

(COUNTER-)TERRORISM AND HYBRIDITY

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Legal scholars have written much about different ‘models’ of counter-terrorism, with the ‘criminal justice’ and ‘military’ models dominating the discourse.² However, these models of counter-terrorism law and its place within a broader ecosystem of counter-terrorism measures, policies and practices, fail to appreciate the breadth, complexity and drivers of counter-terrorism when viewed in the round. Indeed, this is indicative of legal scholarship on counter-terrorism, which tends (in contrast to some sociological scholarship in the field) to focus almost exclusively on doctrinal legal research, infrequently placing counter-terrorist law and policy within its broader context. In this, hybridity may be a helpful lens through which to view counter-terrorism law and practice; it may facilitate our understanding of counter-terrorism as a field of practice with multiple limbs and elements, indicating more fully the terrain on which critical engagement with terrorism and counter-terrorism ought to focus. This chapter aims to illustrate the hybrid nature of terrorism and counter-terrorism as mechanisms of resistance within asymmetrical power relationships and, through considering its combination of measures and engaged actors, to illustrate the critical usefulness of conceptualizing counter-terrorism as a hybrid phenomenon.

Terrorism as Hybridity

The concept of terrorism is mired with definitional controversy, not least because of the persistent lack of an international legally binding definition of the phenomenon that is universally accepted.³ This results from long-standing and primarily political disagreements about whether resistance movements and state actions should be included within the concept, reflecting persistent discordance in the rhetorical commitment to countering terrorism and the practical, political contestation about what constitutes the legitimate use of force, ‘legitimacy’ being the bright line that divides terrorism from other forms of violence.⁴

Bearing that in mind, it is instructive—for the sake of convenience—to take as a starting point the definition of terrorism adopted (in non-binding form) by the United Nations General Assembly in its 1997 UN Declaration to Supplement the 1994 Declaration on Measures to Eliminate International Terrorism, annexed to UN General Assembly Resolution

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² See, for example and an overview, Robert Chesney & Jack Goldsmith, “Terrorism and the Convergence of Criminal and Military Detention Models” (2008) 60(4) *Stanford Law Review* 1079.

³ For a good overview see Ben Saul, *Defining Terrorism in International Law* (2006; Oxford University Press).

⁴ On legitimacy, violence, and terrorism see Laura Donohue, “Terrorism and the Counter-Terrorist Discourse” in Victor V. Ramraj, Michael Hor & Kent roach (eds), *Global Anti-Terrorism Law and Policy* (2005; Cambridge University Press).

51/210. Having reaffirmed that all UN member states condemn terrorism “wherever and by whomsoever committed”, the General Assembly went on to provide the following definition:

Criminal acts intended or calculated to provoke a state of terror in the general public, a group of persons or particular persons for political purposes are in any circumstance unjustifiable, whatever the considerations of a political, philosophical, ideological, racial, ethnic, religious or any other nature that may be invoked to justify them.

For the purposes of considering terrorism and counter-terrorism as contemporary and hybrid practices, this offers an acceptable working definition. Although violence that falls within this definition is *prima facie* deemed ‘illegitimate’, it is clear that it is effectively a violence that is *purposive* that is captured here. ‘Random’ or ‘senseless’ violence does not generally fall into the category of terrorism as defined here; although we may deem the use of such violence illegitimate and criminal, we do not tend to consider it ‘terroristic’.⁵ Terrorist violence, however, is illegitimate for its targeting of civilians and/or its deployment in the place of (or sometimes in conjunction with) forms of political engagement for the purposes of achieving the aims that motivate it.

For some theorists it is the domination to which this violence seeks to respond that explains the abandonment of non-violent approaches. These theorists explain, rather than excuse, such violence as a response to repression and domination that seems otherwise immune to effective non-violent resistance. This emerges as an important narrative in both national and international terrorism. The use of violence by nationalist and republican groups in Northern Ireland, for example, has been characterized as a response to both unwanted occupation and the effective abandonment of the Catholic community by the state, if not its outright oppression.⁶ In respect of contemporary terrorism at the international level—sometimes referred to as ‘Islamist fundamentalism’—Jock Young has argued that this is a form of resistance to the seemingly limitless domination (political, economic and cultural) of ‘the West’ and resultant Occidentalism.⁷ Importantly, this reflects a characterization of terrorism as a form of rational political choice, as argued by Crenshaw in 1981.⁸ Although research into the causes of terrorism tends to illustrate that a variety of different factors are relevant in different contexts,⁹ this diversity does not preclude the identification of some core ‘root’

⁵ Legal definitions of terrorism often specify that a prescribed list of criminal activities are terrorist where there are done with the purpose, aim or intention of achieving a certain end. See, for example, UN Security Council Resolution 1566 (2004) and the Terrorism Act 2000 (United Kingdom).

⁶ See generally Richard English, *Armed Struggle: The History of the IRA* (2003; Pan MacMillan), and Joseph Ruane and Jennifer Todd, *The Dynamics of Conflict in Northern Ireland: Power, Conflict and Emancipation* (1996; Cambridge University Press).

⁷ Jock Young, *The Vertigo of Late Modernity* (2007; Sage).

⁸ Martha Crenshaw, “The Causes of Terrorism” (1981) 13(4) *Comparative Politics* 379.

⁹ For an excellent overview see *Exploring Root and Trigger Causes of Terrorism* (2008; Transnational Terrorism, Security and the Rule of Law). Available at <http://www.transnationalterrorism.eu/tekst/publications/Root%20and%20Trigger.pdf>

causes of terrorism. Terrorism research has long distinguished between preconditions (root causes) and precipitants (trigger causes) of terrorism.¹⁰

A comprehensive study of the existing research on the causes of terrorism has found that terrorism as resistance to dominance of some kind is a recurring theme.¹¹ In terms of this dominance, there appears to be a clear 'root causes' relationship between terrorism and a lack of democracy, civil liberties and the rule of law, high economic growth through rapid modernization (especially in respect of 'ideological' terrorism), dictatorship, and (ongoing or historical) occupation. All of these situations are related with asymmetrical power relationships in which terroristic violence, triggered by a particular event or trend at any given point, becomes a counter-hegemonic strategy. In that, terrorism is remarkably successful. This does not mean that terrorism succeeds in achieving the ultimate political or ideological objectives of the individual or group actors involved, but rather that it manages to shift power in some important ways.

Providing the public good of security is a core duty of the nation state and, since the creation of major international institutions, the so-called 'international community'.¹² In addition, states consider themselves to have the monopoly on the infliction of legitimate violence within the boundaries of legality and justification laid down in domestic and international law. Once a terrorist campaign begins—and often before an attack has been perpetrated—states' responsibilities to their residents, their neighbouring states, their citizens abroad, their allies, and the international community at large trigger a need to respond. The response here, whether it is legal, political, economic or otherwise, is counter-terrorism.

As a practice, counter-terrorism is both responsive and preventive: it both responds to a perceived and/or crystallised threat, and attempts to prevent the emergence of future threats and attacks. In the context of counter-terrorism, states and international institutions may have superior political and economic resources to those available to terrorists, but they are relatively disempowered vis-à-vis the terrorist threat: the hybridity of terrorism frustrates easily recognized categories, boundaries and understandings of the international and transnational system. This manifests itself in a number of ways.

First, terrorist organisations are likely to be significantly more adaptable than states are capable of being.¹³ As states and international institutions introduce measures to disrupt terrorist activity, resourcing and communications the groups in question tend to adapt their working practices to evade these measures. The state cannot, however, retreat from those

¹⁰ Crenshaw, n. 7 above. See also Jeffrey Ian Ross, "Structural Causes of Oppositional Political Terrorism: Towards a Causal Model" (1993)

¹¹ *Exploring Root and Trigger Causes of Terrorism*, n. 8 above.

¹² This is evident from the first line of the Charter of the United Nations, which provides 'We the Peoples of the United Nations determined to save succeeding generations from the scourge of war', as well as from the powers conferred on the Security Council to maintain international peace and security by Chapters VI and VII of the Charter.

¹³ This is not to suggest that all terrorist organisations demonstrate adaptability; rather some level of organizational sophistication and capacity for learning is likely required. See, for example, Calvert Jones, "Al-Qaida's Innovative Improvisers: Learning in a Diffuse Transnational Network" (2006) 19(4) *Cambridge Review of International Affairs* 555.

measures. It will instead invest resources in their implementation and, often, legal and political resources in their (political and legal) defence and maintenance, as well as working to devise and implement more measures responding to terrorists' adaptation strategies. States are, thus, committed to investing significant political, human, economic and often diplomatic resources in these measures, while the more adaptable terrorist organizations at which they are aimed innovate around them. Not only does this strategically disadvantage the state when compared to terrorist organisations, but it also necessitates the investment of vast amounts of economic resources in counter-terrorism creating second order impacts for social protection, welfare, international aid, and other budget allocations at national level. This is in addition to the direct (micro- and macro-) economic impacts of terrorism and counter-terrorism, which are themselves strikingly significant.¹⁴

Secondly, terrorist organisations—where they have a clear structure—do not generally operate subject to the principles of transparency, accountability, lawfulness and deliberation that liberal democracies are founded on. Thus, terrorist policies, strategies and approaches may be devised and implemented with relative ease, while states will *generally* have to contend with expectations of justificatory deliberation, lawfulness, answerability and often be tested in their counter-terrorism by political and judicial review at national and international levels.¹⁵ Although there are plentiful notorious examples of states introducing speedy and repressive “panic-related” measures in response to particular terrorist attacks,¹⁶ as the time from an attack extends greater demands for justification and lesser tolerance of security overreach tends to emerge. This is notwithstanding the perceived level and nature of a terrorist threat at any given time. Thus, although states may capitalize on a period of fear and panic, as panic subsides the environment becomes somewhat less receptive to repressive measures introduced with reduced deliberation. A great deal of counter-terrorism law and policy is made outside of this time period, when a more robust process is demanded.

This leads, finally, to a third aspect in which states are relatively disempowered in counter-terrorism: the demands of law. Terrorism does not comply with law: terrorist organisations are not bound by constitutions of the kind that limit governments, and they do not generally comply with international legal standards such as international humanitarian law. States, in contrast, must and *generally do* comply with law. This does not mean that counter-terrorism never takes place outside of law: it is clear that it does. Neither does it mean that legal standards might not be subjected to deeply troubling overt or covert recalibration in counter-terrorist contexts.¹⁷ However it does mean that states commit significant time and

¹⁴ On the economics of terrorism and counter-terrorism see Friedrich Schneider, Tilman Brück & Daniel Meierrieks, “The Economics of Terrorism and Counter-Terrorism: A Survey (Part II)”, (2010) CESifo Working Paper Public Finance, No. 3012.

¹⁵ I have previously identified these as ‘legitimacy factors’ in counter-terrorism. See Fiona de Londras, “Can Counter-Terrorist Internment Ever be Legitimate?” (2011) 33(3) *Human Rights Quarterly* 593.

¹⁶ By ‘panic-related’ I mean measures that are driven by, respond to, and are introduced in the context of ‘manufactured’ (or ‘moral’) panic, ‘bottom-up’ (or genuine) panic, or a combination of the two. See Fiona de Londras, *Detention in the ‘War on Terrorism’: Can Human Rights Fight Back?* (2011; Cambridge University Press), Chapter 1.

¹⁷ See Helen Fenwick & Gavin Phillipson, “Covert Derogations and Judicial Deference: Redefining Liberty and Due Process Rights in Counterterrorism Law and Beyond” (2011) 56(4) *McGill Law Journal* 863; Helen Fenwick, “Post

resources to establishing the legal permissibility of their desired counter-terrorist measures, including in judicial review. While there is a clear interest in keeping state actions within legal boundaries for reasons of legitimacy as well as for legal reasons relating to the integrity of the legal system and its constitutionalist resilience, it is at least arguable that approaches that are unlawful or the lawfulness of which is disputed, may serve important short-term security purposes that the state considers to warrant unlawful activity. Such activity, of course, brings with it more critiques and demands for accountability from civil society, responding to which consequently absorbs yet more of the state's legal, political and economic capital. The desirability of holding states to their legal limitations is not in dispute, however the implications of this are an important element of the hybridity of terrorism. While these exercises in legal accountability are ongoing, terrorist organisations devote themselves to devising and executing their own agendas, unburdened by the need for democratic and legal legitimacy.

The nature, as well as the success, of terrorism as a hybrid 'entity', and the desire of states to be effective in addressing it, more or less necessitates hybridity in counter-terrorism itself, to which this chapter now turns.

Hybrid Counter-Terrorism

I have already referred above to counter-terrorism as an 'ecosystem', a term intended to convey the great scale and diversity of measures, approaches, policies and instruments that comprise counter-terrorism and, thus, the nature of counter-terrorism as a dynamic and delicate enterprise. As an activity or practice, counter-terrorism defies us to arrive at a definition any more exacting than 'that which tends to *counter* terroristic activity'. In some ways, the circularity of this definition is reflective of the nature of terrorism itself, which is a broadly drawn and diverse set of activities aimed at disrupting dominant state power. Given the challenges involved in defining counter-terrorism, it is instructive to look at the counter-terrorist strategies adopted by national and international governance entities, and particularly those of states and international institutions, to counter terrorism; strategies that, taken together, indicate the hybridity of counter-terrorism itself.

In the main, these strategies furcate into a number of strands. The UN's Global Counter-Terrorism Strategy identified four areas of activity:

1. Measures to address the conditions conducive to the spread of terrorism
2. Measures to prevent and combat terrorism
3. Measures to build states' capacity to prevent and combat terrorism and to strengthen the role of the United Nations system in this regard
4. Measures to ensure respect for human rights for all the rule of law as the fundamental basis of the fight against terrorism.¹⁸

9/11 UK counter-terrorism cases in the European Court of Human Rights: a 'dialogic' approach to rights' protection or appeasement of national authorities?" in Fergal F. Davis & Fiona de Londras, *Critical Debates on Counter-Terrorism Judicial Review* (2014; Cambridge University Press).

¹⁸ 'Plan of Action', Annex to General Assembly Resolution 60/288 of 8 September 2006.

At the European Union level the Counter-Terrorism Strategy focuses on four activities: prevent, protect, pursue, and respond, which in turn are the out-working of the Union's strategic commitment "[t]o combat terrorism while respecting human rights, and make Europe safer, allowing its citizens to live in an area of freedom, security and justice".¹⁹ At a national level there is a similar trend. By means of example, the United Kingdom's counter-terrorism strategy, known as CONTEST, adopts a four-part strategy of pursue, prevent, protect, and prepare.²⁰ These approaches at national, regional and international level indicate the contemporary nature of counter-terrorism as a hybrid activity that envelops and transcends the national and international, public and private, law and non-law.

Neither national nor international

Although international institutions have long had an interest in peace and security, the politics as well as the practicalities of counter-terrorism meant that, in the main, counter-terrorist law and policy were driven and implemented at state level prior to the autumn of 2001. This does not mean that there was no internationalised counter-terrorism prior to September 2001. The UN had adopted numerous international conventions on countering specific manifestations of terrorism (although ratification rates were low),²¹ was implementing sanctions as a counter-terrorist measure against Al Qaida and its associates,²² and had addressed terrorism at Security Council and General Assembly levels on various occasions. At European Union level an informal group known as the TREVI (Terrorism, Radicalism, Extremism, and Violence International) group had been established in 1975

¹⁹ European Union Counter-Terrorism Strategy (2005).

²⁰ CONTEST: The United Kingdom's Strategy for Countering Terrorism (2011).

²¹ Conventions deposited with the Secretary-General of the UN: Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents, adopted by the General Assembly of the United Nations on 14 December 1973; International Convention against the Taking of Hostages, adopted by the General Assembly of the United Nations on 17 December 1979; International Convention for the Suppression of Terrorist Bombings, adopted by the General Assembly of the United Nations on 15 December 1997; International Convention for the Suppression of the Financing of Terrorism, adopted by the General Assembly of the United Nations on 9 December 1999.

Conventions deposited with other depositaries: Convention on Offences and Certain Other Acts Committed on Board Aircraft, signed at Tokyo on 14 September 1963. (Deposited with the Secretary-General of the International Civil Aviation Organization); Convention for the Suppression of Unlawful Seizure of Aircraft, signed at The Hague on 16 December 1970. (Deposited with the Governments of the Russian Federation, the United Kingdom and the United States of America); Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation, signed at Montreal on 23 September 1971. (Deposited with the Governments of the Russian Federation, the United Kingdom and the United States of America); Convention on the Physical Protection of Nuclear Material, signed at Vienna on 3 March 1980. (Deposited with the Director-General of the International Atomic Energy Agency); Protocol on the Suppression of Unlawful Acts of Violence at Airports Serving International Civil Aviation, supplementary to the Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation, signed at Montreal on 24 February 1988. (Deposited with the Governments of the Russian Federation, the United Kingdom and the United States of America and with the Secretary-General of the International Civil Aviation Organization); Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation, done at Rome on 10 March 1988. (Deposited with the Secretary-General of the International Maritime Organization); Protocol for the Suppression of Unlawful Acts against the Safety of Fixed Platforms Located on the Continental Shelf, done at Rome on 10 March 1988. (Deposited with the Secretary-General of the International Maritime Organization); Convention on the Marking of Plastic Explosives for the Purpose of Detection, signed at Montreal on 1 March 1991. (Deposited with the Secretary-General of the International Civil Aviation Organization).

²² Security Council Resolutions 1267 and 1269, both of 1999.

(following the Munich Olympics). This group comprised interior and justice ministers engaged in information exchange outside of the formal treaty structures of the European Union. However, counter-terrorism remained primarily a matter for states themselves to address.

Although this did not change utterly in 2001, one noticeable feature of the post-September 11, 2001 *milieu* was the internationalisation of counter-terrorism through the involvement of supranational institutions and organisations. In large part, the elements of counter-terrorism that have been internationalised in this way are those that relate to the transnationalism of terrorism and terrorist activities themselves, as well as those that ease the burdens of negotiating national interests in much counter-terrorist interaction. The content and scope of Security Council Resolution 1373, passed shortly after the attacks on the Pentagon and World Trade Centre, are indicative of this.

In an extraordinary step, this Resolution directed all member states of the United Nations to introduce laws preventing, suppressing, and criminalising activities relating to terrorist fundraising,²³ freeze funds and assets of those involved in or associated with terrorism,²⁴ and prohibit material support for terrorism.²⁵ In addition, states were directed to refrain from supporting terrorist activity, “[t]ake the necessary steps to prevent the commission of terrorist acts” including through providing information to other states, provide assistance to other states in investigating and prosecuting terrorist financing or support, prevent the movement of terrorists through their borders, and refuse safe haven to terrorist actors and activities.²⁶ States were ‘called upon’ to improve mechanisms of exchanging operational information on terrorism and terrorist activities, and broadly to enhance their cooperation in the field of counter-terrorism.²⁷ The Resolution went on to establish the Counter-Terrorism Committee with broad coordinating and capacity-enhancing functions, as well as functions relating to the implementation of counter-terrorist sanctions.²⁸ Although the United Nations’ counter-terrorist infrastructure has developed significantly in the intervening years, Resolution 1373 set the ground conditions for a significant internationalisation of counter-terrorism, with the Security Council effectively acting as a proxy legislator for all member states as well as establishing counter-terrorist cooperation as an international good, if not an expectation of membership of the international community of states committed to the maintenance of peace and security.

As well as operating on a global (i.e. UN level), one way of trying to address the perceived global terrorist threat is to club together in geographically close states; in other words to regionalize counter-terrorism to some extent. This has been evident in the EU, not just in intelligence sharing and coordination where club approaches long pre-date 2001, but also in more general counter-terrorism activities such as counter-radicalization, disruption of financial and communications capacities, and cross-border pursuit.

²³ Operative Paragraph 1(a), (b), (c), SC Resolution 1373 (2001).

²⁴ Operative Paragraph 1(d), SC Resolution 1373 (2001).

²⁵ Operative Paragraph 1(e), SC Resolution 1373 (2001).

²⁶ Operative Paragraph 2, SC Resolution 1373 (2001).

²⁷ Operative Paragraph 3, SC Resolution 1373 (2001).

²⁸ Operative Paragraph 6, SC Resolution 1373 (2001).

Prior to the attacks of 11 September 2001 the European Union had no autonomous counter-terrorism law and did not have a comprehensive approach to countering terrorism.²⁹ This was a product, primarily, of the continuing nationalism of criminal justice as a general matter in the European Union at the time, however the emergence of a clear area of common justice and home affairs together with the attacks of 2001 and subsequent attacks on London and Madrid meant that counter-terrorism has emerged as a significant activity within the EU over the past decade. In the time between September 2001 and July 2013 well over 200 measures were introduced under the counter-terrorism rubric of the European Union, 88 of which were 'binding' law.³⁰ In that time period the EU introduced 26 action plans and strategy documents, 25 regulations, 15 Directives, 11 Framework Decisions, 25 Decisions, 1 Joint Action, 3 Common Positions, 11 Recommendations, 4 Resolutions, 111 Council Conclusions, and 8 International Agreements in the counter-terrorism field.³¹ These measures cover a wide range of activities, and might be broken into three broad categories: capitalising measures, terrorism-specific measures, and terrorism-related measures.

Capitalising measures are measures that reflect policy choices predating major terrorist attacks but where the political impetus for implementing these policy choices was offered by the post-attack atmosphere, such as the European Arrest Warrant and the EU Data Retention Directive. In contrast, terrorism-specific measures are ones that were introduced in order to respond to a perceived risk from terrorism, rather than being general criminal justice measures. As the member states of the European Union retain the vast majority of counter-terrorist and security competence these measures are, in truth, relatively sparse at the EU level and relate to matters in which a transnational approach is required. The primary example of this is the EU's system for the disruption of terrorist financing.³² Terrorism-related measures are measures that are introduced in order to respond to general security concerns, including terrorism. As with capitalizing measures, these are unlikely to be perceived as primarily or even largely 'counter-terrorist', although they have a clear counter-terrorist application and in some cases the justificatory rhetoric surrounding their introduction referred expressly to the threat from terrorism.

In the round, the combination of measures introduced by the EU since September 2001 indicates the emergence of the EU as an internal counter-terrorist space of the Union,

²⁹ See generally Cian C. Murphy, *EU Counter-Terrorism, Pre-Emption and the Rule of Law* (2012; Hart Publishing).

³⁰ Ben Hayes & Chris Jones, *Catalogue of EU Counter-Terrorism Measures Adopted since 11 September 2001* (2013; SECILE Consortium). Available at <http://secile.eu/wp-content/uploads/2013/12/Catalogue-of-EU-Counter-Terrorism-Measures1.pdf>

³¹ *Ibid.*

³² Council Implementing Regulation (EU) No 1285/2009 of 22 December 2009 implementing Article 2(3) of Regulation (EC) No 2580/2001 on specific restrictive measures directed against certain persons and entities with a view to combating terrorism and repealing Regulation (EC) No 501/2009; Council Regulation (EU) n. 1286/2009 of 22 December 2009 amending Regulation (EC) No 881/2002 imposing certain specific restrictive measures directed against certain persons and entities associated with Usama bin Laden, the Al-Qaida network and the Taliban; Council Decision 2009/1004/CFSP of 22 December 2009 updating the list of persons, groups and entities subject to Article 2, 3 and 4 of Common Position 2001/931/CFSP on the application of specific measures to combat terrorism; Directive 2005/60/EC of the European Parliament and of the Council of 26 October 2005 on the Prevention of the Use of the Financial System for the Purpose of Money Laundering and Terrorist Financing." OJ L 309, 25 November 2005.

notwithstanding [the fact](#) that the member states still maintain control over the vast majority of their own counter-terrorism [policy](#), including domestic laws, international affairs (with the exception of CFSP elements of counter-terrorism), and so on. This is further reinforced by the emergence of a counter-terrorist infrastructure within the European Union, including the position of EU Counter-Terrorism Coordinator.³³

The European Union is also, however, a significant external actor in counter-terrorism, taking a role in capacity building and in international reactions to terroristic activity. An excellent example is the recent meeting in Paris of a number of sub-Saharan states that are joining together to confront Boko Haram and the disruptive threat that it poses. In this the EU, as a highly developed supranational regional organization with its own constitutional and legal system, offers an interesting model for what can go right—and what can go wrong—in the regionalization of counter-terrorism. The EU also plays an important external role in counter-terrorism including in the generation of norms, practices and *best practices* through its participation in the coordination and capacity building activities of the UN Counter-Terrorism Committee, its inclusion of counter-terrorism and security clauses in its international agreements, its engagement in security activities and capacity building with third countries and so on. Thus, the EU is both a significant norm generator (or at least modality-designer) internationally and transnationally *and* an exemplar of regionalised CT.

This positioning of counter-terrorism as something that is simultaneously national, regional, transnational and international illustrates the first way in which contemporary counter-terrorism can be conceptualized as hybrid; a characterization that is made necessary by the hybrid capacity and nature of terrorism and its nature as a phenomenon with local nodes of activities and global ramifications.

Neither public nor private

Contemporary counter-terrorism can be accurately characterised as, to at least some extent, a partnership between public and private actors in a number of ways. I have previously typologised privatisation in counter-terrorism in terms of open privatisation, closed privatisation, statutory privatisation, and non-contractual cooption.³⁴ Open privatisation takes place by means of out-sourcing undertaken through open contracts that are declared and can be scrutinised by the public and in open political discourse. Closed privatisation, on the other hand, comprises out-sourcing that is grounded in closed contracts, meaning contracts either the existence or the contents of which are not publicised and which are, consequently, not subject to public discussion and deliberation. Statutory privatisation takes place through placing obligations on private entities by means of legislation. Finally, non-contractual cooption takes place when non-state actors are ‘co-opted’ into counter-terrorism in an informal, networked manner without any clear outline of the parameters of

³³ For an overview see Josephine Doody, “The Institutional Framework of EU Counter-Terrorism” in Fiona de Londras & Josephine Doody (eds), *The Impact, Legitimacy and Effectiveness of EU Counter-Terrorism* (2015; Routledge), forthcoming.

³⁴ Fiona de Londras, “Privatised Counter-Terrorist Surveillance: Constitutionalism Undermined” in George Williams, Fergal F Davis & Nicola McGarrity (eds), *Surveillance, Counter-Terrorism and Comparative Constitutionalism* (2013; Routledge).

the co-option or, indeed, publicization of the fact of the co-operation, co-option and counter-terrorist activities of the non-state actor involved, or where they are involuntarily coopted through the use of their capacities and resources by state actors.

These different kinds of privatisation are not abstractions; they are, rather, happening all around us all of the time. They are also often identifiable in both the national and international dimensions of countering terrorism, and illustrate the hybridisation of public and private activities into a complex counter-terrorist eco-system.

The contractual engagement of private military companies in 'on the ground' counter-terrorism and of private security providers in the provision of 'secure solutions' to sites of physical intelligence-gathering are all examples of open privatisation in contemporary counter-terrorism. Private entities and profit-making companies are also involved in internationalised counter-terrorism, contributing to the review of existing measures and strategies and, both formally and informally, to the development of new measures and strategies whether as 'stakeholders' or as consultants.

As is to be expected, we know less about the prevalence of closed privatisation because, by its very nature, it is highly secretive. That said, some examples of such privatisation have come to light, not least in the context of extraordinary rendition. By means of (largely unsuccessful) litigation in the United States as well as investigations by NGOs, the Council of Europe, and the European Union it has become clear that the practice of extraordinary rendition involved significant volumes of contractual engagement with aviation logistics, security and aviation services companies. These contracts are closed because their very existence is denied and, indeed, when companies suspected to have been involved are sued by victims of rendition the US government has used the very strong 'state secret' defence to prevent courts ordering their discovery, thus reinforcing the closed nature of these contracts.³⁵

Statutory privatisation is widespread in the counter-terrorist context, and it seems that states are increasingly interested in extending it. This is well demonstrated by the creation of legislative requirements for telecommunications companies to retain communications data, which states may then access in statutorily outlined circumstances. The introduction of an obligation for all telecommunications companies to retain 'metadata' beyond the period of time required for business use was a prominent part of the EU's response to the London and Madrid bombings, although it had been on the political agenda (and rejected by the European Parliament) prior to that.³⁶ The controversial Data Retention Directive that was introduced in 2006 required companies to retain telecommunications metadata for a period of time between six and 24 months (with the exact retention period varying depending on each member state's implementing legislation), so that this data could then be accessed by the state in the investigation of serious crime including terrorism. The Directive imposed

³⁵ On privatization in extraordinary rendition see Fiona de Londras, "Privatized Sovereign Performance: Regulating in the 'Gap' between Security and Rights?" (2011) 38(1) *Journal of Law and Society* 96.

³⁶ See Ben Hayes & Chris Jones, *The EU Data Retention Directive: A Case Study in the Legitimacy and Effectiveness of EU Counter-Terrorism Policy* (2013; SECILE Consortium). Available at <http://secile.eu/wp-content/uploads/2013/11/Data-Retention-Directive-in-Europe-A-Case-Study.pdf>

significant financial burdens on these companies, as well as raising very significant civil liberties concerns, and was eventually struck down by the Court of Justice of the European Union in April 2014.³⁷ Notwithstanding that Court's finding that blanket surveillance of this kind is a disproportionate interference with individual rights, the United Kingdom introduced such data retention in the summer of 2014³⁸ and in August of that same year the Australian Attorney General announced the intention of the government there to do the same.

Non-contractual cooption is the fourth and final type of privatisation to consider in the context of counter-terrorism. There are at least three interesting ways in which such privatisation takes place in contemporary counter-terrorism. First, rather than use statutory instruments which are burdensome and time-consuming, it is not unusual for the state to simply 'ask' a private company to 'lend a hand' and these requests are routinely acceded to; here formal and informal networks between individual security and private actors, as well as inter-entity cooperation, may operate to create possibilities for such hybridised approaches to counter-terrorist praxis. So, for example, where there is a thread on an internet forum that 'seems' radicalising or seems to be sharing information about bomb making or encouraging so-called 'Nike terrorism' ('just do it') service providers might be made aware of it by the state and asked to remove it without any legal instrument—like a court order—being acquired to *force* them to do so; similarly search engines might be asked to filter content from their search results (i.e. to have some things not appear) or to super-weight some results over others. This is not an entirely idiosyncratic approach to the regulation of 'harmful' materials online: in the United Kingdom, for example, such regulation takes place by means of a hybrid of criminal law (in the form of online possession offences) and cooperation of this kind between the state and internet service providers.

A second form of non-contractual cooption is the involuntary engagement of the resources or capacities of private entities—especially corporations—by intelligence and security services. This ranges from sentiment analysis to the use of court orders to secure commercially-collected information. Sentiment analysis is an increasingly prominent part of contemporary counter-terrorism, and effectively comprises the constant surveillance and assessment of 'sentiments' as expressed on open online forums such as Twitter or Facebook. In contrast to this, involuntary cooption by means of court orders or other instruments of legal compulsion create legal imperatives for corporations to hand over information that might be of use to intelligence or security services such as telephone records: an activity undertaken in significant volumes in the United States by means of FISA warrants and so-called "NSA letters". Also falling within the category of non-contractual cooption is the involvement of communities in counter-terrorism. Such involvement is a core part of counter-radicalisation which, in turn, is a fundamental element of states' preventative counter-terrorism strategies. However, community involvement is not limited to counter-radicalisation strategies, but has also become part of counter-terrorist policing, often with significant deleterious impacts on societal cohesion.³⁹

³⁷ Joined Cases C-293/12 and C-594/12, Judgment of the Grand Chamber, 8 April 2014.

³⁸ Data Retention and Investigatory Powers Act 2014.

³⁹ See Clive Walker, "The Paradox of Global Terrorism and Community Based Security Policing" in Ralph Henham and Findlay, *Exploring the Boundaries of International Criminal Justice* (2011; Ashgate).

Neither legal nor extra-legal

Countering terrorism does not take place by law alone. Rather it extends beyond the promulgation and implementation of laws, as already indicated to some extent by the references above to internet governance, counter-terrorist capacity building, and counter-radicalisation. To characterize counter-terrorism as being neither legal nor extra-legal is to allude to two different traits of counter-terrorism: first, the use of instruments and modalities beyond law for the purposes of countering terrorism, and second engagement in activities that do not have a clear legal grounding in the name of counter-terrorism.

Effectively countering terrorism involves efforts to try to stabilise and moderate situations of instability, conflict and insecurity as well as targeting specific terrorist activities. In this respect, there is only a limited amount that legal instruments have the capacity to achieve. Rather, non-legal instruments and approaches are employed. This is reflected in the shift in contemporary times to a concentration on human security on an international level. This shift, which can be problematized as a manifestation of 'securitisation',⁴⁰ involves the deployment of resources in the attempt to stabilise broader conditions in which it is believed insecurity and radicalization might flourish, including the provision of basic socio-economic goods such as education, food, shelter and healthcare. Although such securitization raises serious questions as to the growth of the 'security agenda' as well as the reshaping of rights as matters of broader security,⁴¹ the devotion of international and national energies to these efforts is an important example of counter-terrorism beyond law. Similarly, counter-radicalisation—already mentioned above—focuses on using non-legal measures to moderate the conditions in which terrorism is thought capable of flourishing. Beyond this, diplomacy, international politics and geopolitics, investment in technology and (military and non-military) intervention for the purposes of stabilization are all key parts of a contemporary counter-terrorism that goes well beyond law.

Going beyond law, however, can also mean engaging in approaches that are not clearly grounded in law. Termed 'extra-legal' by Oren Gross,⁴² this can include *but also goes beyond* 'unlawful' activities. Certainly, some activities that have been labeled 'counter-terrorism' both since and before 2001 are clearly unlawful, including torture. Others, however, fall into a different space: that of legal uncertainty. In this conceptual space, states do what they consider to be 'necessary' regardless of whether there is a clear legal grounding underpinning them. In many cases, lawfulness is disputed and, reflecting the comments above about states' general fidelity to law, governments will frequently go to substantial

⁴⁰ That critique is disputed, however. For an overview see Rita Floyd, "Human Security and the Copenhagen School's Securitization Approach: Conceptualizing Human Security as a Securitizing Move" (2007) 5 *Human Security Journal* 38.

⁴¹ See for example Liora Lazarus, "Mapping the Right to Security" in Lazarus & Goold (eds), *Security and Human Rights* (2007, Hart Publishing).

⁴² Oren Gross, "Chaos and Rules: Should Responses to Violent Crises Always Be Constitutional?" (2003) 112 *Yale Law Journal* 1481. For a refinement and defence of the extra-legal measures model see also Oren Gross, "Extra-legality and the Ethic of Political Responsibility" in Victor Ramraj (ed), *Emergencies and the Limits of Legality* (2009; Cambridge University Press).

lengths in the attempt to establish lawfulness where this is disputed (a set of claims and counter-claims sometimes termed 'lawfare'). Prominent examples of this include the activities of the National Security Agency and other US agencies that were spectacularly revealed by Chelsea (formerly Bradley) Manning and Edward Snowden.

All of this reinforces the fact that countering terrorism has become a hybrid activity, combining the legal and non-legal in an attempt to both prevent terrorism and respond to terroristic violence, plots and activities as they emerge.

Conclusions

In counter-terrorism, as in all other fields, law does not exist in isolation. Rather, it results from, shapes, and is shaped by its broader societal and operational context. However, for lawyers working in counter-terrorism (including the author) there is a tendency to focus on legal instruments and to assess the scale, nature, success, effectiveness and deficiencies of counter-terrorism as matters purely of legal analysis. This results not only from the volatility of the legal landscape and the challenges of staying abreast of legal arguments and measures, but also the practical challenges of becoming familiar with the counter-terrorist terrain; an activity that realistically requires sustained engagement with the community of counter-terrorist practitioners at national, international, public and private levels. In spite of these limitations, however, the nature of counter-terrorism as a response to terrorism, itself a hybrid phenomenon, makes such a limited horizon challenging for those whose interest is in critically evaluating the true scale and shape of counter-terrorism, its (societal, operational and legal) impacts, and its effectiveness.

The application of a hybridity lens to this exercise holds some potential for our shaping of legal and interdisciplinary scholarship and research on ecosystemic counter-terrorism by expanding the horizons, as well as ensuring the appropriate contextualization, of legal analysis.