United States and France.[39] It demanded, further, that the 'Libyan government must commit itself definitively to cease all forms of terrorist action and all assistance to terrorist groups.'[40] States were required to ban flights that had taken off from or were bound for Libya,[41] reduce diplomatic exchanges with Libya,[42] and to deny entry into or expel from their territory any Libyan nationals known to have been involved in terrorist activity in any other state.[43]

Later in 1992, the ICJ held that Libya's obligation to adhere to Resolution 748 prevailed over its right to try those responsible for the bombings, which it asserted was based upon Article 5 of the Montreal Convention.[44] The decision was unsurprising; as discussed in chapter 3, the UN Charter provides for the primacy of states' Charter obligations – including the obligation to uphold binding decisions of the UNSC – over any other obligations under international

[34] UNSC Res 731 (21 January 1992) UN Doc S/Res/731, para 1.
[35] ibid, Preamble.
[36] ibid.
[37] Anghie (n 6) 299; Convention for the Suppression of Unlawful Attacks against the Safety of Civil Aviation (adopted 23 September 1971, entered into force 26 January 1973) 974 UNTS 177 (Montreal Convention).
[38] UNSC Res 748 (31 March 1992) UN Doc S/Res/748, Preamble.
[39] ibid para 1.
[40] ibid para 2.
[41] Ibid para 4(a).
[42] ibid para 6(a).
[43] ibid para 6(c).
[44] *Questions of Interpretation and Application of the 1971 Montreal Convention Arising from the Aerial Accident at Lockerbie (Libyan Arab Jamahiriya v United States of America)* (Provisional Measures) [1992] ICJ Rep 114, para 42.

law.[45] Nonetheless, the Court clearly refrained from ruling on the legality of the UNSC's assertion of its authority to act as a legislative body relating to international counter-terrorism measures, which have usually come about through states' negotiation, signature and ratification of treaties. This paved the way for the UNSC's transformation of the nature of international lawmaking as relates to counter-terrorism, the Council acting as a 'vertical, uniform and global law-making mechanism.'[46] As Boyle points out – and as is abundantly evident from the developments of the past eighteen years – the Council is a 'seriously deficient vehicle' for international lawmaking, as it lacks 'accountability, participation, procedural fairness, or transparency of decision-making.'[47] The *Lockerbie* cases presented an opportunity for the ICJ to clarify the nature of the UNSC's legal authority and to identify the legal frameworks applicable to its decision-making. In the absence of such a decision, the UNSC's lawmaking activities were unfettered. The Council thus departed from its normal 'crisis management role,'[48] continually operating as a legislative body and thus perpetuating an international state of emergency.

The Council's response to the Lockerbie bombings also lent credence to a particular narrative of international terrorism. In demanding that Libya hand the suspects over to the United Kingdom, the United States and France, the UNSC identified these three states as both the victims of terror and the most appropriate states to deliver justice for those attacks. Meanwhile, none of the relevant resolutions mentioned that nearly 50 of those who died on board UTA flight 772 were from the Congo and 25 from Chad. The rights to be secure from terror and to gain redress for terrorist attacks were reserved for particular states. Meanwhile, a direct link was drawn between 'international terrorism' and the state of Libya. Members of the Council made a deliberate choice to characterise Libya as a state sponsor of terrorism and to impose measures, like travel restrictions, directed at the Libyan state, even though the issue related to specific wrongdoings of Gaddafi and a small number of individuals within his government.

[45] *Charter of the United Nations,* arts 25, 103.
[46] Nicholas Tsagourias, 'Security Council Legislation, Article 2(7) of the UN Charter, and the Principle of Subsidiarity' (2011) 24 Leiden Journal of International Law 539, 540.
[47] Alan Boyle, 'International Lawmaking: Towards a New Role for the Security Council?' in Antonio Cassese (ed), *Realizing Utopia: The Future of International Law* (Oxford University Press 2012) 180.
[48] Simon Chesterman, Ian Johnstone and David M Malone, *Law and Practice of the United Nations* (Oxford University Press 2016) 145.

C.2. Sanctions

Seven years later, in 1999, the UNSC adopted Resolution 1267. The Resolution was addressed to the Taliban, which was, at the time, the government of Afghanistan and a known supporter of Osama bin Laden and his associates. Exercising its Chapter VII powers, the Council required the Taliban to 'turn over Usama bin Laden without delay to appropriate authorities in a country where he [had] been indicted.'[49] The Council was referring to the United States, where bin Laden had been indicted for the bombings of the United States embassies in Kenya and Tanzania. In order to force the Taliban to surrender bin Laden, all states were required to freeze the assets of individuals and entities that the newly established Sanctions Committee designated as Taliban members or affiliates of bin Laden.[50] As noted in chapter 3, states were required to implement a range of other measures including a ban on flights by any aircraft owned or operated by the Taliban. [51] The Resolution was extremely vague in its acknowledgment of the potential humanitarian implications of the sanctions regime, assigning the Sanctions Committee the authority to approve flights delivering humanitarian aid to Afghanistan or enabling fulfilment of religious obligations such as performance of the Hajj.[52] This latter exception was not included in the draft of the Resolution, which was submitted by Canada, the Netherlands, Russia, Slovenia, the United Kingdom and the United States. It was, rather, part of an amendment proposed by the Chinese and Bahraini delegations.[53] Apart from this, the only reference to human rights in the Resolution was the Council's expression of 'concern over the continuing violations of international humanitarian law and of human rights, particularly against women and girls,' by the Taliban.[54]

These concerns regarding the Taliban were not unwarranted; it was a malevolent regime that was indifferent to international law, to the cultural heritage of Afghanistan, and to human life. It is, however, worth noting that while the Council was critical of the Taliban's violations of human rights, it was silent on the human rights implications of the sanctions themselves,

[49] UNSC Res 1267 (15 October 1999) UN Doc S/RES/1267, para 2.
[50] ibid paras 4-6.
[51] ibid para 4(a).
[52] ibid.
[53] UNSC Verbatim Record (15 October 1999) UN Doc S/PV.4051.
[54] UN Doc S/RES/1267 (1999) Preamble.

which were ultimately adopted by consensus.[55] Human rights were discussed on the occasion of the Resolution's adoption. That debate is indicative of the division between the United States and the Resolution's co-sponsors, who insisted that the sanctions were sufficiently narrow in their scope, and opposing states, who characterised the sanctions as punitive measures against the Afghan people. The United States' representative, for example, argued that the sanctions 'are targeted very specifically to limit the resources of the Taliban authorities,' and 'in no way harm the people of Afghanistan.'[56] Yet it was well known that by 1999, the Taliban controlled a majority of Afghan territory, operating as the state's *de facto* government even though the international community would not recognise it as such. Thus, any restriction upon the Taliban's resources was likely to affect the Afghan people. This argument was advanced by the Malaysian representative, who said, 'The imposition of sanctions on the Taliban is tantamount to imposing sanctions on the people of Afghanistan as a whole.' He continued,

> 'Sanctions directed at the Taliban will have a direct and indirect effect on the general population in virtually every aspect of their lives, be it air travel, trade and commerce or other economic activities covered by the sanctions. In the end it is the ordinary people that bear the price, not the intended target.'[57]

A similar argument was made by the Bahraini delegate, who argued that the ongoing civil conflict in Afghanistan was the result of various powers' provision of arms and support to warring factions in previous years. 'This is why,' he said, 'We have to examine the draft resolution before us very carefully due to certain apprehensions regarding its possible negative effects on the humanitarian situation in Afghanistan, at a time when we certainly need to alleviate the suffering of the Afghan people.'[58]

Despite the protests of certain states, the sanctions regime was implemented with minimal humanitarian provisions and no system for appeal or review. Delisting and oversight mechanisms were later introduced and are discussed below. Initially, however, the effect of the Council's decision was to dehumanise the Afghan people and to antagonise the Taliban.

[55] UN Doc S/PV.4051 (1999).
[56] ibid 3.
[57] ibid 3-4.
[58] ibid 4.

This was not necessarily representative of the views of the entire international community or even of all fifteen states represented on the Council at that time. It was, rather, part of certain states' endeavours to foster a global understanding of terrorism as an unfamiliar and foreign threat. Insofar as human rights factored into this discourse, they were invoked in order to support the characterisation of the Taliban as an 'other', an indescribably violent actor wholly incapable of acting in a manner consistent with 'our' principles and values. This construction of the Taliban was consonant with broader views of the organisation, which derived from events like its destruction of the Buddhist statues in the Bamiyan Valley and the murders of journalists and musicians in Afghanistan. These actions, which were undeniably human rights violations and international crimes, did not form the basis of actions that take into consideration the welfare of the Afghan people, but were rather taken as markers of differences in political culture. The organisation was painted as brutal, inhumane and beyond negotiation. Well before September 11, then, the prospect of intervention in Afghanistan was rendered as a civilising mission, a form of liberation, and a means of promoting Western values.

The introduction of the 1267 sanctions regime was, therefore, a continuation of the UNSC's use, by the United States and its allies, as a platform for the perpetuation of an 'us' and 'them' discourse, which situates terrorism and terrorists at the margins of a global society threatened by terrorism. While it is true that security was prioritised over universal human rights within this context, it is not the case that human rights were eliminated from global discourses, or that the subject of the individual as a potential victim of human rights violations was eviscerated from discussions of terrorist organisations. Rather, human rights became something that was discursively and militarily 'given' and defined by certain states. Rights became, as Chowdhury puts it, the 'juridical property' of certain states.[59] This foregrounded the UNSC's responses to September 11, discussed below.

C.3. Human Rights in the UNSC's Responses to September 11

[59] Arjun Chowdhury, '"The Giver or the Recipient?": The Peculiar Ownership of Human Rights' (2011) 5(1) International Political Sociology 35, 35.

On 12 September 2001, the Council met to discuss draft Resolution S/2001/861, which was its initial response to the attacks of the previous day.[60] What is most striking about the proceedings of that meeting is the immediacy with which states, particularly the United Kingdom and United States, characterised terrorism as an affront upon democratic values and upon civilisation more broadly. 'These horrendous acts are an attack not only on the United States,' said the British delegate, almost echoing the *Le Monde* headline quoted above, 'But against humanity itself and the values and freedoms we all share.' He continued,

> 'The life and work of our open and democratic societies will continue undeterred. My Prime Minister has expressed similar sentiments and calls us to understand that mass terrorism is the new evil in our world today, perpetrated by fanatics who are utterly indifferent to the sanctity of human life… We all have to understand that this is a global issue, an attack on the whole of modern civilisation.'[61]

Immediately after the attacks, the UNSC became a forum in which certain states drew a distinction between a victimised, threatened 'us' – defined by shared respect for human rights and the rule of law – and an uncivilised, unreasonable and foreign terrorist 'other.' The characterisation of terrorism as an affront upon human civilisation was not a natural or inevitable consequence of the attacks, but rather a deliberate choice that allowed for terrorists to be constructed as a totally alien enemy that is neither humane nor civilised. At the same time, this rhetoric drew upon, and appealed to, the cosmopolitan ideals discussed in chapter 2. 'The peoples of the earth have… entered in varying degrees into a universal community,' Kant wrote, 'And it has developed to the point where a violation of rights in one part of the world is felt *everywhere.*'[62] The United Kingdom representative's comments, which replicated this Kantian notion of shared humanity and suffering, were affirmed by United States Ambassador Jim Cunningham. 'As others have noted,' he said, 'This was an assault not just on the United States, but on all of us who support peace and democracy and the values for which the United Nations stands.'[63]

[60] UNSC Verbatim Record (12 September 2001) UN Doc S/PV.4370.
[61] ibid 2-3.
[62] Immanuel Kant, 'Perpetual Peace: A Philosophical Sketch' in HS Reiss and HB Nisbet (eds), *Kant: Political Writings* (HB Nisbet tr, first published 1795, Cambridge University Press 1991) 106-7.
[63] UN Doc S/PV.4370 (2001) 7.

Thus, in the days after September 11, the UNSC was made a part of the discursive construction of terrorists as anathema to democracy, human rights and humanity, and as alien to the international community. As I show below, this shaped not only how terrorism was spoken about within the UNSC's meetings, but also the concrete measures that were mandated by the Council. As Anghie points out, 'Different ways of understanding and characterising those events had a profound impact on how to address them.'[64] The UNSC's immediate response to the attacks was to characterise them as an act of war triggering states' inherent right to use force in self-defence.[65] This move constituted tacit authorisation of the United States-led invasion of Afghanistan, which adopted al-Qaeda's actions on September 11 as its own by providing safe haven to members of the organisation, and by refusing to surrender bin Laden and his associates in accordance with Resolution 1267.[66] There was nothing surprising about the recognition of September 11 as an armed attack that triggered the victim state's right to self-defence. What was notable about the UNSC's response to the attack, however, was that while 'international terrorism' was characterised as a threat to international peace and security, and while it was said that states must take a range of forceful and punitive measures against international terrorists, the UNSC provided no definition of the temporal, geographic or legal parameters of those measures. Like the AUMF in the United States and the state of emergency in France, Resolutions 1368 and 1373 placed the entire international community on a war footing in response to the amorphous, undefined concept of terrorism.[67] This deliberate omission enabled a range of rhetorical and physical practices over coming years, which are discussed below: the characterisation of terrorism as a threat to human rights, the intermittent assertion of a human right to be free from terrorism, and the worldwide implementation of repressive measures in the name of counter-terrorism, many of which have led to the erosion of human rights.

C.4. Terrorism as a Threat to Human Rights

[64] Anghie (n 6) 306.
[65] UNSC Res 1368 (12 September 2001) UN Doc S/RES/1368, Preamble; UNSC Res 1373 (28 September 2001) UN Doc S/RES/1373, Preamble.
[66] Sean Murphy, 'Terrorism and the Concept of "Armed Attack" in Article 51 of the UN Charter' (2002) 43 Harvard International Law Journal 41, 51.
[67] See Richard English, *Terrorism: How to Respond* (Oxford University Press 2009).

Jackson argues that the Bush administration's construction of terrorists as barbarous, savage, and uncivilised enemies of freedom legitimised and elicited public demands for the use of lethal violence to combat organisations such as al-Qaeda. To him, the war on terror is based upon the conscious, deliberate construction of diametrically opposing identities. 'Terrorists are endlessly demonised and vilified as being evil, barbaric, and inhuman,' he writes, 'While America and its coalition partners are described as heroic, decent and peaceful – the defenders of freedom.'[68] To an extent, this diametrical opposition between terrorists and the 'civilised' world has been replicated within and by the UNSC, with terrorism consistently characterised as an impediment to the state's ability to protect human rights. To be sure, terrorist attacks directly impact upon victims' enjoyment of their human rights, and, as von Schorlemer points out, they 'aim at the denial of human rights.'[69] While terrorist attacks deprive their immediate victims of their rights to life and security of the person, they are also calculated to create an 'environment of fear' in which individuals are less willing or able to freely participate in public and political life.[70] Often, terrorist attacks directly challenge, or seek to destroy, freedom of religious belief and practice, with significant examples including the 2019 Easter Sunday bombings in Sri Lanka, the 2019 Christchurch mosque shootings,[71] the 2002 Akshardham Temple attack in Gujarat, India,[72] and the ongoing persecution of Egypt's Coptic Christians by both the Muslim Brotherhood and ISIL.[73]

Yet the relationship between acts of terror and human rights is far more complex. As Richard English notes, terrorist attacks and state counter-terrorism measures exist in a 'mutually shaping, reciprocal, antiphonal, paradoxically intimate relationship.'[74] To English, terrorists and states interact with one another in 'processes of spiralling degradation.'[75] Terrorist

[68] Jackson (n 12) 59.
[69] Sabine von Schorlemer, 'Human Rights: Substantive and Institutional Implications of the War Against Terrorism' (2003) 14(2) European Journal of International Law 265, 269 (emphasis omitted).
[70] ibid.
[71] See Alan Anderson, 'Commentary: Thoughts on the New Zealand and Sri Lanka Attacks' (2019) 18(2) Journal on Ethnopolitics and Minority Issues in Europe 72.
[72] Sandu Brahmaviharidas, 'Terrorism and Interfaith Relations at Swaminarayan Akshardham in Gandhinagar' in Raymond B Williams and Yogi Trivedi (eds), *Swaminarayan Hinduism: Tradition, Adaptation, and Identity* (Oxford University Press 2016).
[73] See Girgis Nalem, *Egypt's Identities in Conflict: The Political and Religious Landscape of Copts and Muslims* (McFarland & Company 2018) 190.
[74] Richard English, *Does Terrorism Work?: A History* (Oxford University Press 2016) 79.
[75] ibid.

attacks lead states to implement policies that curtail human rights and disrespect the rule of law, which, in turn, lend credence to terrorist narratives. English writes:

> 'Al-Qaida itself picked up eagerly on the ways in which episodes such as Guantanamo Bay seemed to discredit the United States, and has had some measure of success in presenting the USA as abusive and illegitimate… There was an erosion of certain democratically established norms and practices, in ways that might be seen both to discredit the states concerned and also to give propagandist gifts to their terrorist adversaries. Even in the process of bringing to trial the alleged architect of the 9/11 attack itself – Khaled Sheikh Mohammad – allegations made about US torture at secret CIA sites, and also about other supposed US transgressions, became prominent and occasionally embarrassing.'[76]

What is notable about the UNSC's approach, then, is the fact that certain aspects of this cycle of human rights violations, those relating to the erosion of human rights by terrorists, are especially emphasised in meetings and relevant decisions. Although the importance of respecting human rights while countering terrorism has slowly come to be recognised in UNSC resolutions, the Council has largely served as an international platform for the discourse of the war on terror. This discourse is one of an imagined transnational 'self' – bound by a commitment to human rights, justice, law and civility – threatened by and entitled to secure itself against an 'other' that exists at the margins of international society.

Tierney argues that when a military campaign turns into a 'quagmire',[77] leaders should not abandon the war but should rather adjust its goals. He suggests that where victory becomes unattainable and the occupying force becomes embroiled in a counter-insurgency effort, commanders should develop a narrower set of goals that will enable the achievement of a 'better peace than before, which enhances the security of rights, empowers local people, spreads democracy, and reduces the odds of future violence.'[78] Tierney does not, however, acknowledge that this idea of a recalibrated quest for a 'better peace' allows intervening actors to deploy the language of human rights to morally and legally redeem a campaign that

[76] ibid.
[77] Dominic Tierney, 'The Ethics of Unwinnable War' in Andrew R Hom, Cian O'Driscoll and Kurt Mills (eds), *Moral Victories: The Ethics of Winning Wars* (Oxford University Press 2017) 124.
[78] ibid 125.

initially entailed their violation. This is certainly the case with the UNSC's approach to Afghanistan. As noted above, the UNSC's counter-terrorism sanctions regime was introduced in 1999 and was initially targeted at the Taliban and Osama bin Laden. Despite the fact that some states expressed concerns about the regime's humanitarian impacts, the states that introduced and sponsored Resolution 1267 were unwilling to address the sanctions' potential impacts upon the human rights of the Afghan people. For several years, then, the 1267 sanctions regime included no review or appeal mechanisms, and very few humanitarian exceptions. By contrast, human rights have been at the fore of the UNSC's decisions relating to post-Taliban Afghanistan, where UNAMA has guided the formation of a new government and constitution. In light of the Taliban's resurgence,[79] the UNSC has called upon terrorists operating in the country to disarm, to accept the new constitution's emphasis upon the rights of women and children, and to cease attacks that impede the new government's ability to protect the human rights of the Afghan people. The Councils' decisions consistently express:

> 'Concern over the harmful consequences of violent and terrorist activities by the Taliban, al-Qaida and other violent and extremist groups on the capacity of the Afghan government to guarantee the rule of law, to provide security and basic services to the Afghan people, and to ensure the full enjoyment of their human rights.'[80]

Thus, while the Council was unwilling to consider the impacts of strict sanctions on human rights in Afghanistan, human rights became vitally important in the context of the terrorist violence that followed from the United States-led invasion. This highlights the way in which certain states, unilaterally and through the UNSC, manipulate and define the relevance of human rights in the context of terrorism and counter-terrorism, controlling whose human rights matter and defining what the primary threats to human rights are. This tendency transcends the Council's decisions relating to Afghanistan, informing its approach to the

[79] See Hassan Abbas, *The Taliban Revival: Violence and Extremism on the Pakistan-Afghanistan Frontier* (Yale University Press 2014); Allison M Coady and Hussein Solomon, 'Afghanistan's Arrested Development: Combating Taliban Resurgence with an Eye for Lasting Peace' (2009) 16(1) South African Journal of International Affairs 103.

[80] UNSC Res 2011 (12 October 2011) UN Doc S/RES/2011, Preamble. See also UNSC Res 1833 (22 September 2008) UN Doc S/RES/1833; UNSC Res 1868 (23 March 2009) UN Doc S/RES/1868; UNSC Res 1890 (8 October 2009) UN Doc S/RES/1890; UNSC Res 1917 (22 March 2010) UN Doc S/RES/1917; UNSC Res 1943 (13 October 2010) UN Doc S/RES/1943; UNSC Res 2041 (22 March 2012) UN Doc S/RES/2041; UNSC Res 2069 (9 October 2012) UN Doc S/RES/2069; UNSC Res 2096 (13 March 2013) UN Doc S/RES/2096; UNSC Res 2120 (10 October 2013) UN Doc S/RES/2120; UNSC Res 2145 (17 March 2014) UN Doc S/RES/2145.

global impacts of terrorism. For example, in Resolution 1566 relating to international cooperation in the fight against terrorism, the Council recognised that 'acts of terrorism seriously impair the enjoyment of human rights and threaten the social and economic development of all states.'[81] Similar wording has appeared in a number of subsequent resolutions, with the Council asserting that terrorism impairs both the enjoyment of human rights and 'global prosperity.' [82]

C.5. Freedom from Terror: UNSC Meetings

The characterisation of terrorism as a threat to global human rights and an impediment to the state's ability to protect human rights has clearly been informed by discussions within the Council's meetings. Since September 11, the UNSC has provided certain states with an international forum through which to further a view of terrorists as enemies of humanity and of democratic values, including human rights, freedom and political participation. In a ministerial meeting on 12 September 2001, for example, the Irish delegate argued that 'terrorists have no respect for freedom or tolerance; they have no respect for the human rights of innocent people; they have no respect for promoting diversity and pluralism.'[83] This sentiment was echoed by President Bush four years later, in a Council meeting of heads of state and ministers for foreign affairs. 'Terrorism and armed conflict,' he said, 'Are not only threats to our security, they are the enemies of development and freedom for millions.'[84] This view of terrorists as enemies of freedom and human rights has foregrounded the argument that states, in fact, have an obligation to their citizens to do all in their power to combat terrorism. President Bush said at the same meeting:

> 'We have a solemn obligation to stop terrorism in its early stages. We have a solemn obligation to defend our citizens against terrorism, to attack terrorist networks, and deprive them of any safe haven, and to promote an ideology of freedom and tolerance that refute the dark vision of the terrorists.'[85]

[81] UNSC Res 1566 (8 October 2004) UN Doc S/RES/1566, Preamble.
[82] UNSC Res 1963 (20 December 2010) UN Doc S/RES/1963; UNSC Res 2129 (17 December 2013) UN Doc S/RES/2129.
[83] UNSC Verbatim Record (12 September 2001) UN Doc S/PV.4360, 5.
[84] UNSC Verbatim Record (14 September 2005) UN Doc S/PV/5261, 6.
[85] ibid.

While states bear an obligation under international law to protect those within their jurisdiction from violations of human rights by other private actors,[86] the actions they can take in order to do so are limited by their other obligations arising from international humanitarian law, law on the use of force and international human rights law itself. Yet to Bush, the state's obligation to protect its citizens from human rights violations apparently grounds both an obligation and an unconstrained right to use military violence in the fight against terrorism.

The invocation of human rights within the UNSC's meetings relating to counter-terrorism indicates a desire, on the part of the United States and its allies, to speak about 'our' rights as something threatened by, hated by and in need of protection from terrorists. Implicit in this argument is the idea that the human rights of those within the imagined global community threatened by terrorism are of greater value or importance than those of the terrorist 'other' at the margins. This sentiment was particularly clear in the comments of the UK's representative to the UNSC in 2001. Speaking about recent legislative changes implemented by the UK Government in response to Resolution 1373, the UNSC's main institutional and legal response to September 11, outlined in chapter 3, the delegate stated:

> 'The overall aim of these changes… Is to reinforce the civil liberties that *really matter* – like the right to life itself and the right to life without the fear of the terrorist bomb or the terrorist bullet. We are also cutting back on the opportunities for terrorist suspects to abuse or exploit the freedoms of the United Kingdom, freedoms which the same terrorists themselves seek to destroy.'[87]

Statements like this one deliberately construct terrorists as enemies of a supposed culture of respect for human rights. The UK's representative simultaneously made a number of interrelated arguments about human rights: that individuals have a human right to be safe from terrorism, that terrorists exploit the openness and freedom of democratic societies in order to plan and perpetrate attacks, and that terrorists target Western states precisely in order to attack human rights and democracy. 'Terrorism,' according to a German delegate to

[86] UN Human Rights Committee 'General Comment No. 31 [80]: The Nature of the General Legal Obligation Imposed on States Parties to the Covenant' (29 March 2004) UN Doc CCPR/C/21/Rev.1/Add. 1326.
[87] UNSC Verbatim Record (12 November 2001) UN Doc S/PV.4413, 15.

the UNSC in 2003, 'Threatens democracy, development and freedom, and it scorns national and international law and brutally attacks human rights.'[88]

Within the UNSC's meetings, therefore, Global North states have spoken of human rights in order to highlight the political, cultural and social differences between 'us' and the terrorist enemy. In this counter-terrorism discourse, a common understanding of and supposed respect for human rights mark out the territory of a global community that is collectively threatened by, and is fearful of, terrorists. At its extreme, this view has manifested in calls for the formal, legal recognition of a human right to be protected against terrorism, as was advanced by the Russian delegate to the UNSC in 2003:

> 'It is perfectly clear that terrorism is a gross violation of human rights and freedoms, including the fundamental right to life. That is why we have on our agenda the task of establishing the human right to protection from terrorism. We believe that we must implement as soon as possible the well-known Russian initiative to develop, under the auspices of the United Nations, a code to protect human rights against terrorism.'[89]

While Russia's call has not resulted in the explicit, formal recognition of a human right to be free from terrorism in either a treaty or a UNSC resolution, it reflects the extent to which the UNSC's discussions of counter-terrorism have been informed by the belief that freedom, humanity, and human rights are under threat from terrorism.

What is most striking about these discussions of the terrorist threat to human rights is that human rights are continually spoken of as being owned by, defined by, and realised within the context of, the United States and Europe. Human rights are spoken of as a thing that is either given by, or belongs to, these particular states. As discussed in chapters 1 and 2, this use of the vocabulary of human rights allows for terrorists to be constructed as actors who are too unsophisticated and uncivilised to be considered a part of global society, heightening the sense of difference between 'us' and 'them.' Rao places this discourse within the context of a more general tendency to divide the world into cultures and societies that are either with or without human rights. She thus identifies the existence of:

[88] UNSC Verbatim Record (20 January 2003) UN Doc S/PV.4688, 5.
[89] ibid 16.

> 'A false oppositional dichotomy in which geopolitical borders are erased and a multitude of cultures are collapsed into two falsely unified packages, one bearing the stamp of human rights and the other lacking it. Hence the search for human rights in "Africa," in "Islam," and so on.'[90]

After September 11, the UNSC was seized by a number of its permanent members and their allies. It was used as both a deliberative body and as an international authority, with these states seeking to garner support for an ideological war between a coalition of states united by their supposed commitments to human rights and freedom, and terrorists, who are defined by their commitment to illiberalism and hatred for human rights.

C.6. Globalising the State of Emergency

The repetition of this simple, binary opposition created the sense that the global war on terror is a Manichean struggle between those fighting for the common good of the world and those fighting against it. In advancing the idea that the entire world order was threatened by a savage and irrational other, the United States and its allies attempted to globalise the domestic states of emergency brought about by acts of terrorism. This doctrine of emergency is, according to Rana, 'The Achilles' heel of the human rights doctrinal corpus.'[91] Rana argues that the doctrine of emergency is a relic of colonialism, suggesting that colonising powers were endowed with the authority to restrict free speech, enforce censorship, restrict individuals' freedom of movement, and take away the right to freedom of assembly in order to maintain 'order.'[92] Thus, 'Emergencies essentially provide a *carte blanche* to governments to violate the rights of their citizens.'[93] Rana's argument, which is made in relation to domestic legal systems in democratic societies, is also relevant to the UNSC. Throughout the war on terror, the United States and its allies have consistently turned to the Council to use its Chapter VII powers in order to mandate the universal implementation of extensive counter-terrorism policies. The continual exercise of these powers, which were conceived of as emergency powers that allow responses to immediate threats to international peace and

[90] Arati Rao, 'The Politics of Gender and Culture in International Human Rights Discourse' in JS Peters and Andrea Wolper (eds), *Women's Rights, Human Rights: International Feminist Perspectives* (Routledge 1995) 168.
[91] Rajat Rana, 'Symphony of Decolonisation: Third World and Human Rights Discourse' (2007) 11(4) International Journal of Human Rights 367, 372.
[92] ibid 373.
[93] ibid.

security, has created a prolonged, international state of emergency. This, ultimately, has come at the cost of human rights.

Clearly, then, the UN served the purpose willed by the United States and its allies in the aftermath of September 11. The fluidity of the UNSC's resolutions, their requirement that states take a range of actions against international terrorism without defining the term, has enabled the implementation of sweeping counter-terrorism legislation around the world. For example, many laws, including those implemented in the United Kingdom, criminalise a range of actions including incitement to terrorist violence, possession of materials that may be conducive to attack and material support for terrorism.[94] Adopted in response to the 7/7 bombings and UNSC Resolution 1624, which required states to criminalise incitement to commit terrorist attacks,[95] the 2006 Terrorism Act bans any statement that might be understood by members of the public as inciting or glorifying acts of terror.[96] Bartolucci and Skoczylis thus observe that,

> 'For [counter-terrorism] purposes, British security services have been breaching privacy and human rights laws on an industrial scale, by collecting personal online data. Targets not only included those suspected of terrorism, but ordinary citizens, human rights activists, lawyers and investigative journalist[s].'[97]

Five years earlier, the UK parliament hurriedly adopted legislation in response to September 11 and the UNSC's adoption of Resolutions 1368 and 1373, which required states to take a range of measures to secure their borders against terrorists and to expedite their prosecution.[98] The 2001 Act allowed, among other things, for the indefinite detention of foreign nationals without charge or trial, if the law prevented their removal from the territory of the United Kingdom.[99] The UNSC's Chapter VII resolutions led Member States to hastily and abruptly adopt 'overzealous and draconian' counter-terrorism legislation or amendments

[94] See, for example, Fergal Davis and Clive Walker, 'Manifestations of Extremism' in Genevieve Lennon and Clive Walker (eds), *Routledge Handbook of Law and Terrorism* (Routledge 2015).
[95] UNSC Res 1624 (14 September 2005) S/RES/1624, paras 1-2.
[96] Terrorism Act 2006, pt 1.
[97] Valentina Bartolucci and Joshua Skoczylis, 'The Practice of Counterterrorism in the United Kingdom and its Sociopolitical Effects' in Scott N Romaniuk, Francis Grice, Daniela Irrera and Stewart Webb (eds), *The Palgrave Handbook of Global Counterterrorism Policy* (Palgrave 2017) 347.
[98] UN Doc S/RES/1368 (2001); UN Doc S/RES/1373 (2001). For a detailed outline, see ch 3.
[99] Anti-terrorism, Crime and Security Act 2001, s 23.

to existing criminal law,[100] changes that directly impacted upon the enjoyment of human rights. In the sections that follow, I demonstrate that this pattern – which perpetuates a permanent, international state of emergency and a suspension of human rights considerations – has continued despite an ostensible change to the UNSC's stance regarding human rights and counter-terrorism.

D. A Human Rights Turn? The UNSC from 2001 to 2013

Writing about a number of developments in international law including the UNSC's sanctions regime, Katz Cogan argues that international law's increased regulation of individuals – either directly or through states – is in fact a second human rights turn.[101] The author argues that non-state actors like terrorists now pose the greatest threat to human rights. To Katz Cogan, international law and organisations have consequently rebuffed their own power, and states' power, to directly regulate individuals. This argument might seem to find support in two developments within the UNSC: the reform of the sanctions regime and the Council's increasing recognition of the importance of respecting human rights in the context of counter-terrorism, both outlined in the previous chapter. I argue, however, that the piecemeal amendments to the sanctions regime are clear admissions that the states that proposed and sponsored this framework initially prioritised the implementation of stringent counter-terrorism measures over human rights. As highlighted in chapter 3, when the targeted sanctions regime was introduced in 1999,[102] it included no mechanism for individuals to appeal their inclusion on the Consolidated List or procedures to ensure transparency and accountability in decisions to include individuals or entities on that list. It was only after widespread criticism from states and human rights advocates, noted above and in chapter 3, that the Council established a delisting 'focal point.' This mechanism could receive requests for removal from the Consolidated List directly from the individuals or entities concerned, or requests from their national states.[103] On the occasion of the mechanism's establishment, the Argentinian delegate commented that 'the changes represent progress in the defence of

[100] Christian A Honeywood, 'Britain's Approach to Balancing Counter-Terrorism Laws with Human Rights' (2016) 9(3) Journal of Strategic Security 28, 28.
[101] Jacob Katz Cogan, 'The Regulatory Turn in International Law' (2011) 52 Harvard International Law Journal 321.
[102] UN Doc S/RES/1267 (1999).
[103] UNSC Res 1730 (19 December 2006) UN Doc S/RES/1730.

human rights and in awareness-raising among all members of the Council on the need to operate… in respect for the law and human rights.'[104] In a statement regarding the focal point, the President of the UNSC commented that the 'Council attaches vital importance to promoting justice and the rule of law, including respect for human rights, as an indispensable element for lasting peace.'[105] The President effaced the Council's commitment to 'ensuring that fair and clear procedures exist for placing individuals and entities on sanctions lists and for removing them, as well as for granting humanitarian exemptions.'[106] Thus, after seven years of stasis, the 1267 sanctions regime finally included a delisting mechanism.

Over the coming years, the Council would implement a range of measures in an attempt to address the human rights implications of the sanctions regime. Days after the establishment of the delisting focal point, the Council decided that, when proposing names for inclusion on the Consolidated List, states were to provide a statement of their case, including the reasons for listing and relevant supporting documentation.[107] States were required to highlight those parts of the statement of their case that could be released publicly for the purposes of notifying the individual or entity of their listing.[108] This information would, finally, be communicated by the Secretariat of the 1267 Committee to the UN's permanent mission in the state in which the listed individual or entity was located.[109] In 2008, the Council further decided that a 'narrative summary' of reasons for the inclusion of individuals and entities on the Consolidated List, including those who had already been listed, would be made available on the Sanctions Committee's webpage.[110] The Sanctions Committee was also asked to conduct, over the course of the following 24 months, a review of all the names on the Consolidated List in order to 'ensure that their listing remains appropriate.'[111] The Committee was, finally, called upon to ensure that 'fair and clear procedures exist' for listing, delisting and the granting of humanitarian exemptions to asset and travel bans.[112]

[104] UNSC Verbatim Record (19 December 2006) UN Doc S/PV.5599, 3.
[105] UNSC Presidential Statement (22 June 2006) UN Doc S/PRST/2006/28, 1.
[106] ibid.
[107] UNSC Res 1735 (22 December 2006) UN Doc S/RES/1735, para 5.
[108] ibid para 6.
[109] ibid para 10.
[110] UNSC Res 1822 (30 June 2008) UN Doc S/RES/1822, para 3.
[111] ibid para 26.
[112] ibid para 28.

In 2009, the Council established an Ombudsperson to assist the 1267 sanctions committee with delisting requests.[113] The Ombudsperson's establishment was driven by a number of states including Costa Rica, Belgium, Denmark, Finland, Germany and the Netherlands.[114] The aim of the Ombudsperson's establishment was, according to the Costa Rican delegate, to implement 'fair and clear procedures for including people and institutions on the sanctions list and for withdrawing them, as well as for exceptions authorised for humanitarian reasons.'[115] The delegate continued:

> 'The Group acknowledges that the improvements in the legal procedures serve as an acknowledgement of the concerns expressed by national and regional courts regarding the fundamental rights of sanctioned people and institutions, and that the new procedures adopted strengthen the sanctions regime.'[116]

These procedures developed further in 2011, when individuals were allowed to apply to the focal point for delisting even without the support of their national state.[117] The legal procedures for listing and delisting continued to develop over the coming years. In 2014, for example, the Council decided that the 1267 Sanctions Committee must directly contact individuals to provide them with a summary of reasons for their inclusion on the sanctions list,[118] and directed the Committee to ensure that clear procedures exist for the placement of individuals on the sanctions list.[119] The sanctions regime was also revised in this period in order to ensure that its implementation did not inhibit the reconciliation process in Afghanistan,[120] with the Council voting in 2012 to allow exemptions to the travel ban for individuals who need to travel to Afghanistan to partake in the post-war reconciliation process.[121]

Despite these amendments to the sanctions regime, states and human rights advocates remain concerned about its adverse impacts upon human rights and the rule of law. A 2008

[113] UNSC Res 1904 (17 December 2009) UN Doc S/RES/1904, paras 20-21.
[114] UNSC Verbatim Record (17 December 2009) UN Doc S/PV.6247, 2.
[115] ibid.
[116] ibid.
[117] UNSC Res 1988 (17 June 2011) UN Doc S/RES/1988, para 20.
[118] UNSC Res 2160 (17 June 2014) UN Doc S/RES/2160, para 24.
[119] UNSC Res 2161 (17 June 2014) UN Doc S/RES/2161, para 24.
[120] ibid.
[121] UNSC Res 2082 (17 December 2012) UN Doc S/RES/2082, para 9.

statement by the Costa Rican delegate to the UNSC accurately summarises many of these concerns:

> 'We are concerned by the fact that the Council considers the imposition of sanctions, the freezing of funds and the restriction of travel to be preventive measures… Their imposition must necessarily comply with the international standards of due process set out in the International Covenant on Civil and Political Rights and other instruments of international human rights law.'[122]

The enforcement of the sanctions regime, however, is still not consistent with the ICCPR and other international legal instruments. As noted in chapter 3, the use of the sanctions delisting mechanism remains very limited. In 2017, Ben Emmerson – then the Special Rapporteur for human rights and counter-terrorism – described this delisting process as 'unnecessarily opaque.'[123] The former Special Rapporteur observed that the arrangements for the delisting mechanism formally allow for individual petitioners to be 'kept in ignorance of information that is decisive to the outcome of a delisting petition,' and criticised the UNSC for its failure to address the possibility that evidence leading to certain individuals' inclusion on the Consolidated List had been acquired through torture.[124] Further, in 2019, Ní Aoláin – who replaced Emmerson in the role of Special Rapporteur – expressed concern that humanitarian workers had been included on the Consolidated List upon the basis that they had provided medical assistance to members of a designated terrorist organisation.[125]

The sanctions regime has, therefore, been gradually updated to reflect some of the concerns of its critics. Yet far from overhauling the original arrangements and devising a system that is consistent with international human rights law, the amendments to the regime have been minor adjustments. The core of the sanctions regime introduced by the United States and its allies in 1999, including its inconsistency with international human rights law, remains in place. These changes to the sanctions regime have occurred alongside changes in the wording of the UNSC's resolutions. In 2003, a high-level ministerial meeting of the UNSC resulted in

[122] UNSC Verbatim Record (30 June 2008) UN Doc S/PV.5928, 3.
[123] UN Human Rights Council 'Report of the Special Rapporteur on the Promotion and Protection of Human Rights and Fundamental Freedoms while Countering Terrorism' (21 February 2017) UN Doc A/HRC/34/61, para 19.
[124] ibid.
[125] UN Human Rights Council 'Report of the Special Rapporteur on the Promotion and Protection of Human Rights and Fundamental Freedoms while Countering Terrorism' (1 March 2019) UN Doc A/HRC/40/52, para 20.

the adoption of a declaration on countering terrorism. This was the first Council document to explicitly acknowledge the need to comply with international human rights law while combating terrorism. 'States must ensure that any measures taken to combat terrorism comply with all their obligations under international law,' the document reads, 'And should adopt such measures in accordance with international law, in particular international human rights, refugee and humanitarian law.'[126] This statement was subsequently included in the preambles to all UNSC resolutions relating to counter-terrorism.[127] It was not until 2005, however, that states' duty to implement counter-terrorism measures in a manner that is consistent with their obligations under international human rights law was highlighted in the operative part of a UNSC resolution. Resolution 1624 – regarding incitement to terrorism – called upon states to ensure that the counter-terrorism policies they adopt in order to implement the Resolution 'comply with all of their obligations under international law, in particular international human rights law, refugee law, and humanitarian law.'[128] It should, however, be noted that Resolution 1624 was not adopted under the Council's Chapter VII powers; the human rights content of those resolutions remained minimal for some time to come.

It was not until 2010 that a UNSC resolution recognised the idea that greater respect for and promotion of human rights can prevent terrorist attacks and reduce individuals' desire to join terrorist organisations. The preamble to Resolution 1963 recognised:

> 'The need to strengthen efforts for the successful prevention and peaceful resolution of prolonged conflict, and the need to promote the rule of law, the protection of human rights and fundamental freedoms, good governance, tolerance and inclusiveness to offer a viable alternative to those who could be susceptible to terrorist recruitment.'[129]

The Resolution also recognised that 'development, peace and security, and human rights are interlinked and mutually reinforcing.'[130] This view of counter-terrorism and human rights as

[126] UNSC Res 1456 (20 January 2003) UN Doc S/RES/1456, Annex, para 6.
[127] See, for example, UNSC Res 1535 (26 March 2004) UN Doc S/RES/1535, Preamble; UN Doc S/RES/1566 (2004) Preamble; UNSC Res 1787 (10 December 2007) UN Doc S/RES/1787.
[128] UNSC Res 1624 (14 September 2005) UN Doc S/RES/1624, para 4.
[129] UN Doc S/RES/1963 (2010) Preamble.
[130] ibid.

reconcilable and even co-dependent goals has continued to develop within the work of the UNSC. In 2013, the Council recognised that 'effective counter-terrorism measures and respect for human rights, fundamental freedoms and the rule of law are complementary and mutually reinforcing, and are an essential part of a successful counter-terrorism effort.'[131]

While one might be encouraged by the evolving wording of UNSC resolutions, two aspects of this slow change should be taken into consideration. Firstly, it took more than a decade for a UNSC decision to recognise that there might exist a positive correlation between human rights and counter-terrorism. This idea was first presented by the Brazilian delegate to the UNSC in 1999. The delegate argued that terrorism 'often finds fertile ground amid civil strife and deprivation,' and is driven by 'despair and frustration, manipulating the anguish and sense of hopelessness of those left behind.' Terrorism, the delegate concluded, must be fought through 'the establishment of a culture of human rights and tolerance for all.'[132] The relationship between denial of human rights and terrorism was discussed once again in a ministerial meeting on counter-terrorism held by the Council two months after September 11. This time, the representatives of a number of states highlighted the need to address global poverty, inequality and marginalisation in order to curtail the threat of international terrorism. The Jamaican representative, for example, stated,

> 'The problems of poverty; the prevalence of regional conflicts; the denial of human rights, access to justice for all and equal protection under the law; and the lack of sustainable development and environmental protection provide a fertile breeding ground for terrorism.'[133]

This sentiment was echoed by many others. The Chinese representative, for example, called upon states to generate 'proper solutions to global issues such as poverty, regional conflicts and sustainable development.'[134]

These remarks show, secondly, that states represented in the UNSC have taken divergent approaches to the relationship between human rights and counter-terrorism. While the

[131] UN Doc S/RES/2129 (2013) Preamble.
[132] UNSC Verbatim Record (19 October 1999) UN Doc S/PV.4053, 2.
[133] UN Doc S/PV.4413 (2001) 4.
[134] ibid 5.

United States and its allies have generally focussed upon terrorists' disdain for, and attempt to destroy, human rights, others have called for the Council's decisions to be more consistent with international human rights law. States of the Global South have been the most vehement advocates for a rights-based approach to counter-terrorism, and in this sense, the UNSC has become a forum for the North and South to negotiate the relationship between human rights and security. Take, for example, the meeting that led to the adoption of Resolution 1624 regarding incitement to terrorism. UK Prime Minister Blair stated:

> '[Terrorism] will not be defeated until our determination is as complete as theirs, our defence of freedom as absolute as their fanaticism, our passion for the democratic way as great as their passion for freedom.'[135]

The UK's approach was clearly to characterise terrorists as enemies of human rights, its arguments structured around the binaries of democracy and tyranny, freedom and fanaticism. As noted above, human rights were spoken of as something owned, claimed and given only by certain states, and vulnerable to misuse by terrorists: 'Freedom of speech and expression is the very foundation of any modern, democratic society, but that must never be an excuse for inciting terrorism and fostering hatred.'[136]

By contrast, representatives of Global South states determinedly called for the fight against terrorism to be conducted in accordance with international human rights law. 'We must stress the close relationship between respect for human rights and the fight against terrorism,' the Argentinian delegate said. 'The vulnerability of all nations – large and small, rich or poor – demands international action that is intelligent, coordinated and sustainable, based upon legitimacy [and] respect for human rights.'[137] The Brazilian representative, meanwhile, suggested that the fight against terrorism should not only be consistent with international human rights law, but that it should also entail the promotion of human rights and development. 'The best means at our disposal are the promotion of a culture of dialogue, the promotion of development and the unyielding protection of human rights.'[138]

[135] UN Doc S/PV.5261 (2005) 9.
[136] Statement made by Danish delegate: ibid 15.
[137] ibid 7.
[138] ibid 12.

The contrasting positions taken by states show that it would be a mistake to see the gradual changes to the wording of UNSC resolutions as a human rights turn in the Council's work. Rather, they highlight three key issues. Firstly, UNSC resolutions do not represent the existence of consensus within the international community, or even among the fifteen states represented on the Council at any one point in time. Rather, they are the culmination of a process of negotiation, contestation and compromise. When we consider the Council's meetings, it becomes clear that the inclusion of human rights within key counter-terrorism decisions is the result of campaigns led by a small number of states, very often Global South states, and not by the initiative of the United States and its allies, who brought about the Council's legislative counter-terrorism role. Thus, secondly, it is clear that less powerful states within the Council draw upon the vocabulary of international human rights law in an attempt to challenge and constrain the measures proposed by the leaders of the global coalition against terrorism. Thus, as noted in chapter 2, human rights provide states with a widely recognised language in which to articulate demands for more just institutions, policies and practices.

Thirdly, however, this gives rise to a disjuncture between the wording of the Council's resolutions, which address the need to promote and protect human rights in order to appease certain critics, and their effect, which is to mandate policies conducive to the violation of human rights. This disjuncture has become clearest in the context of the UNSC's work relating to ISIL and foreign terrorist fighters, discussed in the following section.

E. New Directions? Foreign Fighters and ISIL, 2014 Onwards

Writing about Resolution 2178 on foreign terrorist fighters,[139] Ginsborg argues:

> 'The prominence of human rights and international law and the focus on countering violent extremism in order to counter terrorism in a Chapter VII resolution give hope that a different agenda may emerge out of the work of the Security Council.'[140]

[139] UN Doc S/RES/2178 (2014).

[140] Lisa Ginsborg, 'One Step Forward, Two Steps Back: The Security Council, "Foreign Terrorist Fighters", and Human Rights' in Manfred Nowak and Anne Charbord (eds), *Using Human Rights to Counter Terrorism* (Edward Elgar 2018) 196.

To Ginsborg, the Resolution shows that the Council has 'learnt, at least in part, from its mistakes… that the complete disregard of human rights is not always helpful from a security perspective.'[141] This section argues that Ginsborg's early optimism was well-founded, but only to an extent. The UNSC's resolutions relating to foreign fighters and ISIL are a departure from previous decisions insofar as they call for ISIL members to be held accountable for violations of human rights and humanitarian law and incorporate gender and youth perspectives. I conclude, however, that the nature of the Council's decisions relating to counter-terrorism remains unchanged. As Ní Aolaín noted in 2019, the Council's decision-making process is still 'expedited and non-transparent.'[142] To her, the haste with which the Council's resolutions are adopted, combined with its continuing 'legislative compulsion', have resulted in 'overbroad and vague' resolutions that have serious human rights implications.[143] While a comprehensive overview of the impacts of the Council's extensive work in this area is beyond the scope of this thesis, I conclude with a brief discussion of changes to citizenship and immigration laws as an illustrative example.

E.1. Accountability

Since 2014, the UNSC has condemned human rights abuses and violations of international humanitarian law committed by ISIL.[144] . A majority of states represented on the Council in 2014 unequivocally expressed support for the inclusion of this wording for the first time in Resolution 2178. The UK delegate, for example, stated, 'Today, the Council has shown that it will not stand idle in the face of terrorism and violations of human rights.'[145] Referring to ISIL's

[141] ibid.
[142] Ní Aolaín (n 33).
[143] ibid.
[144] UNSC Res 2170 (15 August 2014) UN Doc S/RES/2170, para 1: 'Deplores and condemns in the strongest terms the terrorist acts of ISIL and its violent extremist ideology, and its continued gross, systematic and widespread abuses of human rights and violations of international humanitarian law.' See also, UNSC Res 2249 (20 November 2015) UN Doc S/RES/2249, para 3; UNSC Res 2299 (25 July 2015) UN Doc S/RES/2299, Preamble; UNSC Res 2332 (21 December 2016) UN Doc S/RES/2332, Preamble; UNSC Res 2368 (20 July 2017) UN Doc S/RES/2368, Preamble.
[145] UNSC Verbatim Record (15 August 2014) UN Doc S/PV.7242, 2. Delegates made similar comments in a number of subsequent meetings. See UNSC Verbatim Record (20 November 2015) UN Doc S/PV.7565, 8 (Venezuela); UNSC Verbatim Record (23 December 2015) UN Doc S/PV.7598, 2 (United Kingdom); UNSC Verbatim Record (15 March 2016) UN Doc S/PV.7645, 5 (Iraq), 16 (Ukraine); UNSC Verbatim Record (15 March 2017) UN Doc S/PV.7898; UNSC Verbatim Record (8 June 2017) UN Doc S/PV.7962, 6 (Uruguay); UNSC Verbatim Record (21 September 2017) UN Doc S/PV.8052, 9 (Bolivia and Senegal).

indiscriminate attacks against civilians and mass executions, a number of states described ISIL's actions as crimes against humanity and genocide.[146]

In recent times, the Council has implemented measures to ensure that evidence is gathered in Syria and Iraq for the purposes of criminal proceedings. Adopted in 2017, Resolution 2379 expressed 'determination that, having united to defeat the terrorist group ISIL (Da'esh), those responsible in this group for such acts, including those that may amount to war crimes, crimes against humanity and genocide, must be held accountable.'[147] The UNSC's endeavours to ensure the accountability of ISIL members for human rights abuses are now coordinated by the UN Investigative Team to Promote Accountability for Crimes Committed by Da'esh/Islamic State in Iraq and the Levant (UNITAD), established in 2017.[148] UNITAD's mandate is to 'support domestic efforts to hold Islamic State in Iraq and the Levant accountable by collecting, preserving and storing evidence in Iraq of acts that may amount to war crimes, crimes against humanity and genocide.'[149] In November 2019, UNITAD presented its third report to the UNSC. The Team reported that it has made 'significant progress' in '[building] an evidence base capable of supporting prosecution for war crimes, crimes against humanity and genocide.'[150]

E.2. Gender Perspectives and Children's Rights

Gender perspectives and children's rights have also been mainstreamed in the Council's counter-terrorism decisions and the mandates of relevant subcommittees. In July 2015, the Council expressed 'grave concern that the violent extremism and terrorism perpetrated by ISIL in Iraq has frequently targeted women and girls,' and condemned its 'use of sexual violence against and the sexual enslavement of women and girls.'[151] The Council reiterated these concerns in a number of subsequent resolutions.[152] Gender perspectives, issues of

[146] See the comments of the Australian, Jordanian, and Iraqi delegates: UN Doc S/PV.7242 (2014) 4, 5, 8.
[147] UNSC Res 2379 (21 September 2017) UN Doc S/RES/2379, para 1.
[148] ibid para 2.
[149] Third Report of the Special Adviser and Head of the United Nations Investigative Team to Promote Accountability for Crimes Committed by Da'esh/Islamic State in Iraq and the Levant (13 November 2019) UN Doc S/2019/878, para 2.
[150] ibid para 7.
[151] UNSC Res 2233 (29 July 2015) UN Doc S/RES/2233, Preamble.
[152] See UNSC Res 2253 (17 December 2015) UN Doc S/RES/2253, Preamble; UN Doc S/RES/2299 (2016) Preamble; UN Doc S/RES/2368 (2017).

sexual violence and children's rights have also been discussed at length in UNSC meetings relating to human trafficking and those held as part of its women and peace and security agenda. In 2017, the Council convened a meeting relating to trafficking in conflict situations. Much of the meeting related to terrorist organisations' involvement in human trafficking and sexual slavery. The UK delegate, for example, stated, 'Terrorist organisations openly advocate slavery as a tactic of war. Da'esh has targeted minority groups for forced labour and sexual exploitation. It has established slave markets where women and children are sold with a price tag attached.'[153] The Ethiopian delegate, meanwhile, pointed out that 'many Africans, including women and children escaping from persecution and/or searching for a better life in Europe and the Middle East, are falling victims to those terrorists and criminals.'[154] Later in 2017, the Council convened a meeting regarding human rights and the prevention of armed conflict. The Italian delegate similarly pointed out that 'Islamic State in Iraq and the Levant and its affiliates… are using sexual violence as a terrorist tactic to advance their strategic and ideological objectives. That is why the Council is recognising the victims of sexual violence as victims of terrorism.'[155]

The Council has since continued to deliberate upon the gender dimensions of terrorism, as well as its impacts upon children.[156] Over time, states represented on the UNSC have come to acknowledge that women and children are impacted by, and involved in, the activities of organisations such as ISIL in a variety of ways. In 2017, for example, the Afghan delegate stated that ISIL 'was the essential cause of serious violations perpetrated against children. Da'esh was the very reason for the displacement of thousands of children, for the recruitment of children, for the use of children as suicide bombers and as spies and sources of information.'[157] In 2018, meanwhile, the Swedish delegate acknowledged that 'women play multiple roles in relation to terrorism, including those of perpetrator, supporter, facilitator, victim and preventer.'[158] This marks a significant shift from earlier discussions, in which

[153] UN Doc S/PV.7898 (2017) 7.
[154] ibid.
[155] UNSC Verbatim Record (18 April 2017) UN Doc S/PV.7926, 20.
[156] Similar comments can be found in UNSC Verbatim Record (17 July 2017) UN Doc S/PV.8004, 7 (Bolivia); UNSC Verbatim Record (30 July 2017) UN Doc S/PV.8036, 5 (Under-Secretary General for Humanitarian Affairs); UN Doc S/PV.8052 (2017) 4 (Sweden); UNSC Verbatim Record (28 September 2017) UN Doc S/PV.8059, 18 (Bolivia); UNSC Verbatim Record (27 October 2017) UN Doc S/PV.8079, 42 (Canada), 79 (Iraq).
[157] UNSC Verbatim Record (31 October 2017) UN Doc S/PV.8082, 52.
[158] UNSC Verbatim Record (8 February 2018) UN Doc S/PV.8178, 12.

women and children were considered merely as victims of extremist violence. Recognition of the diversity of roles played by women and children has facilitated dialogue about the broader conditions that render women and young people vulnerable to terrorism as both perpetrators and victims. By August 2018, the Council was engaged in discussions about ISIL's recruitment of women and children. 'Da'esh achieved the support of women,' said a representative of the International Centre for the Study of Radicalisation and Political Violence,

> 'Through targeted, gendered recruitment efforts in its multilingual propaganda, which utilised language and imagery that emphasised women's rights, empowerment and a sense of purpose and belonging offered by their caliphate. It also exploited their personal and political grievances, framed their participation as a religious obligation and promised services ranging from free health care and education to marriage arrangements, among others.'[159]

Another element of this development is the treatment of children involved in ISIL's activities – as recruits, returning foreign terrorist fighters, children of foreign terrorist fighters and soldiers – as victims and not perpetrators of terrorist acts. This was first articulated by the Swedish delegate to the Council in late 2017. 'Children's full enjoyment of their human rights must be safeguarded,' the delegate said. 'Children returning from armed forces or groups must be provided with proper community-based support in order to avoid stigmatisation and future radicalisation. Children should always be treated primarily as victims.'[160] This was recognised in Resolution 2396, adopted under the Council's Chapter VII powers. The Resolution acknowledges that 'children may be especially vulnerable to radicalisation to violence and in need of particular social support… while stressing that children need to be treated in a manner that observes their rights and respects their dignity.' [161] States represented on the Council have since continued to call for a 'comprehensive approach to gender and children's issues' that entails rehabilitation and reintegration programmes, and have reported the implementation of policies that strive to attain that goal.[162]

[159] UNSC Verbatim Record (23 August 2018) UN Doc S/PV.8330, 7.
[160] UNSC Verbatim Record (28 November 2017) UN Doc S/PV.8116, 21.
[161] UNSC Res 2396 (21 December 2017) UN Doc S/RES/2396, Preamble.
[162] UN Doc S/PV.8178 (2018) 16 (Bolivia). See also UNSC Verbatim Record (11 February 2019) UN Doc S/PV.8460, 18 (Belgium): 'Belgium therefore gives priority to the return of terrorist fighters that are children under 10 years who are still in the conflict zone, and takes measures to ensure their rehabilitation and

E.3. Evaluation

The UNSC's endeavours to ensure ISIL members' accountability for human rights violations, and its emphasis upon the rights of women and children, suggest that the Council's approach has significantly changed, and that human rights are now at the fore of its work. At the same time, the Council's discussions, outlined above, show that the language of human rights is still invoked for similar purposes. Counter-terrorism discourses still revolve around the difference between an imagined 'us' – united by our victimhood and respect for human rights – and a terrorist 'other' that flagrantly disregards human rights or exploits them as a vulnerability in democratic states. As Ní Aolaín points out, the Council's hurried decision-making processes and inadequate consultation with human rights lawyers and advocates results in the implementation of far-reaching, repressive measures against an undefined but apparently demonic terrorist enemy.[163] Thus, as was the case immediately after September 11, the Council's decisions enable states' implementation of draconian counter-terrorism measures and facilitate continual expansion of the scope of counter-terrorism itself. Note, for example, the Ethiopian representative's comments, quoted above, in which the terms 'terrorist' and 'criminals' are used interchangeably.

The increasing scope and extent of the UNSC's decisions is most evident in the citizenship and border security laws implemented by states in response to Resolutions 2178 and 2396.[164] Since the adoption of those resolutions, a number of states have enacted laws allowing their respective governments to revoke the citizenships of returning foreign terrorist fighters.[165] Australian legislation, for example, allows the government to revoke citizenships of returning foreign fighters who hold dual nationality,[166] while amendments to the United Kingdom's

recovery. Once minors are returned to Belgium, they will be provided with tailored assistance that takes into account their individual situations.'

[163] Ní Aoláin (n 33).

[164] UN Doc S/RES/2178 (2014); UN Doc S/RES/2396 (2017).

[165] Letta Tayler, 'Foreign Terrorist Fighter Laws: Human Rights Rollbacks Under UN Security Council Resolution 2178' (2016) 18 International Community Law Review 455; Christophe Paulussen and Eva Entenmann, 'National Responses in Select Western European Countries to the Foreign Fighter Phenomenon' in Andrea de Guttry et al. (eds), *Foreign Fighters under International Law and Beyond* (Springer 2016).

[166] Aaron Y Zelin and Jonathan Prohov, 'How Western Non-EU States Are Responding to Foreign Fighters: A Glance at the USA, Canada, Australia, and New Zealand's Laws and Policies' in Andrea de Guttry et al. (eds), *Foreign Fighters under International Law and Beyond* (Springer 2016) 442; Amos Toh, 'Australia's Draconian Response to the Security Council's Resolution on Foreign Terrorist Fighters (*Just Security,* 7 October 2014) <

immigration law allow the government to revoke the citizenship of an individual if the Secretary of State has reasonable grounds for believing that the person is 'able, under the law of a country or territory outside the United Kingdom, to become a national of such a country or territory.'[167] These laws resulted in two parallel cases in 2019, in which the governments of the two states revoked an individual's citizenship based upon their mere *ability* to apply for citizenship of another state. In the case of Neil Prakash, an Australian citizen returning from the conflict in Syria, the Fijian government denied the Australian government's claims that the individual was already a Fijian national. Prakash, an Australian of Fijian descent, has never been or applied to be a Fijian citizen.[168] Similarly, the UK Government revoked the citizenship of Shamima Begum, also returning from Syria, on the grounds that she was eligible for Bangladeshi citizenship. In response, the Bangladeshi government stated that it was unwilling to grant her citizenship, stating that she had never visited Bangladesh or sought citizenship.[169]

As laws allowing the deprivation of citizenship have been passed in a number of other states including Austria, Belgium, Canada, Denmark, France and the Netherlands,[170] the cases of Neil Prakash and Shamima Begum are undoubtedly among many. Revocation of citizenship, especially where the individual is not an established citizen of a second state, is a clear violation of human rights; the rights to nationality and to freedom from arbitrary deprivation thereof are articulated in the Universal Declaration of Human Rights,[171] while the right to enter and leave one's country is protected by the ICCPR.[172] Furthermore, the use of the state's power to deprive an individual of citizenship amounts to a misuse of this area of law in order

https://www.justsecurity.org/15937/australias-draconian-response-security-councils-resolution-foreign-terrorist-fighters/> accessed 23 March 2019.

[167] Immigration Act 2014, s 66(1).

[168] Helen Davidson and Amy Remeikis, 'Neil Prakash "Not a Fiji Citizen": Dutton Move to Strip Australian Citizenship in Doubt' (*The Guardian,* 2 Janaury 2019) < https://www.theguardian.com/australia-news/2019/jan/02/neil-prakash-not-a-fiji-citizen-dutton-move-to-strip-australian-citizenship-in-doubt> accessed 23 March 2019.

[169] 'The Home Secretary Made the Wrong Decision about Shamima Begum – and Her Baby' (*The Independent,* 9 March 2019) < https://www.independent.co.uk/voices/editorials/shamima-begum-baby-dead-son-sajid-javid-syria-isis-uk-citizen-a8815676.html> accessed 23 March 2019.

[170] Sandra Mantu, '"Terrorist" Citizens and the Human Right to Nationality' (2018) 26(1) Journal of Contemporary European Studies 28, 28.

[171] *Universal Declaration of Human Rights*, art 15.

[172] ICCPR, art 12(2).

to take punitive measures against individuals who are merely suspected of 'crimes against public security by act or association.'[173] Thus, as Mantu notes,

> 'Citizenship deprivation targeting dual nationals and citizens with an immigrant background points toward interlinkages between migration, asylum, and notions of (in)security.'[174]

F. Conclusion

In chapter 2, I argued that language matters because the way in which we see and perceive things determines how they are acted upon. 'Terrorism' does not denote a single form of violence, but rather a particular perception of the enemy as a threatening, unknown 'other' with a hatred of democracy and human rights. The UNSC's recent decisions relating to foreign terrorist fighters and the resulting legal changes within domestic jurisdictions are illustrative of this argument. The very notion of a 'foreign terrorist fighter', repeatedly used in the UNSC's meetings and decisions, presupposes that individuals travelling to participate in the civil wars in Syria and Iraq do so with the intention to attack their states of nationality upon return. This is referred to as the 'blowback effect' in security parlance,[175] but there is little evidence of the connection between participation in foreign conflicts and the intent to perpetrate acts of domestic terrorism.

Thus, while the human rights content of UNSC decisions has increased over the past eighteen years, their nature and effect remain the same. Since September 11, the United States and its allies in the war on terror have harnessed the UNSC's power to make legally binding decisions relating to international peace and security. In doing so, they have internationally replicated domestic states of emergency that allow for suspension and violations of human rights in the name of counter-terrorism. These states have, within the UNSC's decisions and debates, continually drawn upon the language of human rights in order to justify and garner support for their approach to counter-terrorism. As noted in chapters 1 and 2, however, the vocabulary of human rights continually fuels political discourses at the UN level and is

[173] Mantu (n 170) 29.
[174] ibid.
[175] Cerwyn Moore and Paul Tumelty, 'Foreign Fighters and the Case of Chechnya: A Critical Assessment' (2008) 31 Studies in Conflict and Terrorism 412; Daniel Byman, 'The Homecomings: What Happens When Arab Foreign Fighters in Iraq and Syria Return?' (2015) 38 Studies in Conflict and Terrorism 581.

deployed to various ends. This chapter has shown that since the 1990s, and particularly after September 11, human rights have been spoken about by and within the UNSC as markers of cultural, social and political differences between 'us' and the terrorist enemy. This othering discourse has created scope for the UNSC to function as a world legislature, continually mandating repressive counter-terrorism measures with detrimental impacts upon the enjoyment of human rights.

This is not to say that the increasing human rights content of UNSC resolutions, discussed in sections D and E, is insignificant. Rather, the contrast between the human rights dimensions of UNSC resolutions and their repressive, legislative aspects highlights the politicised nature of human rights, as does the fact that those two dimensions continue to awkwardly coexist. Moreover, as highlighted in section D, less powerful states within the UNSC, particularly Global South states, have consistently drawn on the language of human rights to challenge the validity of the Council's Chapter VII counter-terrorism decisions. The vocabulary of human rights thus animates the political exchange between states represented in the Council, and, as the next chapter shows, between the UN's branches.

Chapter 5: The General Assembly

A. Introduction

Chapters 1 and 2 noted that the September 11 attacks, as well as the responses of the United States and its allies, invigorated the work of cosmopolitan scholars, stimulating discussion about whether the Kantian vision of an institutionalised world order centred upon human rights might ever come into being. To Habermas, terrorists have since achieved '"success" …in their own eyes' not because of the means they have employed, but because of the 'incommensurate reaction' precipitated by terrorist attacks.[1] According to Habermas, terrorists evaluate the effectiveness of their actions by reference to the harshness of states' responses.[2] Terrorism thrives, therefore, within a cycle of physical force and violations of human rights. Militarism, invasion and harsh treatment of prisoners, among other things, exacerbate the grievances held by terrorist organisations and justify further attacks, in the perpetrators' eyes. Observing this cycle, scholars argued that cosmopolitanism can increase the effectiveness of responses to international terrorism. Habermas wrote:

> 'The undeniably acute danger of international terrorism cannot be combated effectively with the classical instruments of war between states nor, consequently, by the military superiority of a unilaterally acting superpower. Only the effective coordination of intelligence services, police forces, and criminal justice procedures will strike at the logistics of the adversary; and only the combination of social modernisation with self-critical dialogue between cultures will reach the roots of terrorism. These means are more readily available to a horizontally juridified international community that is legally obligated to cooperate than to the unilateralism of a major power that disregards international law.'[3]

Thus, in the aftermath of September 11, cosmopolitan scholars called for a global response to terrorism that is multilateral, promotes human rights and is based upon respect for international law. A cosmopolitan view can, according to these scholars, 'weaken' terrorism in a number of ways.[4] Firstly, cosmopolitanism promotes recognition of the value of each

[1] Jürgen Habermas, *The Divided* West (Ciaran Cronin tr, Wiley 2004) 172.
[2] ibid.
[3] ibid 184.
[4] Daniele Archibugi, 'Terrorism and Cosmpolitanism' (*Social Science Research Council*, 21 November 2001) <http://essays.ssrc.org/sept11/essays/archibugi_text_only.htm> accessed 22 June 2020.

human life, precluding the use of indiscriminate, unregulated violence to fight terrorism.[5] Secondly, the cosmopolitan view prompts states to disavow an 'us against them' approach to terrorists, instead prompting them to address the root causes of terrorism through the promotion of human rights and pursuit of social justice.[6] Crucially, from a cosmopolitan perspective, counter-terrorism measures should be implemented within the frameworks of domestic and international law. This means that the threat of global terrorism can neither justify nor be abated by unauthorised, unilateral military action or extrajudicial punishment of those involved in terrorist activities.[7] Beck, meanwhile, rejected the Kantian form of cosmopolitan idealism,[8] but he did see September 11 as evidence that we are already living in a cosmopolitan condition. As global risks like terrorism now shape daily life in local spaces, states must respond to security issues by implementing cooperative, multilateral policies that promote global human rights. States must, according to Beck, recognise the 'link between the most fundamental interests of nations (and individuals) and the new, unbounded spaces and duties of a responsibility for the survival of all.'[9]

Thus, regardless of whether they saw cosmopolitanism as an idealised future or as our present reality, these scholars all advocated for a shift away from unilateral, military responses to terrorism in favour of a global effort that respects international law and organisations. Many called upon the UN to lead the formation of a cosmopolitan approach to counter-terrorism. For example, Archibugi argued that in the face of terrorism, the UN's function 'ought to be as a mediator between cultures precisely to prevent the present crisis from turning into a clash between civilisations.'[10] Habermas, meanwhile, argued that the UN Charter resembles Kantian cosmopolitanism in that it links universal human rights with the legal enforcement of global peace.[11] To him, a reformed UN with greater enforcement powers could secure a cosmopolitan world order.[12] These calls predate September 11, however. Six

[5] ibid.
[6] ibid.
[7] ibid.
[8] Ronald Axtmann, 'Cosmopolitanism and Globality: Kant, Arendt, and Beck on the Global Condition' (2011) 29(3) German Politics & Society 20.
[9] Ulrich Beck, 'Cosmopolitanism as Imagined Communities of Global Risk' (2011) 55(10) American Behavioural Scientist 1346, 1352.
[10] Archibugi (n 4).
[11] Habermas (n 1) 162.
[12] ibid 173.

years earlier, Held outlined a number of 'transitional steps' that should be taken in order to secure a cosmopolitan world order.[13] One of these was that the UN should 'live up to its Charter.'[14] The UN, according to Held, should implement more effective measures to enforce key provisions of the twin human rights covenants as well as the prohibition of the use of force.[15]

Scholars have, therefore, long envisioned the UN as the vanguard of a cosmopolitan world order, and their calls for the Organisation to perform this role intensified in the context of the war on terror. As chapter 2 pointed out, the UN Charter resonates with many cosmopolitan principles, promising a horizontal legal order that pursues the dual objectives of human rights and peace. Yet the Charter also preserves the sovereign equality of states,[16] thus guaranteeing that a truly cosmopolitan order will never come into being. In simpler terms, the UN attempts to promote and enforce human rights, but its ability to do so is ultimately determined by states. Thus, the UN is sustained by both its potential to enable the realisation of cosmopolitan ideals and those ideals' unattainability. In many ways, the UNGA's decisions and resolutions since September 11 reflect this vision of a cosmopolitan approach to counter-terrorism. This chapter critically analyses the UNGA's work relating to human rights in the context of counter-terrorism. It demonstrates that the decisions and strategies of the UNGA are attempts to develop a rights-based framework for global counter-terrorism. They condemn violations of human rights in the course of states' counter-terrorism measures and call for a global counter-terrorism effort based upon the promotion of human rights. It is shown that the UNGA's work on human rights and counter-terrorism is specifically legal in nature; both the Assembly's decisions and the reports it receives from the Secretariat refer to states' obligations arising from international human rights law, humanitarian law and refugee law. In this sense, the cosmopolitan approach to counter-terrorism has been constructed as a derivative of states' existing obligations under international law.

[13] David Held, 'Cosmopolitan Democracy and the Global Order: Reflections on the 200th Anniversary of Kant's "Perpetual Peace"' (1995) 20(4) Alternatives: Global, Local, Political 415.
[14] ibid 424.
[15] ibid.
[16] *Charter of the United Nations,* art 2(1).

However, as discussed in chapter 2 and shown in the context of the UNSC in chapter 4, human rights operate as more than a body of law. Human rights are *political*, their recognition in widely ratified legal instruments making them a powerful discursive tool. Human rights provide a code of conduct recognised by states and international organisations, a basis upon which to criticise states' actions, a way of demanding fairer political institutions, and a language for the articulation of experiences of injustice.[17] Therefore, this chapter does not explore the UNGA as a law enforcement body, but as a venue for the politics of human rights. It argues that the UNGA has provided a counterpoint to the UNSC's role as an emergency world legislator. As shown in chapter 4, much of the UNSC's work correlates with the broader view of the war on terror as a Manichean struggle between an imagined global community united by its victimhood and respect for human rights and a savage terrorist 'other.' By contrast, the UNGA has provided states that are sidelined or not represented in the UNSC, particularly Global South states, with a platform from which to criticise the counter-terrorist policies and practices of the UNSC, the United States and its allies in the war on terror. I contend, however, that the use of this language of human rights highlights and entrenches the marginalisation of these states. The language of human rights has historically grounded the North's criticism of and intervention in the South.[18] In using this language to criticise and challenge the North's approach to counter-terrorism, states of the Global South reproduce the political power of the language of human rights, which enables states to speak in a way that is comprehensible and recognisable in the international sphere.[19] This ultimately reinforces the structures of power that these states seek to disrupt.

The remainder of the chapter proceeds as follows. Part B.1 considers the UNGA's development of a rights-based framework for global counter-terrorism through its resolutions and decisions, including the Global Counter-Terrorism Strategy and the adoption of the Secretary-General's Plan of Action for Preventing Violent Extremism. The UNGA has

[17] Regina Kreide, 'Between Morality and Law: In Defense of a Political Conception of Human Rights' (2016) 12(1) Journal of International Political Theory 10; James W Nickel, 'Are Human Rights Mainly Implemented by Intervention?' in Rex Martin and David A Reidy (eds), *Rawls' Law of Peoples: A Realistic Utopia?* (Blackwell 2006).

[18] See Anne Orford, *Reading Humanitarian Intervention: Human Rights and the Use of Force in International Law* (Cambridge University Press 2009).

[19] Luis Eslava and Sundhya Pahuja, 'The State and International Law: A Reading from the Global South' (2019) Humanity: An International Journal of Human Rights, Humanitarianism, and Development, doi:10.1353/hum.2019.0015.

sought to harmonise Member States' counter-terrorism policies, as well as the decisions of various UN branches involved in counter-terrorism. In doing so, it has called for the incorporation of human rights considerations into preventive efforts, counter-terrorism policies and engagement with victims of terrorism. Part B.2 then considers explicit discussion of states' legal obligations within UNGA meetings, resolutions and reports presented to the Assembly by the Secretariat. Whereas the UNSC abstractly and broadly reminds states that their counter-terrorism policies must comply with their international obligations, the UNGA and the Secretariat are specific and direct in their discussion of international human rights law. The Assembly attempts to highlight violations of international human rights law within the context of counter-terrorism and shows human rights promotion can enhance national and international counter-terrorism efforts. Part B.3 thus draws parallels between the UNGA's approach to counter-terrorism and the models developed by cosmopolitan scholars, discussed above and in chapter 2.

Part C explores states' invocation of human rights within UNGA debates regarding counter-terrorism. The purpose of this section is to show how the UNGA has become a forum for the contestation and critique of states' practices, as well as those of other UN branches. Part C.1 explores states' criticism of the prioritisation of national security over human rights. In particular, it shows how the UNGA has provided a setting for states to criticise the policies and practices of the United States and its allies, especially the use of torture, arbitrary detention and rendition. These criticisms have most explicitly and regularly been made by Global South states, often in order to challenge the North's moral authority to criticise the human rights records of states from the Global South. Part C.2 considers discussions of terrorism and human rights in the context of border and territorial disputes. Focusing on the Israel-Palestine conflict and the region of Kashmir, disputed by India and Pakistan, the section examines attempts to characterise human rights violations and denial of self-determination as 'state terrorism.' This notion of state-led terrorism blurs the boundaries between violations of human rights by government authorities and acts of terror, which are generally associated with non-state actors. Overall, part C shows how states have drawn upon international human rights lexicon within the UNGA in order to draw attention to the assumptions underpinning common understandings of terrorism. Drawing upon the critical scholarship discussed in chapters 1 and 2, part C situates the UNGA at the centre of the politics of international human

rights law, exploring states' attempts to identify and unlock the radical potential of human rights.

Next, part D synthesises the findings presented in this chapter with the theoretical framework presented in chapters 1 and 2. Firstly, it considers the possibility that the UNGA's work on counter-terrorism represents the arrival of a cosmopolitan moment. Since 2001, the UNGA's decisions have presented informal frameworks for global counter-terrorism that are based upon respect for international human rights law and emphasise the importance of addressing the injustices and inequalities known to lead individuals to participate in terrorist activity. Directly engaging with international law and attempting to harmonise international and state responses to terrorism, UNGA decisions and resolutions resonate with the cosmopolitan ideals that informed both the UN's foundation and scholars' demands of the Organisation in the aftermath of September 11. Yet ultimately, developments within the UNGA are further evidence that a cosmopolitan world order has yet to come into being. Although the Assembly has become a political forum for criticism of states' counter-terrorism policies, the critique advanced by the Global South has fallen upon deaf ears, with the harsh policies and practices they have highlighted continuing unabated. Yet part D suggests, secondly, that human rights often operate as a 'weapon of the weak.' The Assembly's decisions indicate the coalescence of states' opinions regarding the relevance and application of international human rights law to counter-terrorism. In particular, they express the Global South's repulsion at the actions taken by the United States and its allies in the course of the war on terror. This, in itself, has implications for the function of international organisations, which are discussed in the concluding section and in chapter 6.

B. Developing a Rights-Based Approach

As detailed in chapter 3, international terrorism has consistently been a cross-cutting issue at the UN since 2001, permeating the work of many of its branches. The UNGA has provided a forum for discussion among all of the UN's Member States. While the Assembly's decisions and resolutions are not legally binding *per se,* they are important as indications of the policies and strategies that sizeable portions of the international community are willing to implement, and they represent an attempt to coordinate global counter-terrorism efforts. At the same time, UNGA resolutions and decisions are helpful as indicators of the issues that are

considered important within, and significantly influence politics within, the international community. Ever since September 11, the UNGA has expressed concerns about the erosion of human rights in the context of terrorism and counter-terrorism, calling upon both states and other UN branches to ensure that their counter-terrorism policies comply with international human rights law, humanitarian law and refugee law. This section explores the UNGA's attempts to build a global counter-terrorism regime that is based upon respect for human rights and international law. Built through a number of yearly resolutions, the Global Counter-Terrorism Strategy and the Plan of Action to Prevent Violent Extremism, the UNGA's framework for international counter-terrorism resonates with the cosmopolitan ideals discussed above and in chapter 2. Through its decisions, the Assembly projects a vision of a world order in which both the UN and its Member States are bound to combat terrorism through human rights promotion, eradication of poverty and commitment to the rule of law.

B.1. Key Resolutions

The UNGA has implemented a number of key resolutions, some on a regular basis, relating to human rights in the context of terrorism and counter-terrorism. The most significant series of resolutions relates to the protection of human rights and fundamental freedoms while countering terrorism.[20] Like the UNSC's decisions, these resolutions call upon states to 'ensure that any measure taken to combat terrorism complies with their obligations under international law, in particular international human rights, refugee and humanitarian law.'[21] Additionally, the resolutions urge states to consider, in the course of countering terrorism, 'The recommendations of the special procedures and mechanisms of the Commission on Human Rights and the relevant comments and views of United Nations human rights treaty bodies.'[22] These resolutions, therefore, constitute an attempt to coordinate international counter-terrorism efforts and to integrate the work of UN human rights bodies into global

[20] See UNGA Res 57/219 (18 December 2002) UN Doc A/RES/57/219; UNGA Res 58/187 (22 December 2003) UN Doc A/RES/58/187; UNGA Res 60/158 (16 December 2005) UN Doc A/RES/60/158; UNGA Res 61/171 (19 December 2006) UN Doc A/RES/61/171; UNGA Res 62/159 (18 December 2007) UN Doc A/RES/62/159; UNGA Res 63/185 (18 December 2008) UN Doc A/RES/63/185; UNGA Res 64/168 (18 December 2009) UN Doc A/RES/64/168; UNGA Res 65/221 (21 December 2010) UN Doc A/RES/65/221; UNGA Res 66/171 (19 December 2011) UN Doc A/RES/66/171; UNGA Res 68/178 (18 December 2013) UN Doc A/RES/68/178; UNGA Res 70/148 (17 December 2015) UN Doc A/RES/70/148; UNGA Res 72/180 (19 December 2017) UN Doc A/RES/72/180.

[21] See, for example, A/RES/57/219 (2002) para 1.

[22] ibid para 2.

efforts. This clearly contrasts with the UNSC's decisions, which generally highlight the importance of respecting human rights in the context of counter-terrorism, but never acknowledge the recommendations of UN human rights branches, such as the Special Procedures of the Human Rights Council.

Over time, the UNGA's resolutions on the promotion and protection of human rights have become more detailed. These resolutions do not merely read as outlines of a general, rights-based framework for counter-terrorism; they also identify key human rights concerns relating to counter-terrorism. The resolutions thus read as a commentary on the human rights implications of both states' counter-terrorism policies and the decisions of the UNSC. In 2006, for example, the wording of the Assembly's yearly resolution was updated in order to include two additional issues. Firstly, the Assembly stated that counter-terrorism measures 'should be implemented in full consideration of minority rights and must not be discriminatory on the grounds of race, colour, sex, language, religion or social origin.'[23] Secondly, the Assembly urged states, 'While countering terrorism, to ensure due process guarantees, consistent with all relevant provisions of the Universal Declaration of Human Rights.'[24] These resolutions clearly address some of the key human rights concerns discussed in chapters 1 and 2, including the widespread use of racial profiling by state security and police forces and denial of the right to a fair trial for those accused of terrorist offences. The latter issue was addressed even more clearly from 2007 onwards, with the Assembly:

> 'Noting with concern measures that can undermine human rights and the rule of law, such as the detention of persons suspected of acts of terrorism in the absence of a legal basis for detention and due process guarantees, the deprivation of liberty that amounts to placing a detained person outside the protection of the law, the trial of suspects without fundamental judicial guarantees, the illegal deprivation of liberty and transfer of individuals suspected of terrorist activities, and the return of suspects to countries without individual assessment of risk of there being substantial grounds for believing that they would be in danger of subjection to torture.'[25]

[23] UN Doc A/RES/61/171 (2006) para 5.
[24] ibid para 7.
[25] UN Doc A/RES/62/159 (2007) Preamble.

The Resolution clearly reflects widespread concerns relating to the arbitrary detention of terrorist suspects at Guantanamo Bay and elsewhere. Since 2001, the United States has held terrorist suspects in a 'legal black hole' at Guantanamo Bay, which it has indefinitely leased from Cuba.[26] Classed as 'unlawful enemy combatants', the detainees were initially denied judicial review of their detention, guaranteed by the US constitution, and the protections of international humanitarian law.[27] In cooperation with a large number of governments, the detainees were also transferred to the custody of states in which torture is routinely used in interrogations.[28] It should be noted that a majority of the states that proposed the 2007 Resolution, including Argentina, Egypt, Guatemala, Mexico, Peru, Uruguay, Chili, Morocco and Senegal, are states of the Global South. [29] This correlates with broader voting patterns in the UNGA, which have been arranged along developmental lines since the end of the Cold War.[30] According to Joyner, these states:

> 'Aspire to active participation in the creation and application of contemporary international legal norms, a process which they feel will allow them to share more equitably in the distribution of transnational political, economic, and natural resources. To an appreciable degree the global forum chosen for this ambitious undertaking has come to be the United Nations system in general and its General Assembly in particular.'[31]

Thus, in expressing concerns about the human rights implications of the war on terror, and in introducing resolutions to that effect, these states participate in a broader process of contesting and attempting to disrupt global power imbalances. In this sense, the deployment of the vocabulary of international human rights law is *strategic,* as states draw upon it in an

[26] Johan Steyn, 'Guantanamo Bay: The Legal Black Hole' (2004) 53(1) The International and Comparative Law Quarterly 1; Fleur Johns, 'Guantanamo Bay and the Elimination of the Exception' (2005) 16(4) European Journal of International Law 613.
[27] Terry D Gill and Elies van Sliedregt, 'Guantanamo Bay: A Reflection on the Legal Status and Rights of "Unlawful Enemy Combatants"' (2005) 1(1) Utrecht Law Review 28; Michael C Dorf, 'The Detention and Trial of Enemy Combatants: A Drama in Three Branches' (2007) 122(1) Political Science Quarterly 47.
[28] See Sam Raphael, Ruth Blakeley and Richard Jackson, *Rendition in the "War on Terror"* (Routledge 2016); Rendition Research Team, 'The Rendition Project' *(University of Kent,* 2020) < https://www.therenditionproject.org.uk/> accessed 25 April 2020.
[29] Report of the 3rd Committee (5 December 2007) UN Doc A/62/439/Add.2, para 142.
[30] Soo Yeon Kim and Bruce Russett, 'The New Politics of Voting Alignments in the United Nations General Assembly' (1996) 50(4) International Organisation 629, 629.
[31] Christopher C Joyner, 'UN General Assembly Resolutions and International Law: Rethinking the Contemporary Dynamics of Norm-Creation' (1981) 11(3) California Western International Law Journal 445, 446.

attempt to resist their marginalisation within international decision-making processes. These processes are discussed further below and in chapter 6.

In 2012, the Assembly passed, for the first time, a Resolution relating to the use of torture in the context of counter-terrorism.[32] The document

> 'Condemns any action by States or public officials to legalise, authorise or acquiesce in torture and other cruel, inhuman or degrading treatment or punishment under any circumstances, including on grounds of national security and counter-terrorism or through judicial decisions, and urges States to ensure accountability of those responsible for all such acts.'[33]

States' use of torture in the interrogation of terrorist suspects was, by this time, well known. The Resolution followed from the Obama administration's release of the 'torture memos', which affirmed that the US State Department approved the CIA's use of various enhanced interrogation techniques at Guantanamo Bay, in 2009,[34] and the initial approval of the US Senate Select Committee's report on CIA detention and interrogation in 2012.[35] The UNGA has since passed a number of resolutions containing the same condemnation of states' use of torture in the context of counter-terrorism.[36] As shown below, this wording was included in UNGA resolutions following years of criticism, by states within the UNGA's debates, of the United States' use of torture in the interrogation of terrorist suspects and of its allies' involvement in rendition flights. The adoption of this series of resolutions thus reflects the use of the UNGA, by segments of the international community, to condemn violations of international human rights law in the context of terrorism.

[32] UNGA Res 67/161 (20 December 2012) UN Doc A/RES/67/161.
[33] ibid para 5.
[34] David Cole, *Torture Memos: Rationalizing the Unthinkable* (The New Press 2009); Michael P Scharf, 'International Law and the Torture Memos' (2009) 42(1) Case Western Reserve Journal of International Law 321; Philippe Sands, 'Torture Team: The Responsibilities of Lawyers for Abusive Interrogation' (2008) 9(2) Melbourne Journal of International Law 365. For original documents, see 'Torture Documents Released' (*ACLU,* 24 August 2009) <https://www.aclu.org/torture-documents-released-8242009>.
[35] United States Senate, 'Report of the Senate Select Committee on Intelligence Committee Study of the Central Intelligence Agency's Detention and Interrogation Program' (*Senate Select Committee on Intelligence,* 9 December 2014) i < https://www.intelligence.senate.gov/sites/default/files/publications/CRPT-113srpt288.pdf> accessed 22 June 2020.
[36] See UNGA Res 70/146 (17 December 2015) UN Doc A/RES/70/146, Preamble; UNGA Res 72/163 (19 December 2017) UN Doc A/RES/72/163.

The Assembly's consideration of human rights violations in the context of counter-terrorism has extended beyond torture and arbitrary detention. The inclusion of counter-terrorism within a range of human rights-based resolutions reflects both the extent to which counter-terrorism is at the fore of the UNGA's work and an awareness, at least on the part of states sponsoring the relevant resolutions, of the extent to which the war on terror hinders the international promotion and protection of human rights. Since 2003, the Assembly has regularly expressed concerns that states' counter-terrorism legislation may provide them with a basis to hinder the work of, or threaten the safety of, human rights defenders and humanitarian aid workers,[37] a particularly important statement given the increasingly common prosecution of human rights advocates on charges of material support for terrorism.[38] More broadly, the Assembly has reminded Member States that all judicial processes and law enforcement measures relating to terrorism must comply with their obligations under international human rights law.[39] The UNGA has also expressed concerns regarding religious and racial discrimination within the context of counter-terrorism. In a series of resolutions relating to the defamation of religions, the UNGA has recognised that Islam is 'frequently and wrongly associated with human rights violations and terrorism,'

[37] Declaration on the Right and Responsibility of Individuals, Groups and Organs of Society to Promote and Protect Universally Recognised Human Rights and Fundamental Freedoms, UNGA Res 58/178 (22 December 2003) UN Doc A/RES/58/178, para 6; Declaration on the Right and Responsibility of Individuals, Groups and Organs of Society to Promote and Protect Universally Recognised Human Rights and Fundamental Freedoms, UNGA Res 59/192 (20 December 2004) UN Doc A/RES/59/192, para 6; Declaration on the Right and Responsibility of Individuals, Groups and Organs of Society to Promote and Protect Universally Recognised Human Rights and Fundamental Freedoms, UNGA Res 60/161 (16 December 2005) UN Doc A/RES/60/161, para 6; Declaration on the Right and Responsibility of Individuals, Groups and Organs of Society to Promote and Protect Universally Recognised Human Rights and Fundamental Freedoms, UNGA Res 62/152 (18 December 2007) UN Doc A/RES/62/152, para 6; Declaration on the Right and Responsibility of Individuals, Groups and Organs of Society to Promote and Protect Universally Recognised Human Rights and Fundamental Freedoms, UNGA Res 64/163 (18 December 2009) UN Doc A/RES/64/163, para 6; Promotion of the Declaration on the Right and Responsibility of Individuals, Groups and Organs of Society to Promote and Protect Universally Recognised Human Rights and Fundamental Freedoms, UNGA Res 66/164 (19 December 2011) UN Doc A/RES/66/164, Para 7; Twentieth Anniversary and Promotion of the Declaration on the Right and Responsibility of Individuals, Groups and Organs of Society to Promote and Protect Universally Recognised Human Rights and Fundamental Freedoms, UNGA Res 72/247 (24 December 2017) UN Doc A/RES/72/247, Preamble.

[38] See Daphne Barak-Erez and David Scharia, 'Freedom of Speech, Support for Terrorism, and the Challenge of Global Constitutional Law' (2011) 2 Harvard National Security Journal 1; Sahar Aziz, 'The Laws on Providing Material Support to Terrorist Organisations: The Erosion of Constitutional Rights or a Legitimate Tool for Preventing Terrorism?' (2003) 9(1) Texas Journal on Civil Liberties and Civil Rights 45.

[39] UNGA Res 58/183 (22 December 2003) UN Doc A/RES/58/183, para 3: 'States must ensure that any measure taken to combat terrorism, including in the administration of justice, complies with their obligations under international law, in particular international human rights, refugee and humanitarian law'. See also, UNGA Res 60/159 (16 December 2005) UN Doc A/RES/60/159, para 3; UNGA Res 71/188 (19 December 2016) UN Doc A/RES/71/188, para 11.

pointing out that defamation of religions and 'incitement to religious hatred' in the context of counter-terrorism 'contributes to the denial of fundamental rights and freedoms of target groups.'[40] Yet again, it is important to note that the inclusion of these issues in UNGA resolutions is not necessarily a reflection of consensus within the international community. The Resolution relating to defamation of religions passed in the UNGA by 101 votes in favour to 53 against, with Australia, Austria, Belgium, France, Germany, the United States and the United Kingdom among those voting against.[41] While the range of UNGA resolutions relating to human rights in the context of counter-terrorism might give the impression that a multilateral, rights-based global counter-terrorism framework has come into being, these resolutions should be taken as a snapshot of the views of only certain segments of the international community, particularly Global South states. In this sense, we might interpret the UNGA's work relating to this issue as a view of the war on terror from the Global South. As Comras points out, and discussed in chapter 2, the UNGA's work reflects political opportunism on the part of Global South states, who utilise their voices within the Assembly to criticise both the actions of the United States and its allies and the international framework for counter-terrorism they have brought about through the UNSC.[42]

At the same time, the UNGA's resolutions extensively consider the ways in which terrorism itself impacts upon human rights. Taken as a whole, these decisions reflect the cycle of human rights violations that fuels both terrorism and counter-terrorism. This is in contrast with the resolutions of the UNSC, which chapter 4 showed are oblique and selective in their approach to that cycle of violence. The Assembly has recognised that 'terrorism creates an environment that destroys the right of people to live in freedom from fear,' and has condemned human rights violations committed by terrorist organisations.[43] Acts of terrorism are, according to the UNGA, 'Activities aimed at the destruction of human rights, fundamental freedoms and

[40] UNGA Res 60/150 (16 December 2005) UN Doc A/RES/60/150, paras 4, 7; UNGA Res 61/164 (19 December 2006) UN Doc A/RES/61/164, paras 4, 7; UNGA Res 62/154 (18 December 2007) UN Doc A/RES/62/154, paras 5, 7; UNGA Res 63/171 (18 December 2008) UN Doc A/RES/63/171, paras 6-8; UNGA Res 64/156 (18 December 2009) UN Doc A/RES/64/156, paras 6-8; UNGA Res 65/224 (21 December 2010) UN Doc A/RES/65/224, paras 6-8; UNGA Res 69/175 (18 December 2014) UN Doc A/RES/69/175, paras 5-6.
[41] UNGA Verbatim Record (16 December 2005) UN Doc A/60/PV.64, 11.
[42] Victor D Comras, *Flawed Diplomacy: The United Nations & the War on Terrorism* (Potomac Books Inc. 2010) xii.
[43] UNGA Res 56/160 (19 December 2001) UN Doc A56/160, Preamble.

democracy.'[44] Thus, like the UNSC, the Assembly has attempted to identify the counter-terrorism measures that states are required to take under international human rights law. 'Every person, regardless of nationality, race, sex, religion or any other distinction, has a right to protection from terrorism and terrorist acts,' a 2003 Resolution reads.[45] States, by extension, are said to bear an obligation to 'protect persons within their territory and subject to their jurisdiction by preventing and countering terrorism in all its forms and manifestations.'[46] In recent times, the UNGA has recognised the impacts of terrorism upon particular groups, highlighting the need to respect the human rights of victims and their families through support and assistance[47] and drawing attention to the particular needs of women and girls affected by terrorism.[48]

While the UNGA has been particularly vocal about the need for states to combat terrorism in a manner consistent with their obligations under international human rights law, it has also called upon other UN branches to participate in the promotion and protection of human rights in the context of counter-terrorism. In this respect, the UNGA's approach is consistent with the cosmopolitan vision of a horizontal, juridified world order centred upon human rights and international law. According to the UNGA, the Organisation's branches bear the same responsibilities as its Member States. The Assembly has pointed out, for example, that 'states *and international organisations* have a responsibility to ensure that measures taken in the struggle against terrorism do not discriminate in purpose or effect on grounds of race, colour, descent or national or ethnic origin.'[49] Similarly, in a 2015 Resolution, the UNGA called upon both states and international organisations to raise awareness about the ways in which intolerance and sectarian violence are conducive to violent extremism.[50] More concretely, the UNGA's resolutions have directly engaged with other UN branches on the topic of human rights and counter-terrorism. The Assembly has repeatedly called upon states, when

[44] UNGA Res 58/174 (22 December 2003) UN Doc A/RES/58/174, Preamble.
[45] ibid para 11. See also, UNGA Res 59/195 (20 December 2004) UN Doc A/RES/59/195, para 13.
[46] UNGA Res 72/246 (24 December 2017) UN Doc A/RES/72/246, para 6.
[47] UNGA Res 72/165 (19 December 2017) UN Doc A/RES/72/165, Preamble.
[48] See UNGA Res 72/234 (20 December 2017) UN Doc A/RES/72/234, para 41.
[49] UNGA Res 61/149 (19 December 2005) UN Doc A/RES/61/149, para 4 (emphasis added).
[50] UNGA Res 70/109 (10 December 2015) UN Doc A/RES/70/109, para 6.

developing counter-terrorism policies, to take into consideration the recommendations of human rights treaty bodies and Special Procedures of the Human Rights Council.[51]

At the same time, UNGA resolutions have drawn attention to the need for fairer and clearer listing and delisting procedures to be integrated into the UNSC's counter-terrorism sanctions regime,[52] a sentiment that has also been expressed by Member States in general debates.[53] As the delegate for Liechtenstein stated in a general debate in 2014, 'The importance of the human rights dimension… requires the United Nations to lead by example in areas where it undertakes concrete measures to prevent and combat terrorism.'[54] Many of the Assembly's resolutions are an attempt to ensure that the Organisation's counter-terrorism branches and the measures they implement are consistent with the principles and purposes of the UN, including the promotion of human rights and enforcement of international law. The UNGA's engagement with other UN branches highlights three important aspects of its approach to counter-terrorism. Firstly, in drafting and negotiating relevant resolutions, states clearly draw upon the cosmopolitan vision of an international order in which security is promoted through respect for human rights and legal responsibility, outlined in chapter 2. Secondly, the UNGA's deliberative processes are in stark contrast with the decision-making processes of the UNSC, which I argued in chapter 4 are often expedited 'emergency' proceedings, lacking proper consultation with human rights advocates or other UN branches. Thus, thirdly, the UNGA itself provides states with opportunities to contest and criticise the international counter-terrorism measures that particular states continue to mandate under the UNSC's auspices.

B.2. Symbiosis: The Secretariat and the UNGA

Secretary-General António Guterres, who was preceded by Ban Ki-moon (2007 to 2016) and Kofi Annan (1997 to 2006), assumed office in January 2017.[55] As noted in chapter 2, Guterres

[51] See, for example, UN Doc A/RES/57/219 (2002) para 2; UNGA Res 58/185 (22 December 2003) UN Doc A/RES/58/187, para 8; UNGA Res 60/149 (16 December 2005) UN Doc A/RES/60/149, Preamble.
[52] See, for example, UN Doc A/RES/63/185 (2008) para 19; UN Doc A/RES/65/221 (2010) paras 9-10; UN Doc A/RES/68/178 (2013) para 11; UN Doc A/RES/72/180 (2017) paras 14-15.
[53] See, for example, UNGA Verbatim Record (8 September 2006) UN Doc A/60/PV.99, 10 (Pakistan): 'The listing and delisting procedures of the Security Council sanctions committees lack due process and the right to effective remedy. These are recognised as fundamental human rights by jurists.'
[54] UNGA Verbatim Record (12 June 2014) UN Doc A/68/PV.95, 5.
[55] UN, 'Former Secretaries General' (*United Nations,* 2020) <https://www.un.org/sg/en/content/former-secretaries-general> accessed 25 April 2020.

began his term in office by reorganising the UN's counter-terrorism institutions, attempting to streamline their work through the UNOCT and the Counter-Terrorism Compact. One of the UNOCT's stated aims is to improve compliance with international human rights law by both UN branches and states involved in counter-terrorism.[56] Although Guterres' institutional reforms reflect his desire to improve respect for human rights in the context of the UN's counter-terrorism work, the position of the Secretariat has remained consistent since the war on terror began. The Secretariat's relationship with the UNGA is symbiotic, with the former providing recommendations to, and attempting to carry out the decisions of, the latter.[57] In its reports to the UNGA, the Secretariat has explicitly addressed the relationship between terrorism, counter-terrorism and international human rights law. Unlike the resolutions of the UNSC, which contain broad, general calls upon states to implement counter-terrorism measures that are consistent with their obligations under international human rights law, the Secretariat's reports to the UNGA address specific provisions of legal instruments that have implications for national or international counter-terrorism measures. In this sense, the UNGA's decisions and the Secretariat's reports constitute UN-level discussions about the implications of terrorism and counter-terrorism for international human rights law. As argued above, the openness and continuity of this process is in stark contrast with the operation of the UNSC. The Secretariat's counter-terrorism reports to the UNGA are particularly detailed in their discussions of two areas of international human rights law: states' obligation to combat terrorism and states' violations of international human rights law in the course of their counter-terrorist practices.

In a number of reports, the Secretariat has noted that international human rights law allows for and requires the implementation of counter-terrorism measures. The purpose of these statements is to highlight the importance of combating terrorism within the framework of international human rights law, and to draw attention to the counter-productivity of conducting the fight against terrorism in a manner that directly contradicts existing law. 'Human rights law makes ample provision for counter-terrorist action,' a 2005 report reads,

[56] UNOCT, 'What We Do: Human Rights' (*UN Office of Counter-Terrorism,* 2020) < https://www.un.org/counterterrorism/human-rights> accessed 25 April 2020.
[57] See ch 2, pt B.

'Even in the most exceptional circumstances.'[58] According to the Secretariat, international law grounds not only a right to combat terrorism, but also an obligation to do so. The Secretariat noted in 2018 that 'states not only have a right, but also a duty to prevent and counter acts of terrorism, as part of their human rights obligation to protect the life, liberty and security of all individuals under their jurisdiction.'[59] Indeed, states bear an obligation under international law to protect populations from serious violations of human rights enumerated in the ICCPR.[60] As shown in chapter 4, many of these rights, including the rights to life, liberty and freedom of religion, are threatened by terrorist attacks,[61] and a state's failure to take steps to combat terrorism would likely amount to a violation of its Covenant obligations. The Secretariat, has, accordingly, characterised terrorist acts as 'violations of the right to life, liberty, security, well-being and freedom from fear,' pointing out that 'adopting and implementing effective counterterrorism measures is… a human rights obligation for states.'[62] According to the Secretariat, the UN also has a significant role to play in addressing the threat that terrorism poses to human rights:

> 'Terrorism devastates the human rights of those it targets, crippling their ability to realise their potential as human beings and threatening the development of societies based on democratic principles, rule of law and respect for human rights, including economic and social rights. International cooperation remains an essential component of an effective counter-terrorism strategy, and the United Nations has an important role to play in this regard.'[63]

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[58] Kofi Annan, 'A Global Strategy for Fighting Terrorism' (*United Nations,* 10 March 2005) <https://www.un.org/sg/en/content/sg/statement/2005-03-10/secretary-generals-keynote-address-closing-plenary-international> accessed 30 June 2020.

[59] Effects of Terrorism on the Enjoyment of Human Rights, Report of the Secretary-General (28 August 2018) UN Doc A/73/347, para 5.

[60] UN Human Rights Committee 'General Comment No. 31 [80] on the Nature of the General Legal Obligation Imposed on States Parties to the Covenant' (29 March 2004) UN Doc CCPR/C/21/REV.1/Add.13, para 8: 'The positive obligations on States Parties to ensure Covenant rights will only be fully discharged if individuals are protected by the State, not just against violations of Covenant rights by its agents, but also against acts committed by private persons or entities that would impair the enjoyment of the Covenant rights in so far as they are amenable to application between private persons or entities.'

[61] Organisation for Security and Cooperation in Europe, 'Preventing Terrorism and Countering Violent Extremism and Radicalisation that Lead to Terrorism: A Community-Policing Approach' (*OSCE,* February 2014) 31 <https://www.osce.org/secretariat/111438?download=true> accessed 22 June 2020; Michael Ignatieff, 'Human Rights, the Laws of War, and Terrorism' (2002) 69(4) Social Research 1137, 1137.

[62] Uniting Against Terrorism: Recommendations for a Global Counter-Terrorism Strategy, Report of the Secretary-General (27 April 2006) UN Doc A/60/825, para 111.

[63] Protection of Human Rights and Fundamental Freedoms while Countering Terrorism, Report of the Secretary-General (8 August 2003) UN Doc A/58/266, para 56.

This view of counter-terrorism as a duty, as opposed to a right, is significant. As noted in chapters 1 and 4, the assertion of a right to combat terrorism by both states and the UNSC has resulted in the implementation of forceful counter-terrorism measures, some involving military action, and has justified restrictions upon human rights. While claims of a right to combat terrorism derive from the broader right to forcefully defend the security of the *state,* the notion of counter-terrorism as a human rights obligation shifts the purpose of counter-terrorist action to the protection of civilian populations. Within this framework, counter-terrorism does not require restrictions upon, or suspension of, human rights, but rather their protection and enforcement. The Secretariat has, therefore, argued to the Assembly that 'compromising human rights cannot serve the struggle against terrorism.'[64] This rhetorical construction of counter-terrorism as the fulfilment of a duty to protect human rights is conflictual, however. While it grounds the argument that human rights should not be violated in the context of counter-terrorism, it also perpetuates, to some extent, the othering discourses discussed in the context of the UNSC in chapter 4. While the coalition of states engaged in the fight against terrorism is characterised as a civilised, democratic, dignified 'us', terrorists are constructed as uncivilised, anti-democratic and disrespectful of human rights. In 2006, for example, Kofi Annan argued that 'we must never sacrifice our values and lower our standards to those of the terrorists. International cooperation to fight terrorism must be conducted in full conformity with international law.'[65] According to the former SG, the violation of human rights in the context of counter-terrorism 'facilitates the achievement of the terrorist's objective – by ceding to him the moral high ground, and provoking tension.'[66]

Thus, even the Secretariat has suggested that respecting human rights in the context of counter-terrorism is a matter of maintaining 'our' superiority over the terrorist enemy. 'Every time we advance the protection of human rights,' a report of the Secretariat stated in 2003, 'We deal a blow to the evil designs of terrorists.'[67] Although it has perpetuated the 'us' and 'them' narrative of the war on terror to some degree, the Secretariat has, since 2001, utilised

[64] Annan (n 58).
[65] UN Doc A/60/825 (2006) para 112.
[66] Annan (n 58).
[67] Implementation of the International Strategy for Disaster Reduction, Report of the Secretary-General (12 August 2003) UN Doc A/58/277, para 56.

the UNGA as a forum to promote a global approach to counter-terrorism that is based upon respect for human rights and the rule of law. In 2011, the Secretariat argued that terrorism is most effectively combated through 'effective criminal justice systems based on respect for human rights and the rule of law.'[68] The report called upon states to develop 'holistic and effective counter-terrorism strategies' that include the 'ratification and implementation of all international human rights treaties.'[69] States have been urged to ensure that their national legislation complies with their international human rights obligations, to provide human rights training to security agencies and law enforcement involved in counter-terrorism, and to ensure accountability for gross human rights violations.[70] This is important, according to the Secretariat, because 'violations of international human rights law committed in the name of state security can facilitate violent extremism by marginalising individuals and alienating key constituencies.'[71]

Apart from calling upon states to ratify the core human rights treaties, the Secretariat has consistently highlighted a number of areas of international human rights law that are affected by counter-terrorism. Reports to the UNGA have most frequently called upon states to comply with international standards of human rights 'by prohibiting torture and cruel, inhuman or degrading treatment,' and, relatedly, allowing monitoring bodies to access prisons, abolishing 'places of secret detention,' and providing those accused of terrorist offences with access to judicial review of their detention.[72] As above, this is clearly in response to arbitrary detention and torture of terrorist suspects at Guantanamo Bay and at CIA black

[68] Protecting Human Rights and Fundamental Freedoms while Countering Terrorism, Report of the Secretary-General (22 July 2011) UN Doc A/66/204, para 43.
[69] Promoting Human Rights and Fundamental Freedoms while Countering Terrorism, Report of the Secretary-General (19 July 2013) UN Doc A/68/298, para 51.
[70] Plan of Action to Prevent Violent Extremism, Report of the Secretary-General (24 December 2015) UN Doc A/70/674, para 50.
[71] UN Doc A/70/674 (2015) para 27. See also, Protecting Human rights and Fundamental Freedoms while Countering Terrorism, Report of the Secretary-General (11 August 2016) UN Doc A/72/316, para 45; A World Against Violence and Violent Extremism, Report of the Secretary-General (1 December 2017) UN Doc A/72/261, para 3.
[72] Protecting Human Rights and Fundamental Freedoms while Countering Terrorism, Report of the Secretary-General (29 July 2009) UN Doc A/64/186, para 50; Protecting Human Rights and Fundamental Freedoms while Countering Terrorism, Report of the Secretary-General (4 August 2010) UN Doc A/65/224, para 35; Protecting Human Rights and Fundamental Freedoms while Countering Terrorism, Report of the Secretary-General (22 September 2005) UN Doc A/60/374, para 25; Protecting Human Rights and Fundamental Freedoms while Countering Terrorism, Report of the Secretary-General (11 September 2006) UN Doc A/61/353, para 42.

sites in a number of states including Afghanistan, Lithuania, Poland, Romania and Thailand.[73] Some of the Secretariat's reports to the UNGA have specifically referred to methods of interrogation widely known to have been used by the CIA, including 'incommunicado detention, prolonged solitary confinement or similar measures aimed at causing stress.'[74] In 2008, the Secretariat reported to the UNGA regarding violations of non-derogable rights in the context of counter-terrorism.[75] Non-derogable rights are those rights enumerated in the ICCPR that cannot be violated or restricted, even in situations of emergency that threaten the life of a state. The report identified numerous violations of non-derogable rights, expressing concern that the use of targeted killings is a violation of the right to life,[76] that states are violating *non-refoulement* obligations by deporting refugees suspected of terrorist offences to states in which they might be subjected to torture,[77] and that the use of specialised military courts to prosecute terrorists infringes upon the right to a fair trial.[78] In recent years, the Secretariat has also condemned states' use of surveillance and data retention, introduced in many domestic counter-terrorism laws,[79] to monitor and suppress political opponents.[80]

Like many of the Assembly's decisions, the Secretariat's reports to the UNGA directly engage with the work of other UN branches involved in counter-terrorism. The Secretariat often echoes the concerns expressed by UN human rights branches regarding the erosion of

[73] Vincent C Keating, 'The Anti-Torture Norm and Cooperation in the CIA Black Site Programme' (2016) 20(7) International Journal of Human Rights 935, 936. See also, Amrit Singh, *Globalizing Torture: CIA Secret Detention and Extraordinary Rendition* (Open Society Justice Initiative 2016) 6; Philip Mudd, *Black Site: The CIA in the Post-9/11 World* (Liveright 2019).

[74] Protection of Human Rights and Fundamental Freedoms while Countering Terrorism, Report of the Secretary-General (28 August 2008) UN Doc A/63/337, para 39. For further information on interrogation techniques and violations of the Convention Against Torture at Guantanamo Bay, see: Sands (n 34); M. Cherif Bassiouni, 'The Institutionalisation of Torture under the Bush Administration' (2006) 37 Case Western Reserve Journal of International Law 389; Andrea Birdsall, 'But we don't call it "torture"! Norm contestation during the US "War on Terror"' (2016) 53(2) International Politics 176.

[75] UN Doc A/63/337 (2008).

[76] ibid para 30.

[77] ibid para 44.

[78] ibid para 64.

[79] See Paula Rosenzweig, 'Privacy and Counter-Terrorism: The Pervasiveness of Data (2010) 42(3) Case Western Reserve Journal of International Law 625; Simon McKay and Jon Moran, 'Surveillance Powers and the Generation of Intelligence within the Law' in Genevieve Lennon and Clive Walker (eds), *Routledge Handbook of Law and Terrorism* (Routledge 2015).

[80] UN Doc A/72/316 (2017) para 35: 'Digital surveillance has been used unlawfully by some States to target political opponents and to monitor, collect and access bulk information on specific individuals and communities. Such practices, whether they involve the bulk collection of data or the targeting of individual communications, may infringe not only the right to privacy but also the right to freedom of opinion and expression and other human rights.'

international human rights standards in the context of the war on terror. In 2005, for example, Secretary-General Annan remarked that 'international human rights experts, including those of the UN system, are unanimous in finding that many measures which States are currently adopting to counter terrorism infringe on human rights and fundamental freedoms.'[81] In this context, the Secretariat has argued to the UNGA that the UN, as a whole, has an important role to play in combating terrorism through human rights promotion. A 2006 report argues that 'through its development of norms and through its increasing operational capacity to address development and humanitarian concerns as well as security, political and human rights issues, [the UN] can play a crucial role in helping countries to address various types of exclusion.'[82] In this regard, the Secretariat was instrumental in the development of the Global Counter-Terrorism Strategy,[83] discussed below, and has urged Member States to implement each of its four pillars.[84]

In 2014, the UNSC adopted Resolution 2178 relating to foreign terrorist fighters. Outlined in chapter 2 and discussed at length in chapter 4, this Resolution required states to implement a range of measures in order to curtail individuals' ability to travel to Syria and Iraq to fight alongside ISIL, al-Nusra and other terrorist organisations.[85] As discussed in chapter 4, the Resolution's adoption was driven by fears of the 'blowback effect,' the assumption that foreign terrorist fighters will return to the West indoctrinated with the ideologies of terrorist organisations and equipped with the knowledge required to plan or perpetrate terrorist acts. In its 2017 report to the General Assembly, the Secretariat observed that the Resolution, adopted under the Council's Chapter VII powers, had led states to enact a variety of counter-terrorism laws that are inconsistent with their obligations under international human rights law. The report reads,

> 'Faced with the serious threat posed by terrorist groups, including ISIL, States have taken a wide range of administrative and legislative measures, under the scope of Security Council resolution 2178 (2014), to deter individuals who are or who seek to

[81] Annan (n 58). See also, UN Doc A/73/347 (2018) para 6: 'Human rights treaty bodies have expressed concern at law enforcement officials reportedly engaging in the torture and ill-treatment of detainees while responding to alleged security threats.'
[82] UN Doc A/60/825 (2006) para 37.
[83] ibid.
[84] See, for example, UN Doc A/73/347 (2018) para 51.
[85] UNSC Res 2178 (24 September 2014) UN Doc S/RES/2178.

> become foreign fighters, such as blocking the validity of travel documents, revoking citizenship, freezing financial assets and prosecuting individuals for acts ranging from recruitment and incitement to the planning of terrorist acts. However, such measures may have a negative impact on the right to due process, including the right to presumption of innocence; the right to freedom of movement and to be protected against arbitrary deprivation of nationality; the rights to freedom of religion, belief, opinion, expression and association; and the right to protection against arbitrary or unlawful interference in privacy.'[86]

This report is illustrative of the way in which the Secretariat attempts to operate as an oversight mechanism, highlighting the human rights implications of the UNSC's decisions and their implementation by states. Attempting to ensure that international and national counter-terrorism measures are consistent with international human rights law and calling upon the UNGA to promote respect for human rights in the context of counter-terrorism, the Secretariat's reports draw upon, and perpetuate, the UN's cosmopolitan promise of a world legal order that is centred upon human rights and durable security. Terrorism, according to these reports, thrives within a 'vicious cycle' of human rights violations by both state and non-state actors.[87] 'Violations of international human rights law committed in the name of state security,' a 2016 report reads, 'Facilitate violent extremism by marginalising individuals and alienating key constituencies, thus generating community support and sympathy for and complicity in the actions of violent extremists.'[88]

Thus, through its reports on human rights and counter-terrorism, presented annually to the UNGA, the UN Secretariat has advanced a vision of the UN as an international organisation that leads coordinated, global counter-terrorism efforts based upon respect for and promotion of international human rights law. This means that the Secretariat has criticised the actions taken by states at times and the measures implemented by the UN's branches at others. These reports, however, have been of little effect. For eighteen consecutive years, the Secretariat has repeatedly called upon states to respect human rights, including the prohibition of torture, the right to freedom from arbitrary detention and the right to a fair

[86] UN Doc A/72/316 (2017) para 41.
[87] ibid para 45.
[88] UN Doc A/70/674 (2015).

trial, and has repeatedly called for the UN's branches to mandate counter-terrorism measures that are consistent with international standards of human rights. While these annual reports may reflect the Secretariat's commitments to the principles of the UN Charter and the cosmopolitan ideals that it enshrines, the fact that these calls have been made so frequently shows that the Secretariat's ability to compel compliance with international law remains limited. As argued in chapter 2, the UN can only protect human rights as effectively as its Member States will allow it to. While the Secretariat and UNGA interact as the leader and congress of an international organisation propelled by cosmopolitan ideals, these interactions are mainly symbolic and rhetorical.

B.3. The Global Counter-Terrorism Strategy

The work of the Secretariat and UNGA is, nevertheless, significant as an indicator of the values and ideals held by at least a section of the international community. It is, furthermore, a discursive counterpoint to the UNSC, which the United States and its allies have utilised as a world counter-terrorism legislature. The Global Counter-Terrorism Strategy ('the Strategy') was adopted by a consensus decision of the UNGA in 2006.[89] Drafted and adopted on the recommendations of the Secretariat,[90] the Strategy calls upon Member States to implement coordinated counter-terrorism measures based around four pillars of action. As the Cuban delegate commented on the occasion of its adoption, 'The strategy reaffirms the obligation of States to ensure that any measures taken to combat terrorism comply with their obligations under international law, in particular human rights law and humanitarian law.'[91] The document, furthermore, highlights the importance of addressing human rights violations including racial discrimination, marginalisation and socioeconomic inequality that can lead individuals to support or engage in terrorist activity. As Nowak and Charbord have observed, the Strategy 'can be seen as the General Assembly's answer to the Security Council's approach on the issue of countering terrorism.'[92] While the UNSC has prioritised the implementation of

[89] UNGA 'Global Counter-Terrorism Strategy' (20 September 2006) UN Doc A/RES/60/288, Annex ('UN Global Counter-Terrorism Strategy').
[90] See UN Doc A/60/825 (2006).
[91] UN Doc A/60/PV.99 (2006) 7.
[92] Manfred Nowak and Anne Charbord, 'Key Trends in the Fight against Terrorism and Key Aspects of International Human Rights Law' in Manfred Nowak and Anne Charbord (eds), *Using Human Rights to Counter Terrorism* (Edward Elgar 2018) 23.

punitive and repressive measures in the fight against terrorism,[93] the Strategy 'places human rights at its centre, as the thread that runs through its entirety.'[94] As a living document, the Strategy is subject to biannual review by the UNGA. Many updates to the Strategy, discussed below, reflect the emergence of new human rights concerns within the contexts of terrorism and counter-terrorism.

Three of the Strategy's four pillars relate, at least in part, to human rights. Pillar I calls upon Member States to implement measures to address the conditions conducive to the spread of terrorism, drawing attention to issues around the world including 'lack of the rule of law and violations of human rights, ethnic, national and religious discrimination.'[95] Meanwhile, Pillar II outlines a range of measures that Member States should implement in order to combat terrorism. These include prosecution or extradition of perpetrators of terrorist acts in accordance with international human rights law,[96] and countering terrorist use of the internet in a manner that respects human rights.[97] Lastly, Pillar IV outlines a range of measures to 'ensure respect for human rights for all and the rule of law as the fundamental basis of the fight against terrorism.'[98] This part of the document begins with a statement that 'effective counter-terrorism measures and the promotion of human rights are not conflicting goals, but complementary and mutually reinforcing.'[99] Pillar IV reminds Member States that 'any measures taken to combat terrorism [must] comply with their obligations under international law, in particular human rights law, refugee law and international humanitarian law.'[100] States are called upon to become parties to the core international human rights and humanitarian law treaties'[101] and to support the work of the UN Human Rights Council,[102] the High Commissioner for Human Rights[103] and the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism.[104] The

[93] For further discussion, see ch 4.
[94] Nowak and Charbord (n 92).
[95] UN Global Counter-Terrorism Strategy, Pillar I.
[96] ibid Pillar II, para 3.
[97] ibid Pillar II, para 11.
[98] ibid Pillar IV.
[99] ibid.
[100] ibid Pillar IV, para 2.
[101] ibid Pillar IV, para 3.
[102] ibid Pillar IV, para 6.
[103] ibid Pillar IV, para 7.
[104] ibid Pillar IV, para 8.

document argues, among other things, that the most effective way to combat terrorism is through the prosecution of perpetrators within criminal justice systems based upon the rule of law.[105]

Oldring points out that, in adopting the Strategy, governments made a commitment 'to ensuring respect for human rights and the rule of law as the very basis of the fight against terrorism.'[106] Yet the commitments undertaken by states were not themselves new; the Strategy is simply a reaffirmation that states' obligations under international human rights law apply to actions taken in the context of counter-terrorism, as they do in all other areas of action. The Strategy is, however, an indicator of widespread recognition of the need to mainstream human rights considerations into all international and domestic efforts to combat terrorism. The biannual review of the Strategy enables the UNGA to reiterate its call for this change. In the 2014 review, for example, the UNGA called upon Member States to 'respect and protect the right to privacy… in accordance with international law, in particular international human rights law, and to take measures to ensure that interferences with or restrictions on that right are not arbitrary.'[107] The 2014 review also called upon Member States, for the first time, to take into consideration their obligations under international human rights and humanitarian law in their use of remotely piloted aircraft.[108] Meanwhile, the 2016 review contained the most detailed content relating to human rights. The Resolution:

> 'Stresses that when counter-terrorism efforts neglect the rule of law, at the national and international levels, and violate international law, including the Charter of the United Nations, international humanitarian law and refugee law, human rights and fundamental freedoms, they not only betray the values they seek to uphold, they may also further fuel violent extremism that can be conducive to terrorism.'[109]

[105] ibid Pillar IV, para 4.
[106] Lisa N Oldring, 'Questions of Accountability in Countering Terrorism' in Manfred Nowak and Anne Charbord (eds), *Using Human Rights to Counter Terrorism* (Edward Elgar 2018) 305.
[107] 2014 Review of the United Nations Global Counter-Terrorism Strategy, UNGA Res 68/276 (24 June 2014) UN Doc A/RES/68/276, para 12.
[108] ibid para 13. See also, 2018 Review of the United Nations Global Counter-Terrorism Strategy, UNGA Res 72/284 (28 June 2018) UN Doc A/RES/72/274, para 78.
[109] 2016 Review of the United Nations Global Counter-Terrorism Strategy, UNGA Res 70/291 (1 July 2016) UN Doc A/RES/70/291, para 16.

The document, also adopted by consensus, [110] calls upon states to combat terrorism through 'a national criminal justice system based on respect for human rights and the rule of law, due process and fair trial guarantees.'[111] It also urges states to 'end foreign occupation, confront oppression, eradicate poverty, promote sustained economic growth, sustainable development, global prosperity, good governance, human rights for all and the rule of law' as part of their counter-terrorism efforts.[112] The 2016 review was also novel in its acknowledgment of the multiplicity of roles that women and children play in counter-terrorism.[113] The Resolution calls upon both Member States and UN branches involved in counter-terrorism to 'integrate a gender analysis on the drivers of radicalisation of women to terrorism into their relevant programmes,' and to evaluate the 'impacts of counter-terrorism strategies on women's human rights.'[114] The Resolution also called upon states to acknowledge that children detained for national security purposes or accused of relevant crimes are potentially 'victims of terrorism as well as of other violations of international law,' and thus to treat them 'in a manner consistent with his or her rights, dignity and needs, in accordance with applicable international law.'[115]

Biannual reviews of the UNGA's strategies have reiterated the UN's central role in promoting respect for human rights in the context of counter-terrorism. The Strategy and the related review documents are, therefore, significant as attempts to consolidate the role of human rights in countering terrorism. This is, firstly, because they symbolise states' willingness to assign the UN a key role in enforcing and monitoring compliance with international human rights law within the context of counter-terrorism. Secondly, the Strategy signifies much of the international community's willingness to ensure the integration of human rights considerations into global and domestic counter-terrorism efforts. As White points out, UNGA resolutions are not legally binding *per se,* but they are 'codificatory';[116] through its decisions, the UNGA 'collects together the established rules of international or regional law on a

[110] ibid; Nowak and Charbord (n 92) 23.
[111] UN Doc A/RES/70/291 (2016) Preamble.
[112] ibid.
[113] ibid para 12.
[114] ibid.
[115] ibid para 18.
[116] Nigel D White, *The Law of International Organisations* (2nd edn, Manchester University Press 2005) 176. See also, Ian Hurd, *International Organisations: Politics, Law, Practice* (Cambridge University Press 2011) 105.

subject.'[117] While Falk and Higgins both argue that consensus decisions of the UNGA can lead to the formation of customary international law,[118] this question is not relevant to the Strategy, which merely articulates a common approach to counter-terrorism based upon existing legal frameworks. The Strategy is, nevertheless, a reminder that international human rights law applies within the context of, and ought to be a constraint upon, counter-terrorism.

B.4. The Plan of Action to Prevent Violent Extremism

In 2016, the UNGA adopted the Secretary-General's Plan of Action to Prevent Violent Extremism.[119] The document was the UNGA's first attempt to generate a coordinated, global strategy to address the human rights implications of ISIL's actions and to reduce its capacity to recruit foreign fighters globally. As above, the Plan of Action is a response to the UNSC's decisions relating to ISIL and foreign fighters, which aim to prevent foreign fighters' travel through stricter border controls and aviation security measures. By contrast, and in keeping with the Strategy, the Plan of Action places human rights at the centre of global responses to ISIL and foreign fighters. The report comments that groups such as ISIL:

> 'Violate the rights of women and girls, including through sexual enslavement, forced marriages and encroachment on their rights to education and participation in public life. In areas where ISIL and other terrorist and violent extremist groups currently operate, it appears that religious communities, and women, children, political activists, journalists, human rights defenders and members of the lesbian, gay, bisexual, transgender and intersex community are being systematically targeted, abducted, displaced and murdered. Torture, sexual and gender-based violence, are also reportedly widespread.'[120]

While condemning the violations of human rights perpetrated by ISIL and other terrorist organisations operating in the region, the Resolution also calls upon states to address the human rights violations that lead individuals to join terrorist organisations. The Plan of Action notes that states that 'fail to generate high and sustainable levels of growth, to create decent

[117] ibid.
[118] Richard A Falk, 'On the Quasi-Legislative Competence of the General Assembly' (1966) 60(4) American Journal of International Law 782, 785; Rosalyn Higgins, *The Development of International Law Through the Political Organs of the United Nations* (Oxford University Press 1963) 5.
[119] UN Doc A/70/674 (2015); UNGA Res 70/254 (12 February 2016) UN Doc A/RES/70/254.
[120] UN Doc A/70/674 (2015) para 19.

jobs for their youth… and to manage relationships among different communities in line with their human rights obligations, are more prone to violent extremism.'[121] The Plan of Action, therefore, calls upon states to 'embrace international human rights norms and standards', to promote good governance, and to enable a free and robust civil society in order to reduce the grievances that lead individuals to support or engage in violent extremism.[122]

B.5. Evaluation: Towards Cosmopolitan Security?

Since 2001, the UNGA has adopted a number of resolutions and plans of action relating to counter-terrorism, many of which have been based upon the recommendations of the Secretariat. Through these documents, the Assembly has reaffirmed the relevance and application of international human rights, humanitarian and refugee law to multilateral and domestic counter-terrorism efforts. Documents like the Strategy attempt to establish respect for and promotion of international human rights law as the basis of the fight against terrorism, calling upon states to consider the rights of victims, perpetrators and suspected offenders when implementing counter-terrorism policies. It should be noted that, generally, the UNGA's and Secretariat's work on counter-terrorism emphasises civil and political rights. Apart from some general references to the need for education and the eradication of poverty, the UNGA's resolutions and decisions do not address socioeconomic and cultural rights issues such as the rights to health, food, clothing and housing, all of which may be affected by, or drivers of, terrorism.[123]

The UNGA's work on counter-terrorism is, nevertheless, rooted in the UN Charter and the promotion of international human rights law. Through its promotion of multilateral, rights-based solutions for global issues, the Assembly not only attempts to check the UNSC's and states' emergency counter-terrorism measures, but also promotes many of the cosmopolitan ideals articulated in the UN's founding documents.

C. UNGA Meetings: Challenging the United States and UNSC

[121] ibid para 25.
[122] ibid para 27.
[123] C Cora True-Frost, 'When the UN Addresses "Conditions Conducive to Terrorism," What Happens to Human Rights?' (2017) Michigan State Law Review 805, 849.

The previous section showed how, through its debates and decisions, the UNGA has attempted to streamline human rights considerations within international and domestic efforts to combat terrorism. The Assembly's soft-law output should not, however, be seen as a sign of global consensus on the relationship between human rights and counter-terrorism. This section explores some of the debates and disagreements, within the UNGA, relating to counter-terrorism and human rights. It demonstrates that the Assembly has provided a forum for criticism of states' violation of their human rights obligations in the context of counter-terrorism, for contestation of the definition and scope of the term 'terrorism' itself, and for discussion of the role of human rights within the UN's framework for global counter-terrorism. In particular, the UNGA has become a setting for states to decry the counter-terrorism policies of the United States and its allies and of the ends to which they have harnessed the UNSC's powers. This section explores the UNGA's debates in three parts. Firstly, it examines states' criticisms of practices of torture, arbitrary detention and rendition in the course of the war on terror. Secondly, it considers attempts to reintroduce the concept of 'state-led terrorism' in the context of the United States' counter-terrorism policies, the Israel-Palestine conflict and the India-Pakistan dispute over Kashmir. Finally, it briefly explores states' contestation of the human rights content of specific resolutions or the human rights agendas of UN branches involved in counter-terrorism.

This section shows that states of the Global South have been the most vocal in decrying the war on terror's impacts upon human rights. This is particularly noteworthy in the context of the UNGA, where each Member State is continuously involved in deliberative decision-making processes. Within and beyond the war on terror, the UNGA provides Global South states, whose influence in the UNSC is neither consistent nor significant, with a forum in which to conduct multilateral diplomacy, voice concerns, attempt to influence global decision-making processes, and to affect the concretisation of anti-colonialism and anti-imperialism within international law and organisations.[124] This fault line between North and South has, perhaps, become even more pronounced through the course of the war on terror. The

[124] See Siba Grovogu, 'A Revolution Nonetheless: The Global South in International Relations' (2011) 5(1) The Global South 175, 187; Sally Morphet, 'Multilateralism and the Non-Aligned Movement: What Is the Global South Doing and Where Is It Going?' (2004) 10(4) Global Governance 517; Vijay Prashad, *The Poorer Nations: A Possible History of the Global South* (Verso Books 2012) 3.

Assembly's debates are illustrative of the tensions between the North and South, with states invoking the language of human rights in order to contest and assert political power in the context of the war on terror.

C.1. Torture, Rendition, Arbitrary Detention and Drones

The UNGA's biannual reviews of the Global Counter-Terrorism Strategy and its general debates have provided states with opportunities to criticise violations of international human rights law in the context of the war on terror. This section explores states' comments about four interrelated aspects of the war on terror, which are the most widely known human rights issues relating to counter-terrorism: the use of torture in the interrogation of terrorist suspects, detention at Guantanamo Bay, rendition of terrorist suspects, and the use of armed drones for the targeted killing of terrorist suspects.[125]

As discussed in the previous section, the UNGA has adopted a number of resolutions in which it condemns the use of torture in the context of counter-terrorism and calls upon state officials to refrain from attempting to legalise the use of torture in the interrogation of terrorist suspects. This is a result of states' open criticism, within the UNGA's debates, of the use of various methods of torture by the United States government. Cuba has been most vocal in this regard, its representative regularly urging the international community not to accept that the United States can, on the grounds of national security, violate the prohibition of torture. In 2008, for example, the Cuban delegate characterised the United States government as one that 'legalises the use of torture and keeps in concentration camps – such as the one installed in the territory illegally occupied by the United States base at Guantanamo – people who have not been proved of or even charged with any crime.'[126] Since then, the Cuban delegate has repeatedly argued that

> 'The international community should not accept that, in the pretext of a supposed struggle against terrorism, certain States may commit acts of aggression and interfere

[125] These aspects of the war on terror are discussed in greater depth in ch 1.
[126] UNGA Verbatim Record (24 September 2008) UN Doc A/63/PV.7, 39.

> in the internal affairs of others, perpetrate or enable flagrant violations of human rights and international humanitarian law such as torture.'[127]

The Cuban delegate has continually characterised the United States' actions as 'double standards,'[128] arguing that the latter lacks the moral authority to 'liberate and democratise' other states while it flagrantly violates human rights.[129] Cuba's condemnation of the United States' torture of terrorist suspects thus arose from two particular circumstances: the United States' perennial lease of Guantanamo Bay from the Cuban government and its enforcement of an embargo against the Cuban government since the mid-twentieth century. Cuba's criticisms of the United States are, therefore, a manifestation of the complex political relationship between the two states. This highlights the fact that the need to respect human rights while countering terrorism is, in itself, politicised by states within the UNGA, with Global South states drawing upon the vocabulary of international human rights law in order to contest and condemn the United States' actions.

The examination of UNGA debates in this research project has revealed the extent to which human rights form a basis of the fault line between the South and the North, particularly the United States, within the Assembly. The United States has, since the end of World War II, been at the fore of international human rights promotion, particularly within the Global South.[130] Yet as Ignatieff points out, the United States government has historically approached international law 'not as a system of constraints on U.S. power, but as a forum in which U.S. leadership can be exercised and American intuitions about freedom and government can be spread across the world.'[131] The UNGA's meetings relating to terrorism have seen states of the Global South repeatedly use this language, which has historically been employed to criticise, marginalise and subjugate them, to articulate their criticisms of the United States and its allies. This dynamic is exemplified in the comments of the Venezuelan representative to the UNGA in 2012. Citing a 2012 article by former President Jimmy Carter,

[127] UNGA Verbatim Record (28 June 2012) UN Doc A/66/PV.118, 15. See also: UN Doc A/68/PV.95 (2014) 21; UNGA Verbatim Record (12 February 2016) UN Doc A/70/PV.85, 1.
[128] ibid.
[129] UN Doc A/63/PV.7 (2008) 39.
[130] Michael Ignatieff, 'Introduction' in Michael Ignatieff (ed), *American Exceptionalism and Human Rights* (Princeton University Press 2009) 1.
[131] ibid 13.

published in the New York Times,[132] the Venezuelan delegate referred to the United States' practices of torture and detention at Guantanamo Bay, along with its invasions of Iraq and Afghanistan, as state terrorism.[133] The Venezuelan delegate commented that Guantanamo Bay 'houses around 169 prisoners. About half of these have been cleared for release, yet have little prospect of ever obtaining their freedom.'[134] The delegate criticised the United States' use of various methods of torture, including 'waterboarding, intimidation with semi-automatic weapons, power drills or threats of sexual assault against their family members, all in order to elicit forced confessions.'[135] Similarly, in 2004, the Zimbabwean representative argued that the 'fight against international terrorism has exposed the duplicity and insincerity of erstwhile leading democracies and human rights monitors with regard to the question of the observance of human rights.'[136] He continued,

> 'While the sadistic scenes from Abu Ghraib remain vivid in our minds, other places in Iraq, as well as Guantanamo Bay, have provided useful samples of the Western concept of respect for human rights. Let me say once again that the West should spare us their lessons on human rights.'[137]

These states have, therefore, strategically drawn upon the language of international human rights law in order to condemn, and highlight the hypocrisy of, the United States government. Each has argued that the United States has, by its own conduct, deprived itself of the moral authority to speak as a global enforcer of human rights.

To that end, in 2006, Belarus proposed a draft UNGA Resolution relating to the secret detention and extraordinary rendition of terrorist suspects.[138] In the draft Resolution, the UNGA condemns the 'secret detention and unlawful inter-State transfers of detainees suspected of involvement in terrorist activities,' and expresses concern regarding 'the involvement of numerous countries in the practice of secret detention and unlawful inter-

[132] Jimmy Carter, 'A Cruel and Unusual Record' (*The New York Times,* 24 June 2012) < https://www.nytimes.com/2012/06/25/opinion/americas-shameful-human-rights-record.html> accessed 21 June 2020.
[133] UNGA Verbatim Record (28 June 2012) UN Doc A/66/PV.119, 6.
[134] ibid.
[135] ibid.
[136] UNGA Verbatim Record (22 September 2004) UN Doc A/59/PV.5, 26.
[137] ibid 27.
[138] Report of the 3rd Committee (7 December 2006) UN Doc A/61/443/Add.2, para 78.

State transfers.'[139] The draft Resolution then condemns the denial of the right to a fair trial for 'hundreds of alleged suspects' as well as their indefinite detention, unlawful transportation on board civilian aircraft and torture.[140] It calls on states to combat terrorism in a manner consistent with their obligations under the ICCPR, to eliminate practices of secret detention and unlawful interstate transfer of terrorist suspects, and to ensure that no suspects are secretly or arbitrarily detained.[141] Although Belarus ultimately withdrew its proposal,[142] the draft Resolution further highlights Global South states' desire to use the UNGA as a platform for informal criticism of violations of international human rights law by the United States and to compel, through action short of institution of proceedings at an international court or tribunal, compliance with the law.

Meanwhile, regional organisations have also utilised the UNGA as a forum for discussion of the human rights implications of the war on terror. Speaking on behalf of the Organisation of Islamic Cooperation (OIC) in 2014, and referring to the increasingly common use of armed drones for surveillance and targeted killing of terrorist suspects, the Egyptian representative stated that:

> 'The OIC is concerned about violations of human rights that occur during efforts to combat terrorism, and about the broader impact of armed drone attacks on individuals and the psychological wellbeing of children, families and communities, which can include such effects as the interruption of children's education, the undermining of religious and cultural practices and a reluctance to assist the victims of armed drone attacks for fear of being caught in secondary strikes.'[143]

Similarly, in 2004, the Cypriot representative stated on behalf of the Council of Europe that the 'fight against terrorism must never be allowed to degenerate into torture and inhuman or degrading treatment, the prohibition of which is absolute.'[144] While these statements do not specifically reference the actions of the United States or one of its allies, they signify the coalescence of opinion among members of regional arrangements that the policies and

[139] ibid.
[140] ibid.
[141] ibid.
[142] Summary Record of the 51st Meeting of the 3rd Committee (21 December 2006) UN Doc A/C.3/61.SR.51, Agenda Item 67, para 87.
[143] UNGA Verbatim Record (12 June 2014) UN Doc A/68/PV.94, 4.
[144] UNGA Verbatim Record (21 October 2004) UN Doc A/59/PV.39, 23.

methods employed by the United States and its allies are unacceptable violations of international human rights law. At the same time, the statements made by the representatives of regional organisations highlight the strategic and political function of the language of human rights. As noted above, many states that are members of either the OIC or the Council of Europe have, in fact, been complicit in the United States' rendition programme. Thus, the use of human rights language by these actors replicates its use by the United States, with each focusing upon the wrongdoings of others.

Thus, while the UNGA's decisions and plans of action relating to counter-terrorism might suggest that there exists widespread agreement upon the central role of human rights in counter-terrorism, records of its debates suggest otherwise. Since 2001, the Assembly has provided a forum for various states to condemn the actions of the United States and its allies, to call for greater compliance with international human rights law, and to decry, in the context of the United States' actions, the lack of equality among subjects of international law. In particular, Global South states have criticised the United States' double standards, arguing that, in light of the war on terror, the United States government lacks the moral authority to criticise other states' human rights records.

C.2. Challenging Common Understandings of 'Terrorism'

At various times, states have used the UNGA's debates regarding counter-terrorism to characterise the policies and practices of certain governments as state terrorism. This is in an attempt to challenge and broaden general understandings of terrorism, which is typically associated with nonstate actors.[145] The notion of state terrorism has, nevertheless, been used by scholars from Arendt to Chomsky to describe the use of programmatic violence by governments in order to instil both fear and obedience in their subjects,[146] and, as noted in chapters 1 and 2, critical scholars have called for the term's reinstatement within

[145] Lee Jarvis and Michael Lister, 'State Terrorism Research and Critical Terrorism Studies: An Assessment' (2014) 7(1) Critical Studies on Terrorism 43, 43; Ruth Blakeley, 'Drones, State Terrorism and International Law' (2018) 11(2) Critical Studies on Terrorism 321, 324.

[146] See, for example, Hannah Arendt, *The Origins of Totalitarianism* (Harcourt Books 1968) 6: 'Terror is no longer used as a means to exterminate and frighten opponents, but as an instrument to rule masses of people who are perfectly obedient. Terror as we know it today strikes without any preliminary provocation.' See also: Noam Chomsky, *Pirates and Emperors, Old and New: International Terrorism in the Real World* (Pluto Press 2002); Alexander L George (ed), *Western State Terrorism* (Polity Press 1991).

contemporary terrorism studies. For example, Blakeley observes that while there has been little commentary among scholars and policy makers on the use of terrorism by liberal democratic states, history is dotted with examples of the use of such violence as part of imperial and neo-imperial projects.[147] Some examples, according to Blakeley, include the British Empire's use of airpower during the early twentieth century and the United States' use of lethal drones as part of its counter-terrorism operations.[148]

The concept of terrorism was nevertheless dissociated from the state following September 11, except insofar as the acts of terrorist organisations are attributable to a state.[149] Undefined as it may be in international law, 'terrorism' has come to connote the threat that non-state, usually Islamic extremist, actors are thought to pose to Western, democratic states.[150] It is notable, within this context, that states have attempted to reintroduce the concept of state terrorism through the UNGA's meetings. The term has, at times, been used to describe the United States' counter-terrorism policies. 'Some imperialist Powers,' the Venezuelan delegate said in 2012, 'Practise State terrorism, which they justify by invoking reasons of national security.'[151] The delegate continued, 'The people of the world are calling for an immediate end to State terrorism practiced by the Government of the United States with its murderous drones.'[152]

The notion of state terrorism has also been used in relation to situations of unlawful occupation and territorial disputes, particularly the Israel-Palestine conflict and the India-Pakistan dispute over Kashmir. In 2002, for example, the Palestinian delegate argued that Israeli actions in the Occupied Territories 'must be classified as terrorist activities.'[153] The delegate continued, 'Israeli actions against defenceless Palestinians constitute a major violation of human rights, international law and the principles of the Charter.'[154] Palestine has

[147] Blakeley (n 145) 324.
[148] ibid.
[149] For an in-depth interrogation of this topic, see Kimberley N Trapp, *State Responsibility for International Terrorism: Problems and Prospects* (Oxford University Press 2011).
[150] Blakeley (n 145) 324. See also, Richard Jackson, 'Writing Identity: Evil terrorists, Good Americans' in *Writing the War on Terrorism: Language, Politics and Counter-Terrorism* (Manchester University Press 2005).
[151] UN Doc A/66/PV.119 (2012) 6.
[152] ibid 7.
[153] UNGA Verbatim Record (8 October 2002) UN Doc A/57/PV.26, para 8.
[154] ibid.

found the support of other states in the rhetorical construction of Israel's actions as state terrorism. The Venezuelan delegate, for example, argued in 2013 that 'the occupying power has practiced State terrorism, violating international law, human rights and international humanitarian law… it has practiced apartheid and ethnic cleansing.'[155] Similar comments were made by the Pakistani delegate in 2017, referring to the actions of Indian military forces in Kashmir, whose territorial status has been disputed by the two states since the partition of India in 1947.[156] According to the delegate, India 'tortures and kills innocent Kashmiris.'[157] The delegate continued, 'Indian State terrorism has been amply documented by successive human rights reports of various international organizations. There are thousands of pictures to prove Indian state terrorism.'[158]

The acts that these comments refer to are, of course, egregious human rights violations or war crimes, with those who characterise the actions of the United States, Israel and India as state terrorism using these three terms interchangeably. The use of the phrase 'state terrorism' is not, therefore, legally significant outside the context of international humanitarian law, which prohibits acts of terrorism calculated to spread fear among a civilian population.[159] The use of this term is, however, noteworthy as it represents an attempt to highlight the way in which powerful states, many of which control the UNSC's decisions, manipulate and restrict the use of the term 'terror' in order to obscure the consequences and moral gravity of their own counter-terrorist policies.

C.3. Summary

Transcripts and records of UNGA debates show that the Assembly has provided a forum for the discussion, negotiation and contestation of the relationship between human rights,

[155] UNGA Verbatim Record (26 November 2013) UN Doc A/68/PV.58, para 3.
[156] See Haimanti Roy, *The Partition of India* (Oxford University Press 2018).
[157] UNGA Verbatim Record (25 September 2019) UN Doc A/72/PV.23, 35.
[158] ibid 35-6.
[159] Geneva Convention Relative to the Protection of Civilian Persons in Time of War (adopted 12 August 1949, entered into force 21 October 1950) 75 UNTS 287 (Geneva Convention IV) art 33; Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (adopted 8 June 1977, entered into force 7 December 1978) 1125 UNTS 3 (Additional Protocol I) art 51(2); Protocol Additional to the Geneva Conventions of 12 August 1949 and Relating to the Protection of Victims of Non-International Armed Conflicts (adopted 8 June 1977, entered into force 7 December 1978) 1125 UNTS 609, art 13(2).

terrorism and counter-terrorism. In particular, states have utilised their voices within UNGA to decry others' violations of international human rights law in the context of counter-terrorism, with delegates condemning the use of drones, extraordinary rendition, torture, arbitrary detention and state terrorism, among other things, in the context of the war on terror. As has been noted throughout this section, states of the Global South have been most vocal in relation to this topic, the significance of which is further discussed in part D, below.

It should be noted, finally, that the UNGA has also been the setting of debate among states about the role that the UN itself should play in the promotion of human rights in the context of counter-terrorism. The Assembly's adoption of Resolution 72/246 without a vote sparked one such debate.[160] The Canadian delegate, for example, argued that the Resolution, which considers the effect of terrorism on the enjoyment of human rights, 'Leaves aside key references to human rights.'[161] In particular, Canadian officials were concerned by the fact that the document relates to 'religious extremism alone' without considering the other forms that terrorism takes.[162] While some states have pushed for greater integration of human rights perspectives into the UNGA's decisions regarding counter-terrorism, others have criticised both the UN and states for disavowing repressive, military approaches to counter-terrorism in favour of rights-based approaches. In 2018, the Russian delegate stated,

> 'We note with regret that several States have supported a shift towards controversial concepts: now, when planning and implementing counter-terrorism measures, greater attention is being paid to the prevention of violent extremism and the role of gender in protecting human rights. We believe that that approach leads to the erosion of full-fledged antiterrorism cooperation and *shifts the focus from countering terrorists to positioning them as the suffering victims of undemocratic regimes and in need of external assistance.*'[163]

The UNGA's debates, therefore, reflect the existence of multiple, competing constructions of the relevance and application of human rights considerations to counter-terrorism. While the Assembly's decisions and many states' remarks suggest that there is, within the international

[160] UN Doc A/RES/72/246 (2017).
[161] UNGA Verbatim Record (1 December 2017) UN Doc A/PV.61, 3.
[162] ibid.
[163] UNGA Verbatim Record (26 June 2018) UN Doc A/72/PV.102, 19 (emphasis added).

community, a growing commitment to ensuring that human rights are the basis of counter-terrorism efforts, the extent to which human rights are relevant and applicable remains controversial.

D. Evaluation

D.1. A Cosmopolitan Moment?

As noted in chapter 2, the UN Charter established an organisation whose purposes are to maintain international peace and security and to promote respect for human rights.[164] According to Habermas, the UN Charter meets Kant's vision of a cosmopolitan world order 'halfway';[165] it envisions an international organisation that pursues the dual objectives of human rights and durable peace through the development, promotion and enforcement of international law.[166] Yet as discussed in the previous chapter, the war on terror has seen the United States and its allies harness the power and legal authority of the UNSC in order to mandate the worldwide implementation of repressive, 'emergency' counter-terrorism measures that are often inconsistent with states' obligations under international human rights law.[167] The authority of the UN's branches and its Charter have, furthermore, been undermined by the reinterpretation of the right to self-defence by the United States and its allies, as well as their circumvention of the UNSC's power to approve or disapprove the use of force.[168]

In light of this challenge to international law and organisations, sociologists such as Beck, philosophers including Habermas, and critical security scholars all called for a cosmopolitan approach to counter-terrorism that is based upon multilateralism, commitment to the principle of non-use of force, and universal human rights.[169] In some ways, the UNGA has answered this call, its counter-terrorism work a stark contrast to – and a direct response to – the work of the UNSC and some of its permanent members. Through its resolutions and the

[164] *Charter of the United Nations,* art 1(1).
[165] Habermas (n 1) 143.
[166] ibid.
[167] For further discussion, see ch 4. See also Antony Anghie, 'On Making War on the Terrorist: Imperialism as Self-Defence' in *Imperialism, Sovereignty and the Making of International Law* (Cambridge University Press 2005).
[168] See Christine Chinkin and Mary Kaldor, 'Self-Defence as a Justification for War: The Geo-Political and War on Terror Models' in *International Law and New Wars* (Cambridge University Press 2017).
[169] For further discussion, see ch 1-2.

Strategy, the Assembly has attempted to promote the mainstreaming of human rights considerations within global and domestic counter-terrorism efforts. The UNGA has, furthermore, attempted to coordinate the counter-terrorism work of various UN branches, promoting a harmonised effort that is based upon the Organisation's purposes and principles, as well as international human rights law. All UN branches ought to promote the Organisation's core purposes and principles and should work in concert with one another to do so. The synergy between the Secretariat and the UNGA, discussed in part C, reveals the possibility of cooperation and harmony among the UN's branches.

Yet the UNGA's meetings show that barriers remain to the formation of a rights-based approach to counter-terrorism. Cosmopolitan and critical scholars often call for the UN itself to be reformed, [170] but the Organisation cannot bring about a cosmopolitan approach to security unless that is the intention of the states by which it is constituted. While developments such as the Strategy and its subsequent reviews are encouraging, the Assembly's debates show that there remains significant disagreement as to the place of human rights within counter-terrorism efforts that are implemented internationally or domestically. Meanwhile, the UNGA's continuous, repeated condemnation of the violation of human rights in the context of counter-terrorism, as well as its regular call upon states to abide by the prohibitions of torture and arbitrary detention, are symbolic. They show that, despite states' efforts to promote compliance with international human rights law through the forum of the UNGA, certain policies and practices continue unencumbered by international human rights law, or any political pressure to comply with the law that might be generated through the UNGA.

D.2. A Weapon of the Weak?

The question that remains, then, is of what we might take from the UNGA's approach to counter-terrorism. Firstly, the continual adoption of resolutions that endorse a rights-based approach to counter-terrorism indicates that a number of states support, in principle, an approach to counter-terrorism that is based upon multilateralism and respect for human rights. Secondly, the Assembly's debates, as well as the resolutions themselves, show that

[170] See Held (n 13) 424; Archibugi (n 4).

international human rights law provides states with a language in which to criticise the counter-terrorism policies and practices of the United States and its allies. As scholars have noted in relation to social movements and non-governmental organisations, human rights are often a 'weapon for the weak,'[171] allowing actors to make claims about the validity or legality of the actions of powerful states.

The UNGA has provided one such setting for states of the Global South to draw attention to the human rights implications of the war on terror. The vocabulary of international human rights law has been mobilised in order to highlight the abhorrence of certain counter-terrorism measures and to highlight the inconsistency in the behaviours of the United States and its allies, who, while speaking as bastions of international human rights, continue to implement repressive, worldwide counter-terrorism measures under the UNSC's auspices. This highlights the way in which international human rights law has taken on a political life within settings such as the UNGA. Even if the law itself is difficult to enforce, it provides a widely accepted way of articulating and voicing demands for reform and justice.[172] However, the use of this language highlights and reifies the interlocutors' marginalisation. As discussed in chapters 1 and 2, international law is continually involved in the making of the state. Disavowing positivist accounts of international law as the product of state consent, critical scholars argue that international law and organisations continually mould weaker states into something that resembles the international expectations of a state.[173] This chapter has shown that, through both the UNGA's meetings and the resulting decisions, states of the Global South continually draw upon the lexicon of international human rights law in order to challenge the counter-terrorism policies and practices of the United States and its allies, implemented both unilaterally and through the UNSC. Yet in doing so, these states speak a language that has historically been used by states of the North to criticise and marginalise the South. As a result, states of the Global South entrench the power structures they seek to disrupt. They reveal, ultimately, that the UNSC's and UNGA's differing approaches to human

[171] See, for example: Ron Dudai, 'Rights Choices: Dilemmas of Human Rights Practice' (2014) 6(3) Journal of Human Rights Practice 389; Sophie Jacquot & Tommaso Vitale, 'Law as Weapon of the Weak? A Comparative Analysis of Legal Mobilisation by Roma and Women's Groups at the European Level' (2014) 21(4) Journal of European Public Policy 587.
[172] Brooke Ackerly, 'Human Rights Enjoyment in Theory and Activism' (2011) 12(2) Human Rights Review 221; Nickel (n 17).
[173] See Eslava and Pahuja (n 19).

rights and counter-terrorism are part of a broader, ongoing power struggle within the United Nations, conducted along developmental lines.

E. Conclusion

This chapter has explored the UNGA's efforts to promote and protect international human rights law within the context of counter-terrorism. Part B discussed the decisions and plans of action adopted by the Assembly. Resolutions adopted by the UNGA have deplored the violation of human rights in the context of counter-terrorism, calling upon states to ensure that their counter-terrorism measures are consistent with international human rights law, especially the prohibitions of torture and arbitrary deprivation of liberty, as well as the right to a fair trial. At the same time, UNGA resolutions have highlighted the way in which international terrorism impacts upon the enjoyment of human rights, thus arguing that states bear an obligation, under the ICCPR, to take measures to protect individuals from violations of human rights by non-state actors including terrorist organisations.

These resolutions have been complemented by the Strategy and the Plan of Action to Prevent Violent Extremism, both of which were based upon the recommendations of the Secretariat. As noted in part B, these documents are both a contrast and an answer to the UNSC's approach to counter-terrorism, which largely focuses upon repressive national security measures. The Strategy and the Plan of Action both emphasise the importance of human rights, attempting to situate them at the centre of global and domestic counter-terrorism efforts. To that end, both documents call upon all UN branches to generate harmonised and rights-based solutions to the threat of international terrorism.

Part C explored some of the discussions of the relationship between human rights and counter-terrorism within the UNGA's meetings. It showed how the UNGA has functioned as a setting for states to condemn the violation of human rights in the context of counter-terrorism, with many states disputing the disregard for international human rights law displayed by the United States and its allies in the war on terror. At the same time, the UNGA has provided a forum for states to discuss the role of the UN and to establish the Organisation's role as a promoter of human rights in the context of counter-terrorism.

Overall, this chapter has explored the UNGA as a setting for political debate regarding international human rights law. The chapter has shown that states strategically use the language of human rights in order to resist international power imbalances. This use of human rights lexicon reveals the transformative potential of human rights and illustrates their normalising function; human rights operate as a vocabulary that states *must* invoke in order to function and be understood within the setting of international organisations. Lastly, this chapter has shown that just as human rights define the political interactions between states, they also form a basis of political interactions between the UN's branches. These interactions, also explored in chapters 1 and 4, are discussed in the concluding remarks presented in the next chapter.

Chapter 6: Conclusion

'What you see is not what we see. What you see is distracted by memory, by being who you are, all this time, for all these years.' – Don DeLillo, 'The Falling Man'[1]

'He was seeing something elaborately different from what he encountered step by step in the ordinary run of hours. He had to learn how to see it correctly, find a crack in the world where it might fit.' – Don DeLillo, 'The Falling Man'[2]

A. The Decades After

Chapter 1 began with a discussion of Don DeLillo's *Falling Man*, a novel about the trauma experienced by the people of New York City and the world as they relived September 11 in the days and months following the attacks. In taking that day as the starting and finishing point of this story, I, too, have perpetuated the discourses problematised in the preceding chapters. A discussion about terrorism framed within the events of September 11 contributes to and reinforces understandings of that day as a turning point, as the day the world changed forever.[3] As shown in chapter 4, that understanding of September 11 was crucial to the demonization and alienation of the terrorist enemy that grounded the war on terror. The idea that September 11 was so unforeseen, so cataclysmic and so difficult to contextualise by reference to anything in the world 'before' that day gave rise to the argument that we needed a new way of seeing and being in the world. This new way of understanding the world inheres a view of the terrorist as mysterious, menacing, inhumane and unentitled to humane treatment.

Yet there is irony in the construction of the post-September 11 world as something new and forever changed. As shown throughout this thesis, the understanding of terrorists as threats to democracy, freedom, liberty, human rights and the rule of law arises from the history of an imagined 'us', a global risk society.[4] In simpler terms, the discourse of the war on terror is anchored in a common understanding among the United States and its allies that they share

[1] Don DeLillo, *Falling Man: A Novel* (Simon and Schuster 2007) 115.
[2] ibid 168.
[3] Joseph Margulies, *What Changed When Everything Changed: 9/11 and the Making of National Identity* (Yale University Press 2013); Malinda S Smith, 'Terrorism Thinking: "9/11 Changed Everything"' in Malinda S Smith (ed), *Securing Africa: Post-9/11 Discourses on Terrorism* (Routledge 2010).
[4] Ulrich Beck, 'Incalculable Futures: World Risk Society and Its Social and Political Implications' in Ulrich Beck (ed), *Ulrich Beck: Pioneer in Cosmopolitan Sociology and Risk Society* (Springer 2014).

a history as international defenders and promoters of civility and human rights. 'What you see is distracted by memory,' DeLillo wrote, 'By being who you are all this time, for all these years.'[5]

For nearly two decades, scholars, novelists, artists, musicians, lawyers, human rights advocates, leaders and private individuals have sought to identify that 'crack in the world' where the story of September 11 might fit. Countless creative, academic, professional and undoubtedly personal pursuits have been dedicated to making sense of those attacks and, just as importantly, the responses that followed. This thesis constitutes one such attempt. It highlights the way that states have turned to the United Nations – which was born out of post-World War II dreams of international peace and universal human rights – to support, constrain and challenge the war on terrorism. Specifically, the preceding chapters have shown how human rights, which are at the core of the UN's objectives and principles, are strategically invoked by states in order to support a diverse range of political outcomes relating to counter-terrorism.

This chapter synthesises the research project's findings, reflecting upon their significance and future implications. Reviewing the substantive chapters of the thesis, part B discusses the UNSC's and UNGA's differing approaches to the relationship between human rights and counter-terrorism. It argues that while the human rights content of UNSC decisions has become more extensive over time, the UNSC's approach remains to adopt legally binding decisions relating to counter-terrorism and to assign states the responsibility of implementing those decisions in a manner consistent with their human rights obligations. This has resulted, and continues to result, in the implementation of laws and practices that impact upon the enjoyment of human rights. By contrast, the UNGA has spawned soft-law documents that outline a rights-based approach to counter-terrorism based upon existing international legal frameworks. While these decisions accurately identify the regimes of international law applicable to national and international responses to terrorism, their enforceability, and thus their concrete impact, is relatively limited.

[5] DeLillo (n 1) 115.

Parts C and D return to the question of why words matter in the study of terrorism and counter-terrorism. Part C summarises the arguments advanced in chapter 4, discussing the UNSC's involvement in the construction of a global terrorist 'other.' Specifically, it contends that the United States and its allies have capitalised upon their position within the UNSC in order to globalise the alienation and demonisation of the terrorist enemy, universalising a state of counter-terrorist emergency that justifies the suspension of human rights. Part C contends that by identifying the existence of this discourse and the various domestic and international levels at which it operates, scholars are able to incite activism and to call for the generation of alternative understandings of terrorism and counter-terrorism.

Meanwhile, part D reflects upon the Global South's attempts to challenge and resist these discourses, particularly within the setting of the UNGA. It contends that the pattern of discourse and counter-discourse between North and South is reflected in the relationship between the UNSC and UNGA. The equal representation of Global South states in the Assembly, and these states' decisions to use the UNGA as a forum for critique of the North's policies and practices, accounts for the UNSC's and UNGA's contrasting approaches to counter-terrorism and human rights. Returning to the literature discussed in chapters 1 and 2, part D argues that the Global South's use of human rights language ultimately entrenches the political power and history of that language, which has traditionally been invoked by the North to subjugate and marginalise the South.

Part E, therefore, discusses this thesis' contributions to existing literature. It suggests, first, that the language of international human rights law is inescapably political, a fact highlighted in the discussion of the Global South in part D. However, I submit that the politics of human rights can, in fact, be deployed to productive and transformative ends by those who are critically aware of its subversive and normalising effects. Thus, as a work of critical international law scholarship and critical terrorism studies, this thesis is a first step in the re-imagination and redeployment of the language of human rights, as it untangles and exposes the uses of that language in the context of the UN's counter-terrorism work.

Finally, part F returns to the question asked by scholars and practitioners in the aftermath of September 11: where to next? It problematises two further elements of the discourse of the

war on terror: the notion of a free fall captured in the famous image of the falling man and explored in DeLillo's novel; and the image of a downward spiral that has come to be repeated throughout the human rights literature relating to the war on terror. I call for the disavowal of both of these images. While one denotes a sudden, uncontrolled fall and the other a steady descent, both suggest that the decades after September 11 will inevitably lead humanity to a low point. Instead, I call for a new image: one of deceleration. Discussing recent developments in the nexus of security and human rights, I argue that scholars and human rights advocates must take pause, reflect upon and resist the sense of urgency that has animated the war on terror – and its erosion of human rights – for eighteen years.

B. The UNSC and UNGA: Differing Approaches

Chapter 4 discussed the UNSC's role in the war on terror. Introduced in 1999, the targeted sanctions regime, which now applies to al-Qaeda, ISIL and affiliated entities or individuals, was initially devoid of any review or appeal mechanism. After several years of scholarly, legal and political criticism, the targeted sanctions regime was updated to include a delisting focal point and an Ombudsperson to receive and review delisting requests. Over time, the UNSC and the Sanctions Committee have also attempted to improve the fairness and transparency of the sanctions regime, providing more information about the reasons for individuals' inclusion on the Consolidated List and ensuring that relevant individuals and governments can access this information. The use of the delisting mechanism remains limited, however; as discussed in chapter 4, its procedures are still not in line with international standards of human rights.

The piecemeal nature of amendments to the sanctions regime is representative of the UNSC's wider approach to the relationship between human rights and counter-terrorism. Chapter 4 showed that, over time, the human rights content of relevant UNSC decisions has become more detailed and explicit. In particular, the Council's decisions relating to foreign terrorist fighters emphasise the rights of women and children and seek to provide reparations to victims of gross human rights violations at the hands of ISIL in Syria and Iraq. These decisions do not, however, provide the groundwork for an international, rights-based approach to counter-terrorism. Their focus has been, and remains, the implementation of repressive criminal law and border protection measures that protect states against, and insulate them

from, the threat of international terrorism. While the UNSC now emphasises the importance of respecting human rights while countering terrorism and calls for efforts to address the human rights violations that are conducive to violent extremism, it ultimately leaves it to states to implement counter-terrorism measures in a manner consistent with their own obligations under international human rights law.

However, this ultimately results in the implementation of laws and practices that are conducive to the violation of human rights. Chapter 4 provided a number of examples of national laws that have been implemented in pursuance of UNSC decisions and have had detrimental impacts upon the enjoyment of human rights. Private data has been collected and stored, individuals have been detained without charge, their belongings and homes have been searched, and their rights to nationality and free movement have been revoked. Freedom of speech, association and religion have also been curtailed, especially in the context of laws that criminalise incitement to, or 'material support' for, terrorism. These laws have not only had implications for individuals who have no direct involvement in terrorist activity; they have also been used to target human rights advocates, humanitarian organisations, scholars and lawyers in a number of jurisdictions.

Of course, the UNSC's primary role is not the promotion of human rights or the enforcement of international human rights law, but rather the maintenance of international peace and security. The Council has not acted outside its legal authority in implementing its counter-terrorism decisions; as highlighted in both chapters 3 and 4, Chapter VII of the UN Charter authorises the Council to implement a range of forceful and non-forceful measures in response to threats to international peace and security. Two other features of the UN Charter are pertinent, however. Firstly, Article 24 of the UN Charter states that in discharging its responsibility to maintain international peace and security, the UNSC 'shall act in accordance with the Purposes and Principles of the United Nations.'[6] Secondly, these purposes and principles include the promotion of respect for human rights and fundamental freedoms.[7] Thus, the UNSC's abrogation of its responsibility to make decisions that promote and ensure

[6] *Charter of the United Nations,* art 24.
[7] ibid art 2(3).

respect for human rights is at odds with the role assigned to it by the UN's founding document.

Chapter 5 showed that, in contrast with the UNSC, the UNGA has promoted a coordinated, multilateral approach to global counter-terrorism with human rights and the rule of law at its core. This approach has been outlined in documents such as the UNGA's Global Counter-Terrorism Strategy, discussed in chapters 3 and 5. The Strategy does not attempt to impose any new obligations upon states, but rather outlines an approach to global counter-terrorism that amalgamates existing regimes of international law including human rights, humanitarian and refugee law. The Strategy also reflects upon the roles of a myriad of existing UN branches in counter-terrorism, including the UNODC, the Secretariat, Special Procedures of the Human Rights Council, and the committees that oversee the implementation of the core human rights treaties. In its reports to the UNGA, the Secretariat has stressed the importance of coordination across the UN's branches, emphasising the need to integrate the human rights branches' recommendations into the counter-terrorism decisions made by the Organisation's principal organs.

Another notable aspect of the UNGA's Global Strategy is that it is a living document. The Strategy is subject to biannual review, which aims to ensure that the Strategy continually reflects emerging issues and threats. The UNGA's regular review of the Strategy reflects the organ's commitment to open and inclusive procedure. This sharply contrasts with the UNSC, whose hasty, non-consultative and non-transparent decision-making processes were discussed in both chapters 4 and 5.[8] Those chapters showed, therefore, that the UNSC and UNGA take different structural, procedural and substantive approaches to counter-terrorism decision-making. As shown in chapter 4, the UNSC's counter-terrorism decisions are no longer silent about the impact of counter-terrorism upon human rights. Yet the hurried nature of the Council's decision-making process results in resolutions that emphasise national security

[8] See Fionnuala Ní Aoláin, 'The UN Security Council's Outsized Role in Shaping Counter Terrorism Regulation and Its Impact on Human Rights' (*Just Security,* 19 October 2018) < https://www.justsecurity.org/61150/security-council-mainstream-human-rights-counter-terrorism-regulation/> accessed 19 March 2019; Alan Boyle, 'International Lawmaking: Towards a New Role for the Security Council?' in Antonio Cassese (ed), *Realizing Utopia: The Future of International Law* (Oxford University Press 2012).

and criminalisation of terrorism, while leaving it to states to determine how human rights factor into, and constrain, their counter-terrorism laws. This allows for and encourages, perhaps, the implementation of counter-terrorism measures that have deleterious effects upon the enjoyment of human rights. By contrast, the UNGA's soft-law output aims to harmonise the counter-terrorism policies and practices of states and UN branches. Nowak and Charbord write:

> 'Between 2004 and 2006, the General Assembly, together with the Secretary-General, recalibrated the UN's approach to countering terrorism, away from coercive policies, and back towards the core values of the UN. These efforts culminated in the unanimous adoption of the… UN Global Counter-Terrorism Strategy and Plan of Action.'[9]

The UNGA aims to place the Organisation's core values, including promotion of respect for universal human rights, at the centre of global counter-terrorism efforts. The Assembly's efforts are, however, limited by the informal and unenforceable nature of its soft-law outputs. Furthermore, its work has been dislodged by that of the UNSC, which has been complicit in the institutionalisation and legalisation of a war against a global terrorist 'other.'

C. Words Matter, I: Constructing a Global 'Other' Through the UNSC

The difference in the approaches of the UNSC and UNGA cannot be attributed to their respective mandates. In fact, as Scheinin points out, it is the UNGA that has traditionally acted, and should act, as a world legislature, contributing to the progressive development of international law and adopting legally binding treaties.[10] According to Scheinin, when the UNSC adopted Resolution 1373 in 2001, it 'took for itself "legislative powers", powers which inherently belong to the General Assembly.'[11] In order to understand the two organs' contrasting roles in counter-terrorism, we must consider the ways in which they are understood and utilised by their Member States. As noted in chapter 4, the Bush administration launched the war on terror with a call to the UN to serve a purpose in global

[9] Manfred Nowak and Anne Charbord, 'Key Trends in the Fight against Terrorism and Key Aspects of International Human Rights Law' in Manfred Nowak and Anne Charbord (eds), *Using Human Rights to Counter Terrorism* (Edward Elgar 2018) 23.
[10] Martin Scheinin, 'Impact of Post-9/11 Counter-Terrorism Measures on all Human Rights' in Manfred Nowak and Anne Charbord (eds), *Using Human Rights to Counter Terrorism* (Edward Elgar 2018) 94.
[11] ibid.

counter-terrorism.[12] This purpose was, according to the United States, to support a geographically, temporally and legally unbounded war against terrorists. Thus, the UNSC 'took' legislative powers for itself, as suggested by Scheinin, at the behest of the United States and its allies, many of which are permanent members of the Council. These states, chapter 4 showed, carefully and deliberately set out to use the Council in order to foster international support for their war on terror.

One of the ways in which the United States and its allies achieved this objective was by globalising the 'us' and 'them' discourse that drives the war on terror. As shown in chapter 2, the way in which issues are spoken about, seen and understood ultimately determines the ways in which they are acted upon. An envelope in the mailbox of a business or private home is indeed a tangible, physical thing that an employee or resident can hold in their hand. Yet the understanding of a letter from an unknown sender as a threat, as a potential vessel for anthrax sent by a member of an Islamic terrorist organisation, only came about as a result of counter-terrorist discourses in the aftermath of September 11.[13] Similarly, a bomb blast is a physical occurrence that can damage structures and injure human beings, but we only understand it as an act of terrorism perpetrated by an extremist group such as al-Qaeda or ISIL because of our *perception* of the culprit of that particular physical occurrence.

Thus, chapter 4 showed that the war on terror came about as a result of the deliberate construction of binary oppositions between the victims and perpetrators of terrorism: us/them, self/other, civilised/uncivilised, humane/inhumane, democratic/undemocratic, liberal/illiberal, gentle/savage. While this discursive construction originated in the United States in the immediate aftermath of the September 11 attacks, it was soon internationalised by the Bush administration and its partners in the war on terror. The prominence of those attacks gave rise to a shared, global sense of victimhood and threat. An imagined world risk society came into being, one threatened by, and pitted against, a terrorist enemy at its

[12] George W Bush, quoted by Richard A Falk, 'What Future for the UN Charter System of War Prevention?' (2003) 97 American Journal of International Law 590, 590. For further discussion, see ch 4, pt B.
[13] See Ryan Ellis, 'Creating a Secure Network: The 2001 Anthrax Attacks and the Transformation of Postal Security' (2014) 62(1: Supplement) The Sociological Review 161; Dan Jones, 'Structures of Bio-terrorism Preparedness in the UK and the US: Responses to 9/11 and the Anthrax Attacks' (2005) 7(3) British Journal of Politics and International Relations 340.

margins. As noted in chapter 4, one of the key markers of difference between the imagined global 'self' and the terrorist 'other' is human rights. *We* are united by our commitment to human rights, freedom and democracy, while terrorists are animated by a hatred of, and the intent to destroy, human rights. Absurdly, it is argued by extension that our way of life, supposedly characterised by values of freedom, liberty, human rights and equality of opportunity, is under urgent threat from the terrorist enemy. This mentality has led the United States and its allies to assert their authority to write the contemporary narrative of human rights, defining whose rights matter, which rights can be suspended in the name of counter-terrorism, and where the protections of human rights simply do not apply.

Chapter 4 argued that a small number of states have seized the power and legal authority of the UNSC to universalise the othering discourse of the war on terror, thus perpetuating an international state of emergency in which the suspension and violation of human rights are justified. It showed that the groundwork for this global discourse was, in fact, laid well before September 11. The UNSC's response to the Lockerbie bombings and the ICJ's decision in the proceedings brought by Libya supported both the view of terrorism as a threat emanating from places devoid of human rights and of the UNSC as a supreme, unconstrained decision-maker when it comes to international counter-terrorism. This pattern continued in 1999, when, in response to al-Qaeda's increasing activity and its affiliation with the Afghan Taliban, the UNSC introduced the 1267 sanctions regime. Despite states' calls for a sanctions regime that took into consideration the human rights of the Afghan people, the system introduced by the UNSC provided very narrow scope for humanitarian exceptions or appeal and was incognizant of the fact that the costs of the regime's implementation would ultimately be passed on to the Afghan people, a majority of whom were under the Taliban's rule at the time.

Thus, by the time of the September 11 attacks and the declaration of the war on terror, the UNSC was already being shaped into a reactive, legislative body. In the days, weeks, months and years after the attacks, the United States and its allies repeatedly turned to the Council to mandate sweeping changes to states' counter-terrorism and criminal laws. As noted in chapter 4, the human rights content of earlier resolutions relating to counter-terrorism was limited. Their implementation was hasty and entailed neither sufficient consultation nor

lengthy deliberative processes. Ultimately, these resolutions paved the way for the violations of human rights known to occur within many jurisdictions in times of emergency. The resolutions not only required states to take draconian measures against terrorists, but they did so without providing any definition of terrorism itself. These UNSC decisions, as Scheinin argues, 'Aim to criminalise a phenomenon without defining it.'[14] They demand that states criminalise terrorism, financing of terrorism, travelling for the purpose of terrorism, providing logistical support to terrorists, seeking or acquiring terrorist training, acquiring or selling materials that might be used in a terrorist attack, and inciting terrorism; but they allow states to define 'terrorism' as they wish and to apply international and domestic human rights law as they wish. These actions and omissions are neither accidental nor reflective of a deficiency in the Council itself. They are, rather, symptoms of the radical uncertainty that has deliberately been brought about by a small number of states that exercise control over the Council's decisions. This condition of uncertainty has not only allowed, but has also encouraged, the erosion of human rights in the context of counter-terrorism.

On its face, Resolution 2178 and subsequent resolutions on foreign terrorist fighters[15] might provide some hope that the UNSC's emphasis is shifting and that its goals are now more aligned with the UN's purposes and principles. These resolutions are particularly detailed in their discussion of human rights, pointing out that 'respect for human rights, fundamental freedoms and the rule of law are complementary and mutually reinforcing with effective counter-terrorism measures, and are an essential part of a successful counter-terrorism effort.'[16] To Scheinin, however, Resolution 2178 is, in fact, far more damaging to international human rights and the rule of law than Resolution 1373 and related Council decisions. This, he argues, is for two reasons. Firstly, the resolution imposes extensive, new legal obligations upon states – to criminalise individuals' travel for the purposes of participating in terrorist activity, or any support, financing or promotion thereof – without placing temporal or geographic limitations upon those obligations.[17] Secondly, Resolution 1373 mirrors the provisions of the 1999 Terrorist Financing Convention.[18] Thus, while Resolution 1373 merely

[14] Scheinin (n 10) 96.
[15] UNSC Res 2178 (24 September 2014) UN Doc S/RES/2178.
[16] ibid Preamble.
[17] Scheinin (n 10) 95.
[18] See ch 2, pt C.1.

accelerated the implementation of the pre-existent Terrorist Financing Convention, Resolution 2178 imposed 'totally new obligations upon Member States,' obligations that were devised by the Council itself.[19] Both Resolutions are, however, crucial as indicators of the UNSC's transformation of international lawmaking after September 11. They signify the removal of state consent as a requirement for the making of international law, the former Resolution having mandated the universal implementation of a treaty that states previously had the *option* of ratifying and the latter inventing entirely new legal obligations without any consultation with human rights lawyers or advocates. Combined with the nature of UNSC decision-making processes, highlighted above and in the previous two chapters, this transformation led by the UNSC has allowed for the continuation of the global war on terror as an unchecked, unregulated mission in which security is pursued at the expense of human rights.

I also argued in chapter 4 that the UNSC's meetings have provided an international forum for the articulation and furtherance of the othering discourse of the war on terror. The chapter explored the ways in which a number of permanent members of the Council have, in its meetings relating to counter-terrorism, characterised terrorism as antithetical to democracy and freedom, dividing the world into an anti-terrorist coalition united by its commitment to human rights and the menacing, violent terrorist 'other.' The UNSC has, therefore, been made complicit in the construction of this global 'us' and 'them' discourse in a number of ways. Firstly, states have seized upon the Council's Chapter VII powers in order to mandate the global implementation of repressive counter-terrorism measures, with many of its decisions directly resulting in violations of human rights. Secondly, the Council has been reshaped into an emergency international lawmaking body. Emergency counter-terrorism powers in domestic contexts, like the AUMF in the United States, have provided governments with almost unlimited power to suspend and curtail human rights. Similarly, the UNSC's continually breathless and reactionary function has paved the way for a dangerously unregulated, undefined war against terrorism. The increasing human rights content of the UNSC's decisions has been lauded by scholars, but ultimately, this language has both legitimised and obscured the violence, discrimination and marginalisation to which these decisions are conducive.

[19] Scheinin (n 10) 95.

Understanding the ways in which human rights vocabulary is invoked, subverted and sidelined within the UNSC's decisions and meetings is not merely important for the purposes of acquiring academic knowledge. Rather, identifying the existence of this othering, emergency discourse is crucial for scholars who intend to document the political functions of human rights, as is understanding the various domestic and international settings in which the discourse is present. By exposing the existence of this discourse, and by highlighting the injustices to which it is conducive, scholars can incite advocacy and new thinking. In particular, this form of analysis enables us to call for the generation of new vocabularies and modes of understanding terrorism and counter-terrorism, ones in which discussions of human rights are more open and involve inclusive dialogues about how we can live together in a cosmopolitan world society, outlined in chapter 2. This is discussed at length below.

D. Words Matter, II: The Global South and the UNGA

Chapter 4 also showed that during their rotational memberships of the UNSC, some states of the Global South have called for the Council to implement counter-terrorism frameworks that are more consistent with international human rights law. Yet the power of these states within the UNSC is limited by comparison to that of the permanent five members, and their representation within that body is only temporary. As a result, states of the Global South have turned to the General Assembly in order to advance their own interests and preferences relating to counter-terrorism. Engaging with existing literature on the Global South and international organisations, chapter 5 characterised these states' recourse to the UNGA as part of a broader struggle at the UN that is conducted along developmental lines. The division is not absolutely clear and neither the North nor South can be treated as entirely monolithic; as shown in chapter 4, certain Global South states have also reproduced the 'us' and them' discourse of the war on terror insofar as it legitimises their repression of criminal organisations and political opponents.

There is, however, a clear dynamic in the interaction between the UNGA and UNSC. With equal representation in the UNGA, Global South states have turned to this body as a way of demanding inclusion in the development of international law and governance. These states have not only affected the adoption of documents such as the UNGA's Global Counter-

Terrorism Strategy; they have also used the UNGA's plenary meetings as a platform for clear, explicit criticism of the counter-terrorism policies of the United States and its allies. In particular, states of the Global South have decried the North's hypocrisy. As shown in chapter 5, the language of human rights has typically been invoked by the North in order to criticise, marginalise and intervene in the South. Yet as representatives have repeatedly pointed out within the UNGA, these same states have flagrantly violated human rights in the context of counter-terrorism. Thus, the UNGA has become a setting in which states and regional organisations openly criticise policies and practices including detention at Guantanamo Bay, interrogation at the CIA's various black sites, and the use of drones for targeted killing of terrorist suspects.

Chapter 5 argued, however, that the use of the language of human rights is itself deliberate, political and thus conflictual. Even the criticism of states' counter-terrorism policies by reference to international human rights law is a strategic choice, with weaker actors drawing upon a legally and politically legitimised language in order to challenge the behaviour of more powerful states and to disrupt the unequal distribution of power between them. Human rights thus provide a language in which to articulate experiences of injustice and demands for political change. However, the use of this language is, in and of itself, problematic. As I have argued throughout this thesis, modern human rights vocabulary has generally been employed to further provincial, European ideals and has thus been involved in the subjugation of the Global South. The language of human rights has been mobilised in order to argue that states of the Global South do not comport with the international standards and expectations of a state, grounding intervention in or sidelining of these states.[20] Thus, in drawing upon human rights vocabulary to criticise both the policies of the United States and the inconsistency in its approach to international human rights law, states of the Global South reify the power and normalising effects of this language. In seeking to unlock the transformative potential of human rights law, these states ultimately highlight the inescapability of its politics, drawing attention to the absence of an alternative way of seeing, being and understanding.

[20] See Anne Orford, *Reading Humanitarian Intervention: Human Rights and the Use of Force in International Law* (Cambridge University Press 2003). For a philosophical conception of human rights as limits upon sovereignty, see Joseph Raz, 'Human Rights Without Foundations' (2007) Oxford Legal Studies Research Paper 14/2007 <https://scholarship.law.columbia.edu/faculty_scholarship/1491> accessed 28 April 2020.

E. Words Matter, III: Contributions to Literature on International Organisations, Law and Politics

Chapters 1 and 2 discussed the theoretical foundations of this thesis, which is primarily based upon critical international law scholarship and CTS. Specifically, this thesis takes a discursive approach to the study of international human rights law and counter-terrorism. It seeks to understand, deconstruct and document the ways in which counter-terrorism is spoken about within the UN's principal organs, showing how these discourses and discursive practices are informed by, or marginalise, human rights. My primary theoretical contention is, then, that the way in which issues are seen and spoken about is intrinsically linked with how they are acted upon. The war on terror was built upon the bifurcation of humane and inhumane, civilised and uncivilised, the international community and its margins, a divide that continues to drive national and international counter-terrorism efforts today.

Through the substantive chapters of this thesis, I have shown how human rights factor into this discourse of the war on terror in a number of different, and often conflicting, ways. 'Our' commitment to human rights is said to distinguish us from the brutish and backward enemy. 'Our' subject position as global enforcers and promoters of human rights supposedly entitles and compels 'us' to free people in foreign territories who are suffering at the hands of terrorist-supporting, tyrannical governments. Furthermore, 'our' right to be free from terrorist violence, the urgent need to rid ourselves of that threat, apparently means that, in the short term, certain human rights must be limited or sacrificed. While chapters 1, 2 and 4 explored literature on the development of this discourse within domestic settings, this thesis advances several key arguments regarding its international function.

Firstly, the 'us' and 'them' discourse of the war on terror has been replicated by states within, and under the auspices of, the UN's primary organs. In particular, chapter 4 showed that the United States and its allies have harnessed the power of the UNSC, and their position as permanent members, in order to garner international support for the war on terror. This has seen the othering discourse of the war on terror reproduced within the UNSC's meetings and the Council's Chapter VII decisions, with the terrorist threat treated as something emanating from foreign, undemocratic states where there is a lack of respect for human rights and the

rule of law. The UNSC's Chapter VII powers have, furthermore, been used to propel the world into a perennial state of emergency, enabling the hasty adoption of poorly defined, draconian counter-terrorism measures that have resulted in violations of and limitations upon human rights around the world.

Secondly, the language of human rights has been used by states of the Global South in order to challenge the North's counter-terrorism policies and practices, implemented both domestically and through the UNSC. 'As soon as there is a power relation,' Foucault wrote, 'There is the possibility of resistance.'[21] Yet as I have shown throughout this thesis, the Global South's recourse to the language of human rights highlights and entrenches historical patterns of the South's marginalisation. As Pahuja points out, the Global South has long used the seemingly universal, apolitical language of international law and organisations in order to affect global change, challenge power imbalances, and demand a part in decision-making and lawmaking processes. Yet in doing so, these states have continued to reify a language based upon, and involved in the constant advancement of, European values.[22] Chapter 5 argued that, in particular, the language of international human rights law has historically enabled states of the North to characterise those of the South as inadequate: developmentally, socially, politically, institutionally, legally and economically. Human rights have acted as limits upon both these states' sovereignty and their capacity to act in the international arena.

Foucault's work might, therefore, lead us to conclude that the use of the language of human rights is, in all cases, malicious or self-defeating. This is because, in using human rights vocabulary to draw attention to the hypocrisy of the United States and its allies, states of the Global South ultimately reify the power structures and imbalances they seek to disrupt. Later in his career, however, Foucault clarified that his contention is not that everything is 'bad' or that resistance is futile. He argued, by contrast, that his agenda is to show that everything is 'dangerous.'[23] To Foucault, an awareness of the dangerous functions of power can enable scholars to work as cautiously optimistic activists. As I argued in chapter 2, my critique of the

[21] Quoted by Kevin J Heller, 'Power, Subjectification and Resistance in Foucault' (1996) 25(1) SubStance 78, 78.
[22] Sundhya Pahuja, *Decolonising International Law: Development, Economic Growth and the Politics of Universality* (Cambridge University Press 2011) 2.
[23] Michel Foucault, 'On the Genealogy of Ethics: An Overview of Work in Progress' in Paul Rainbow (ed), *The Foucault Reader* (Pantheon Books 1984) 343. For further discussion, see ch 2, pt C.

operation of counter-terrorism discourses at the UN is driven by the conviction that terrorism is best combated through cooperative, multilateral efforts that respect and promote human rights. Based upon the work of Beck, a sociologist and international political theorist, I argued that global threats like terrorism and climate change have reduced the relevance of national boundaries.[24] As individuals, we are still members of national communities, but our everyday lives are increasingly being shaped by encounters with the global.[25] The 'banal' side of the cosmopolitan condition includes things such as the popularity of international cuisine in local areas, while its most extreme manifestation is the realisation of global risk.[26] We thus find ourselves living in a 'world risk society.'[27] As seen throughout the war on terror, and as highlighted in chapters 4 and 5, the most common response to the realisation of global risk is the reification of national borders, prejudices, discrimination, marginalisation and violence. To Beck, however, the emergence of global risks *should* prompt the realisation of the 'cosmopolitan imperative', the reality that our wellbeing is indelibly linked with that of others.[28]

Turning to the work of critical security scholars, chapter 2 thus argued that global security efforts, including counter-terrorism, must be based upon respect for international law and human rights. I identified, in the UN's constitutive documents and its institutional structure, the promise of a rights-based approach to international security. Yet chapters 3, 4 and 5 showed that there exist a number of barriers to the UN's fulfilment of that promise, most notably the way that the language of international law and human rights is controlled and manipulated by a small number of powerful states. If the vocabulary of human rights is inescapably political, exclusionary and marginalising, then questions arise as to if, and how, we can use that language as something with transformative potential.

[24] Beck (n 4) 86.
[25] Ulrich Beck, 'The Cosmopolitan Society and its Enemies' (2002) 19 Theory, Culture and Society 17.
[26] Ulrich Beck, 'We Do Not Live in an Age of Cosmopolitanism but in an Age of Cosmopolitization: The "Global Other is in Our Midst"' in Ulrich Beck (ed), *Ulrich Beck: Pioneer in Cosmopolitan Sociology and Risk Society* (Springer 2014).
[27] Ulrich Beck, 'Living in the World Risk Society' (2006) 55 Economy and Society 329.
[28] Ulrich Beck, 'Cosmopolitanism as Imagined Communities of Global Risk (2011) 55 American Behavioural Scientist 1346, 1352.

As I noted above, documenting the political subversion, manipulation and selective application of human rights allows scholars to call for and generate new vocabularies, new ways of seeing, understanding, speaking and acting. Even as we explore the disciplinary effects of the language of human rights, we can remain aware that the contemporary human rights movement at least *began* as an endeavour to codify and institutionalise universal, moral claims about the minimum standards of treatment to which each individual is entitled.[29] It is indeed unfortunate that human rights are used as a justification for violent counter-terrorism measures, that they are said to come second to national security, and that the capacity of Global South states to articulate demands for change in the language of human rights is limited. Yet these functions of human rights are the products of history, of the way that this language has been embedded in political practices, interactions and utterances – that is, exchanges of power – over time. For example, Cuba's decrial of the United States' 'illegal annexation' and use of torture at Guantanamo Bay, discussed in chapter 5, is the result of a complex historical relationship between those two states, in which the United States has marginalised and antagonised Cuba upon the basis of human rights. 'What you see is distracted by memory,' DeLillo wrote, 'By being who you are, all this time, for all these years.'[30]

How, then, might we reimagine the relationship between human rights and counter-terrorism in the context of the UN's work? Firstly, we must acknowledge that human rights are, and always will be, political. Yet this politics of human rights can be productive insofar as it encourages open, inclusive, inter-cultural dialogues about experiences of violence and injustice.[31] The fact that Global South states are confined to using the language of human rights in a way that encourages and entrenches Northern values and power reflects the way that the structures and procedures of the UN have historically favoured the interests of some and sidelined those of others. Scholars must continue to call for these imbalances to be rectified, even though disenchantment with both the UNSC and the human rights movement is justifiable. Most importantly, *if* the UNSC is to continue to function as a legislative body, its

[29] See, for example, Jeffrey Flynn, 'Habermas on Human Rights: Law, Morality, and Intercultural Dialogue' (2003) 29(3) Social Theory and Practice 431.
[30] DeLillo (n 1) 115.
[31] For a discussion of the political conception of human rights, see ch 2, pt C.

decision-making processes must be open and transparent, incorporating a greater diversity of voices. These might be the voices of victims of terrorism, of international NGOs or of other UN branches. For example, the Special Rapporteurs on terrorism and human rights, torture and arbitrary detention have extensive legal expertise and knowledge of human rights practice, and they play an invaluable role in documenting human rights abuses in the context of counter-terrorism. Their roles are, however, limited to critique and oversight, the necessity of which would be greatly reduced if they were included in consultative processes at the UNSC.

At the same time, scholars have an important role to play in continuing to identify and document the strategic use of the language of human rights. While this thesis contributes a valuable starting point, there is much work to be done to untangle and understand the politics of human rights within the context of the UN. Future studies will need to examine the way that human rights continually constrain and enable political action, thus informing the operation of each of the metaphorical 'levels' of the UN discussed in chapter 1. For example, in chapter 5, I pointed out that both the OIC and the Council of Europe have expressed, at the UNGA's meetings, concern regarding the United States' use of torture and arbitrary detention of terrorist suspects, without acknowledging the complicity of some of their own members in those practices. This tendency to rely upon human rights as constraints upon others' actions and justifications for one's own can only effectively be challenged if rigorously studied and documented.

This thesis thus makes a number of valuable contributions to literature on international organisations, law and politics, particularly in the area of human rights and counter-terrorism. Firstly, the thesis is novel in the way that it studies multiple UN principal organs as settings for political interactions between states or groups thereof. As I highlighted in chapter 2, the UN can only promote and protect human rights to the extent allowed by its Member States. By exploring the politics within and amongst the UN's principal organs, the substantive chapters of this thesis highlight the complexity of the challenge of protecting human rights in the context of counter-terrorism. They demonstrate that, in fact, the UN has become a setting for contestation of the relationship between human rights and counter-terrorism. Secondly, this thesis is unique in the way that it shows how the language of international human rights

law is mobilised within counter-terrorism rhetoric at the UN, a key player in the war on terror. The thesis is neither a doctrinal study of the war on terror within the framework of international law nor a study of domestic counter-terrorism discourses, both of which are common in the literature discussed in chapter 1. Rather, the thesis highlights how the language of international law and organisations is, in itself, part of the global politics of counter-terrorism. In doing so, the thesis simultaneously contributes to – and bridges the gap between – critical international law scholarship and critical terrorism studies, both of which are discussed in chapters 1 and 2. Finally, this thesis explores the relationship between, and fluidity of, past and present. It shows how the uses and marginalisation of the language of human rights within the context of the war on terror are the products of various political histories. Recognising and documenting these relationships between past and present enables us to generate new ways of approaching the relationship between human rights and counter-terrorism. Thus, finally, this thesis highlights an important area for further research and reflection.

F. The Cycle, the Spiral and the Free Fall: Where to Next?

DeLillo's *Falling Man* was based upon a photograph by the same name.[32] Named by *Time* magazine as one of the 100 most influential images of all time,[33] the picture depicts an unidentified man who jumped from the Twin Towers in the moments after the September 11 attacks. The photograph's subject appears to be falling straight down to the ground, the faces of the two towers merging into one another behind him. Like DeLillo's novel, the photograph has broader symbolic power that speaks to the war on terror more generally. 'The true power of Falling Man,' the *Time* magazine's commentary reads, 'Is less about who the subject was and more about what he became: a makeshift Unknown Soldier in an often unknown and uncertain war, suspended forever in history.'[34]

The image is, then, a metaphor for a world in free fall, entering a war with no clear enemy, no known ending and no clear concept of victory. Discussions of the war have, in fact, become replete with metaphors of cycle and descent.[35] This haunting image of the falling man is etched into public memory of September 11 and has become a symbol of the uncertainty brought about by that moment. Yet much of the literature discussed throughout this thesis characterises the relationship between terrorism and counter-terrorism as a cycle or downward spiral of human rights abuses. This thesis ends, therefore, where it began: with the argument that language and words matter. The images of a spiral and a cycle have different connotations, of course. A spiral of human rights violations presumably entails a steady descent into inhumanity, perennial violence or chaos, while a cycle involves a continual repetition of history. Both, however, have a similar meaning: that there is no escape and no reasonable prospect for change.

In order to reinvigorate the study of human rights and counter-terrorism – in order to document, challenge and disrupt the problematic ways in which human rights are woven into and erased from counter-terrorism discourses – scholars must first disavow these metaphors of the cycle, the spiral and the free fall. They must, instead, strive to bring about a sense of

[32] Richard Drew, 'Falling Man' (*Time,* 2001) <http://100photos.time.com/photos/richard-drew-falling-man> accessed 28 April 2020.
[33] Time, '100 Photos: The Most Influential Images of All Time' (*Time,* 2020) <http://100photos.time.com/about> accessed 28 April 2020.
[34] Drew (n 32).
[35] For a discussion of the role of metaphor in security discourses, see Andrew R Hom, 'Angst Springs Eternal: Dangerous Times and the Dangers of Timing the Arab Spring' (2016) 47(2) Security Dialogue 165.

deceleration. Eighteen years into the war on terror, it is crucial to overcome the feelings of urgency, emergency and crisis that have animated the study of terrorism and counter-terrorism. Only when scholars take pause and deliberately untangle the layers of meaning, representation and understanding that have been heaped upon the concept of global counter-terrorism will we understand how current patterns of prejudice and violence can be changed. Presently, the discourse of the global war on terror permeates all that is political, bringing in its wake the violation of, and scepticism regarding, human rights.

Already, at the time of writing, the COVID-19 outbreak is becoming the new frontier of the war on terror. The laws, policies and practices that states have put in place to respond to terrorism have enabled and shaped government responses to the outbreak, as have the new ways of thinking that came into being following September 11. The Israeli government, for example, has enabled state security apparatus to use surveillance and data collection technologies used in counter-terrorism operations in order to track the movements and interactions of carriers of the virus.[36] This move relies upon both the laws and technologies developed as part of Israel's counter-terrorism policy, as well as the public's acceptance of limitations upon human rights within that context. The convergence of public health and the war on terror is, meanwhile, far clearer in the United States. There, the Department of Homeland Security claims that extremist groups have already tried to deliberately spread the SARS-CoV-2 virus,[37] and the State Department has moved to name the virus as a biological weapon.[38] The moves to characterise the virus as a terrorist threat and to establish attempts to spread the virus as a crime signify the possibility of a new wave of arbitrary and discriminatory arrests and prosecutions in the name of counter-terrorism. It symbolises states' lasting intention to expand the scope and application of their counter-terrorism laws, even in the face of new and novel global threats. Meanwhile, as Ní Aolaín points out, the retreat from public life and policy in light of the COVID-19 pandemic threatens to reduce the

[36] Joshua Krasna, 'Securitization and Politics in the Israeli COVID-19 Response' (*Foreign Policy Research Institute,* 13 April 2020) < https://www.fpri.org/article/2020/04/securitization-and-politics-in-the-israeli-covid-19-response/> accessed 28 April 2020.

[37] See The Economist, 'Spore Wars: The Havoc Wrought by COVID-19 Will Spark New Concern Over Bio-Weapons' (23 April 2020) <https://www.economist.com/united-states/2020/04/23/the-havoc-wrought-by-covid-19-will-spark-new-concern-over-bio-weapons> accessed 28 April 2020.

[38] See Bill Gertz, 'State Department Marks Bioweapons Accord with Reference to Pandemic' (*Washington Times*, 26 March 2020) < https://www.washingtontimes.com/news/2020/mar/26/state-department-marks-bio-weapons-accord-referenc/> accessed 28 April 2020.

impact of the UNGA's current review of its Global Counter-Terrorism Strategy, distracting from the development of a document that is vital in promoting respect for human rights in the context of counter-terrorism.[39]

Thus, instead of accepting our descent into a spiral or cycle of violence and human rights violations, scholars must seek to understand and expose the languages and logics underpinning the national and international expansion of the war on terror. It is vitally important to rethink the presently agonistic relationship between human rights and security. In particular, future studies should consider the operation of the domestic laws and policies that have come about as a result of the UNSC's counter-terrorism decisions. As is ongoingly the case with government responses to the COVID-19 pandemic, it is likely that counter-terrorism policies around the world have grounded the continual expansion of the security state and have justified further infringement of human rights. Charting this everyday life of the international framework for counter-terrorism might, ultimately, give impetus to longstanding calls for reform and revision of the United Nations.

[39] Fionnuala Ní Aolaín, 'Negotiating a Global Counter-Terrorism Strategy in a Time of COVID-19' (*Just Security,* 30 March 2020) < https://www.justsecurity.org/69408/negotiating-a-global-counter-terrorism-strategy-in-a-time-of-covid-19/> accessed 28 April 2020.

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