

## 9. Constructing a right to counterterrorism: Law, politics and the Security Council

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### INTRODUCTION

Late on 11 September 2001 (9/11), George W Bush gave an address from the Oval Office. Delivered from behind the *Resolute* desk, which has intermittently sat in the Oval since 1961, the address bore both visual and thematic imprints of American exceptionalism. ‘America was targeted for attack’, said President Bush, ‘because we’re the brightest beacon for freedom and opportunity in the world.’<sup>1</sup> He continued, ‘Today, our nation saw evil – the very worst of human nature – and we responded with the best of America.’<sup>2</sup> While it drew upon the historical lexicon and symbols of American national identity, the address also signified the beginning of a new chapter in international affairs. The ‘war on terror’, a prolonged response to the 9/11 attacks, has seen the United States and its allies pursue terrorists through military action, targeted killing and infamous programmes of rendition, detention and interrogation.

In retrospect, it seems as though the ethos of the ‘war on terror’ was written into Bush’s address, delivered just hours after the Twin Towers’ collapse. For 18 years, a destructive global war has been waged – apparently – in defence of freedom and democracy, the very bases of human rights. Yet the true relationship between this war and human rights is far more complex and conflicted. Terrorism is characterized as an affront upon Western values of freedom and human rights, but the need to prevent terrorist attacks is cited as justification for restrictions upon human rights. And, while military operations against state sponsors of terrorism have been justified by reference to the human rights of

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<sup>1</sup> George W Bush, Address to Nation on Terrorist Attacks (*US National Archives Catalog*, 11 September 2001) <https://catalog.archives.gov/id/6171390> accessed 22 April 2020.

<sup>2</sup> Ibid.

nationals of those states,<sup>3</sup> individuals captured in the course of such operations have been deemed ineligible for the protections afforded by international human rights and humanitarian law.<sup>4</sup> ‘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.’<sup>5</sup> Thus, as Francesca Klug points out in this volume’s framing chapter, 9/11 catalysed the transition from the period of ‘acceptance’ – during which the international human rights movement gained traction and widespread support – to ‘co-option’, when the human rights discourse was subverted and deployed in the service of national interests.<sup>6</sup>

Throughout this co-option period, the West has asserted its authority to write the contemporary narrative of human rights: what they are, whose human rights are worth fighting for, how far human rights can be restricted, and – most crucially – what and who the greatest threats to human rights are. The narrative of the war on terror is written in the language of human rights but simultaneously reflects a disavowal of the conception of human rights as universal, which drove the conclusion of the Universal Declaration of Human Rights (UDHR) and the twin Covenants; it is the narrative of a democratic, civilized ‘us’ versus a barbaric, uncivilized ‘them’, of ‘freedom’ versus its enemies. A new international order has been imagined by the United States and its allies, one that operates within and against the things situated at its margins: terror, violence and disorder.<sup>7</sup> ‘These things are treated as at once frightening and fascinating’, Kennedy writes, ‘and most importantly, they are treated as *real* things, capable of signification within public culture.’<sup>8</sup>

<sup>3</sup> See, for example, George W Bush, ‘President Says Saddam Hussein Must Leave Iraq Within 48 Hours’ (Address at the White House, Washington DC 2003) <https://georgewbush-whitehouse.archives.gov/news/releases/2003/03/20030317-7.html> accessed 22 April 2020. ‘We will tear down the apparatus of terror and will help you to build a new Iraq that is prosperous and free. In a free Iraq, there will be no more wars of aggression against your neighbors, no more poison factories, no more executions of dissidents, no more torture chambers and rape rooms. The tyrant will soon be gone. The day of your liberation is near.’

<sup>4</sup> See, for example, Marco Sassòli, ‘The Status of Persons Held in Guantánamo under International Humanitarian Law’ (2004) 2 *Journal of International Criminal Justice* 96.

<sup>5</sup> Hilary Charlesworth, ‘Human Rights in the Wake of Terrorism’ (2003) 82 *ALRC Reform* 26, 26.

<sup>6</sup> See Francesca Klug, this volume, ch 2.

<sup>7</sup> David Kennedy, ‘A New Stream of International Law Scholarship’ (1988) 7 *Wisconsin International Law Journal* 1, 12.

<sup>8</sup> *Ibid* (emphasis in the original).

What has resulted is the formation of an imagined international community whose physical integrity and value orientations must be secured against terrorists. Human rights have been rendered as a thing *belonging to* this community: a culture that terrorists reject, a law whose protections terrorists do not enjoy, and a concept that affirms ‘our’ superiority over the terrorist enemy. Thus, the universal human rights discourse that gained acceptance in the late twentieth century has been co-opted to a discourse in which ‘we’ – an imagined world community that is threatened by terror<sup>9</sup> – have a collective right to be secure from terrorism and to defend ourselves against terrorists. The cosmopolitan formulation of human rights as moral and legal claims that protect all individuals against the state now seems secondary to concerns that non-state actors – such as terrorists – pose the greatest threat to individual freedom and liberty. This has led to what Cogan describes as the ‘second human rights turn’ in international law, in which states and international organizations are exercising renewed and strengthened regulatory authority *vis-à-vis* individuals.<sup>10</sup> Yet this is not a new form of human rights enforcement, but an altogether different formulation of ‘rights’. This formulation of rights is, perhaps, driven by the perceived remoteness and irrelevance of universal human rights discussed by Klug earlier in this volume, designed to address concerns that human rights protect the accused terrorist but not the potential victims of a terrorist attack.

Anghie characterizes this ‘us’ and ‘them’ discourse of the war on terror as a ‘new international jurisprudence, of “national security” [...] based on the right of the world’s one superpower, the United States, to wage unilateral, pre-emptive war’.<sup>11</sup> As many scholars have observed, this pre-emptive war has seen the United States and its allies circumvent the UN Security Council (UNSC) and undermine the authority of the UN Charter regime relating to the use of force.<sup>12</sup> But in other ways, the United States and its allies have harnessed the UNSC’s discursive and ‘legislative’ power in order to sustain the us/them binary underpinning the war on terrorism. This chapter argues that the UNSC’s exercise of both its legal and discursive authority has perpetuated the othering discourses driving the war on terror. It argues, first, that the highly publicized

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<sup>9</sup> Ulrich Beck and Natan Sznajder, ‘Unpacking Cosmopolitanism for the Social Sciences: A Research Agenda’ (2010) 61 *The British Journal of Sociology* 381, 391.

<sup>10</sup> Jacob Katz Cogan, ‘The Regulatory Turn in International Law’ (2011) 52 *Harvard International Law Journal* 321.

<sup>11</sup> Antony Anghie, *Imperialism, Sovereignty and the Making of International Law* (Cambridge University Press 2005) 300.

<sup>12</sup> See, for example, Thomas M Franck, ‘The Power of Legitimacy and the Legitimacy of Power: International Law in an age of Power Disequilibrium’ (2006) 100 *AJIL* 88; Richard A Falk, ‘What Future for the UN Charter System of War Prevention?’ (2003) 97 *AJIL* 590.

and transnational nature of terrorism has given rise to an imagined world society, bound by a collective perception of the risk of terrorist attack. Though initially written by the Bush Administration, this ‘us’ versus ‘them’ narrative has been co-authored by various international actors. The chapter primarily focuses upon the UNSC’s work – with reference to other UN organs – in the 1990s, the immediate aftermath of 9/11 and in response to the ‘foreign terrorist fighters’ phenomenon. While the UNSC is increasingly cognizant of specific human rights issues – such as the rights of victims of terrorism and civilians in armed conflict – many of its decisions are consistent with the core claim underpinning the war on terror: that terror is a threat emanating from the under-developed, undemocratic and insufficiently civilized margins of world society.

## CONSTRUCTING THE ENEMY

We live in an age in which everyday life within states is shaped by international issues. Globalization 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 and transnational terrorism. The development of this condition – referred to by Beck as the ‘cosmopolitan moment’<sup>13</sup> – coincided with, and was exemplified by, the 9/11 attacks. The world witnessed these attacks as they took place and relived them many times over in the following weeks, with 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.’<sup>14</sup>

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.’<sup>15</sup> States came together in a world risk society as they began to fear and anticipate that they – like the United States – would be targeted for attack by an organization like Al Qaeda. Yet

<sup>13</sup> See, for example, Ulrich Beck, ‘Critical Theory of World Society: A Cosmopolitan Vision’ (2009) 16:1 *Constellations* 3, 4.

<sup>14</sup> 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.

<sup>15</sup> Beck and Sznajder (n 9) 391.

this risk society was not formed upon the basis of objective calculations of the threat of transnational terrorism or of Al Qaeda's capacity to orchestrate another attack on the scale of 9/11. Rather, it was based upon cultural, political and social perceptions of who the members of this threatened community are and of the identity of their common enemy. As Beck observes: '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.'<sup>16</sup>

Thus, 9/11 had two related global effects. Firstly, it awakened a new kind of global consciousness, famously articulated by French newspaper *Le Monde* in its headline, 'We are all Americans now.'<sup>17</sup> Secondly, the attacks led to the construction of an out-group that exists at the boundaries of, and threatens, this community. The world was, in other words, divided into the Coalition of the Willing and the terrorists. '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'.<sup>18</sup>

'People go to war', Der Derian writes, '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'.<sup>19</sup> The war on terror is unique in that it is being fought against an enemy that is *global* in its outlook and reach. Thus, the enmity driving the war on terror is not solely based upon national identity. It is, additionally, based upon a construction of the coalition of states fighting terrorism as civilized and humane, and of terrorists as savage, barbaric and inhumane. As Jackson points out, this is not a natural consequence of the 9/11 attacks but a result of the deliberate deployment of an 'othering' discourse that sustains the war on terror. 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'.<sup>20</sup> And, by contrast, '[t]he 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'.<sup>21</sup>

<sup>16</sup> Ibid, 391.

<sup>17</sup> Gérôme Truc, *Shell Shocked: The Social Response to Terrorist Attacks* (Andrew Brown tr, Polity 2018) 34.

<sup>18</sup> 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 22 April 2020.

<sup>19</sup> James Der Derian, quoted by Richard Jackson, *Writing the War on Terrorism: Language, Politics and Counter-Terrorism* (Manchester University Press 2005) 60 (emphasis in the original).

<sup>20</sup> Ibid, 59.

<sup>21</sup> Ibid.

It might, therefore, be said that the war on terror has been narrativized as a struggle between two diametrically opposing value orientations: a commitment to freedom and democracy on one hand, and on the other, a rejection of democracy and a commitment to undermining the freedoms to which it is conducive.<sup>22</sup> Concepts broadly relating to human rights – such as freedom, liberty and the abhorrence of despotism – have featured heavily within this narrative. They have not featured as legal or moral constraints upon states' counterterrorism measures but rather as signifiers of the heroism and Messianism of the United States and its allies, particularly in those moments in which the morality and legality of the war on terror have been called into question. As Klug points out earlier in this volume, the need to promote freedom was cited in the justifications for the invasions of both Afghanistan and Iraq, even though the protection of civilians was seldom prioritized in the course of those military operations.<sup>23</sup> And, as Anghie observes, human rights were also invoked in the aftermath of the invasion of Iraq, with the United States' attempts to install democratic institutions and promote human rights in Iraq provided as justifications for an otherwise futile, unwinnable and miscalculated conflict. 'Through the invocation of human rights', Anghie writes, 'what might be seen as an illegal project of conquest is transformed into a legal project of salvation and redemption.'<sup>24</sup>

Yet human rights have also been invoked in a subtler, more pervasive way: in the implicit assertion of a right to security. This right has not been expressed in terms of individual rights to freedom from fear and security of the person, as recognized in the International Covenant on Civil and Political Rights (ICCPR).<sup>25</sup> Rather, it has been suggested that there exists a collective right – on the part of the imagined 'self' at war with the terrorist 'other' – to be secure from terrorism, and to take any actions necessary to bring about that end. For example, nine years after the 9/11 attacks, Harold Hongju Koh asserted that 'al-Qaeda has not abandoned its intent to attack the United States, and indeed continues to attack us'. He continued, 'the United States has the authority [...] And the responsibility to its citizens, to use force, including lethal force, to defend itself'.<sup>26</sup> This assertion – that the United States and its citizens have

<sup>22</sup> See Yota Negishi, this volume, ch 3.

<sup>23</sup> See Francesca Klug, this volume, ch 2.

<sup>24</sup> Anghie (n 11) 303.

<sup>25</sup> 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).

<sup>26</sup> 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 22 April 2020.

a right to be free from the threat of terrorism – is a direct result of the period of widespread acceptance of human rights, which made it possible to suggest that democracy and human rights are themselves ways of life that can and should be physically defended. The language of human rights and democracy was co-opted by the United States and its allies in order to support their claims that the absence of democracy, inadequate development and the failure of criminal law enforcement in relation to terrorist groups all form legitimate grounds for military intervention. This sentiment was most clearly articulated in the United States' National Security Strategy of 2002: '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.'<sup>27</sup>

## THE UN AND COUNTERTERRORISM: A HUMAN RIGHTS TURN?

As pointed out in this chapter's introduction, the UN was formed with the stated objectives of regulating states' use of force and promoting respect for human rights. The UNSC is most active in relation to the former objective and is – under Chapter VII of the UN Charter – authorized to identify and respond to threats to international peace and security.<sup>28</sup> It has, therefore, long been involved in international counterterrorism efforts. In 1999, the UNSC exercised its Chapter VII powers in relation to the Afghan Taliban for the first time, with the adoption of Resolution 1267 initiating a far-reaching sanctions regime against the Taliban and associates of Osama bin Laden.<sup>29</sup> This regime has since evolved such that it now requires the imposition of financial sanctions, a travel ban and an arms embargo upon individuals designated by the Sanctions Committee as members of Al Qaeda or the Islamic State in Iraq and the Levant (ISIL).<sup>30</sup> Resolution 1267 marked the beginning of the Security Council's war on international terrorist organizations, a struggle that accelerated after 9/11. In response to the attacks, the UNSC characterized all acts of international terrorism as threats to international peace and security, pledging to bring to justice all perpetrators, organizers and sponsors of terrorism.<sup>31</sup>

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<sup>27</sup> The White House, 'The National Security Strategy of the United States of America' (Washington DC, September 2002) <https://www.state.gov/documents/organization/63562.pdf> accessed 22 April 2020.

<sup>28</sup> Charter of the United Nations (adopted 24 October 1945) 1 UNTS XVI (UN Charter) ch 7.

<sup>29</sup> UNSC Res 1267 (15 October 1999) UN Doc S/RES/1267.

<sup>30</sup> UNSC Res 2253 (17 December 2015) UN Doc S/RES/2253.

<sup>31</sup> UNSC Res 1368 (12 September 2001) UN Doc S/RES/1368.

Counterterrorism has since become a key concern of the UN, cutting across the mandates of a number of its branches. A complex institutional apparatus has developed alongside a number of frameworks for international counterterrorism, some based upon treaty law, some upon the UNSC's legal authority, and others upon voluntary, informal commitments made by Member States under the UN General Assembly's auspices. A group of treaties, often referred to as the 'sectoral conventions',<sup>32</sup> requires states parties to criminalize a range of acts conducive to international terrorism, including the hijacking of aircraft and financing of terrorism.<sup>33</sup> These treaties overlap with the UNSC's decisions, the most significant being Resolutions 1267 – outlined above – and 1373. Adopted under the UNSC's Chapter VII powers, the latter resolution requires Member States to criminalize the financing of terrorism, freeze the assets of those who participate in terrorist attacks, deny safe haven to terrorists, refrain from supporting terrorist organizations and assist one another in the prevention and investigation of terrorist attacks.<sup>34</sup> The UNSC has played an increasingly 'legislative' function since 2001, regularly exercising its Chapter VII powers in order to require states to adopt or change existing anti-terrorism laws.<sup>35</sup> These treaty and UNSC frameworks are complemented by the 'soft law' output of the UN General Assembly (UNGA) and Secretariat. In 2006, for example, the UNGA adopted the Global Counter-terrorism Strategy, an informal commitment to a coordinated, long-term, international approach to combating terrorism.<sup>36</sup>

As some have already observed, the UN's institutional, legal and political frameworks for counterterrorism reflect a growing awareness that international counterterrorism must be based upon respect for human rights and the rule of law.<sup>37</sup> This is consistent with the more general observation that human rights

<sup>32</sup> Ben Saul, *Defining Terrorism in International Law* (Oxford University Press 2005) 133.

<sup>33</sup> Convention for the Suppression of the Financing of Terrorism (adopted 9 December 1999, entered into force 10 April 2002) 2178 UNTS 197; Convention for the Suppression of Unlawful Seizure of Aircraft (adopted 16 December 1970, entered into force 14 October 1971) 860 UNTS 105.

<sup>34</sup> UNSC Res 1373 (28 September 2001) UN Doc S/RES/1373.

<sup>35</sup> See, for example, Luis Miguel Hinojosa Martínez, 'The Legislative Role of the Security Council in its Fight against Terrorism: Legal, Political and Practical Limits' (2008) 57 *ICLQ* 333; Stefan Talmon, 'The Security Council as World Legislature' (2005) 99 *AJIL* 175.

<sup>36</sup> The United Nations Global Counter-terrorism Strategy, UNGA Res 60/288 (20 September 2006) UN Doc A/RES/60/288.

<sup>37</sup> See, for example, Elinor J Flynn, 'The Security Council's Counter-Terrorism Committee and Human Rights' (2007) 2 *Human Rights Law Review* 371; Rosemary Foot, 'The United Nations, Counter Terrorism, and Human Rights: Institutional Adaptation and Embedded Ideas' (2007) 29 *Human Rights Quarterly* 489; Lisa

have been ‘mainstreamed’ within the UN, and recognized as a pillar of the work of all bodies the organization encompasses.<sup>38</sup> Human rights are most clearly discussed in the Global Counter-terrorism Strategy, which recognizes that ‘effective counter-terrorism measures and the protection of human rights are not conflicting goals, but complementary and mutually reinforcing’.<sup>39</sup> The document outlines a number of concrete measures to be taken by states, including accession to the core human rights treaties and cooperation with the Human Rights Council.<sup>40</sup> The newly created UN Office of Counter-Terrorism coordinates a number of efforts under the human rights pillar of the Global Strategy, including support for victims of terrorism, capacity building for states receiving the children of returning foreign terrorist fighters, and the reintegration of foreign terrorist fighters and violent extremists in Jordan and Indonesia.<sup>41</sup> Each of the sectoral conventions also sets out minimum requirements for states’ treatment of individuals charged with an offence under that convention, namely that they should promptly be brought before a competent court or tribunal and the evidence against them heard. This integrates core ICCPR requirements relating to fair trial into the treaty framework for counter-terrorism. As Klug suggests elsewhere in this volume, however, the expansion of legal frameworks and bureaucratic apparatus for human rights protection is not concomitant with greater, more consistent respect for human rights, an observation that is particularly clear in the context of the war on terror.

The need to respect human rights in the course of counterterrorism has also been recognized by the UNSC. It did so for the first time in 1999,<sup>42</sup> with the Preamble to Resolution 1269 identifying a need to ‘strengthen [...] international cooperation in this field on the basis of the principles of the Charter of the United Nations and norms of international law, including respect for international humanitarian law and human rights’.<sup>43</sup> Similarly worded statements can be found in various resolutions since adopted by the UNSC. For example,

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 Publishing 2018).

<sup>38</sup> 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.

<sup>39</sup> UNGA Res 60/288 (20 September 2006) UN Doc A/Res/60/288, 9.

<sup>40</sup> Ibid.

<sup>41</sup> United Nations Office of Counter-Terrorism, ‘UNOCT Consolidated Multi-Year Appeal’ (2019) [https://www.un.org/counterterrorism/ctif/sites/www.un.org.counterterrorism.ctif/files/UNOCT\\_Multi-Year-Appeal\\_Website.pdf](https://www.un.org/counterterrorism/ctif/sites/www.un.org.counterterrorism.ctif/files/UNOCT_Multi-Year-Appeal_Website.pdf) accessed 22 April 2020.

<sup>42</sup> Flynn (n 37) 373.

<sup>43</sup> UNSC Res 1269 (19 October 1999) UN Doc S/Res/1269.

Resolution 1456 of 2003 stressed that states must implement counterterrorism measures ‘in accordance with international law, in particular international human rights, refugee, and humanitarian law’.<sup>44</sup> And, in 2014, the UNSC recognized that states’ failure to respect human rights, fundamental freedoms, the rule of law, and their obligations under the UN Charter ‘is one of the factors contributing to increased radicalisation and fosters a sense of impunity’.<sup>45</sup> Notably, neither Resolution 1267 nor Resolution 1373 – two of the UNSC’s landmark legislative resolutions relating to counterterrorism – included any concrete link between the counterterrorist measures they mandated and international human rights standards. Some of the human rights issues arising from these decisions have been addressed through subsequent modification. In 2006, for example, the UNSC established the ‘Delisting Focal Point’ to receive delisting requests from individuals targeted by the Resolution 1267 sanctions regime.<sup>46</sup> This was the first time that anybody whose assets had been frozen pursuant to the sanctions regime, established in 1999, was granted the opportunity to appeal the Sanctions Committee’s decision to list them as members or affiliates of terrorist organizations. Then, in 2008, the UNSC required the Sanctions Committee to make the reasons supporting an individual’s or entity’s inclusion on the sanctions list publicly available,<sup>47</sup> followed by the appointment in 2009 of an Ombudsperson as a direct contact for individuals and entities seeking delisting.<sup>48</sup>

According to Fionnuala Ní Aoláin, Special Rapporteur for counterterrorism and human rights, the UNSC’s new ‘super legislative’ role in counterterrorism has had ‘a distinctly negative effect on the overall advancement of meaningful protection for human rights and humanitarian law’.<sup>49</sup> While the UNSC acknowledges the need for states to comply with their obligations under international human rights law (IHRL) and international humanitarian law (IHL), there is no ‘structured and institutional anchor for human rights’ in the measures it has mandated.<sup>50</sup> For the most part, universal human rights have only been acknowledged in non-binding resolutions and the preambles to those adopted under the Council’s Chapter VII powers. The UNSC thus indicates

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<sup>44</sup> UNSC Res 1456 (20 January 2003) UN Doc S/Res/1456, para 6.

<sup>45</sup> UNSC Res 2178 (24 September 2014) UN Doc S/Res/2178.

<sup>46</sup> UNSC Res 1730 (19 December 2006) UN Doc S/Res/1730.

<sup>47</sup> UNSC Res 1822 (30 June 2008) UN Doc S/Res/1822.

<sup>48</sup> UNSC Res 1904 (17 December 2009) UN Doc S/Res/1904, para 20.

<sup>49</sup> Fionnuala Ni 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.

<sup>50</sup> Ibid.

its awareness of the potential human rights implications of its decisions but leaves it to states to implement those decisions in a manner consistent with their obligations under IHL and IHRL, situating human rights obligations and protections elsewhere in the international order. This heightens the seeming inaccessibility and inconsistency of human rights. The relationship between the UNSC's sweeping counterterrorism measures and human rights has only become clear in the moments in which regional courts have pronounced upon the legality of states' implementation of counterterrorism sanctions.<sup>51</sup> While the Court of Justice of the European Union and European Court of Human Rights have been valuable forums for individuals affected by the sanctions regime, their findings – that states' implementation of UNSC sanctions is often inconsistent with their human rights obligations – reflect Klug's observation that the need for legal adjudication renders human rights remote and incomprehensible outside the context of case law.<sup>52</sup> The 'ethic' of human rights – their value as moral claims about the conditions to which all individuals are entitled – has not informed the essence of the UNSC's legislative measures, its approach to counterterrorism or the domestic policies it has mandated. Instead, the UNSC and actors involved in its work have jointly narrativized the war on terror as an existential struggle between good and evil, civilized and uncivilized, us and them, characterizing human rights as things that belong to – and only apply within – certain states.

## CO-AUTHORING THE NARRATIVE

In an address to the UNGA on 12 September 2001, George W Bush challenged the UN to support the United States and its allies in their fight against terrorism. 'Will the UN serve the purpose of its founding', he asked, 'or will it be irrelevant?'.<sup>53</sup> This question foreshadowed the ways in which the UNSC was to be subordinated and circumvented over the coming years. While the United States and its allies have asserted their authority to bypass the UNSC in their exercise of a right to pre-emptive self-defence against terrorists, they have consistently looked to the Council to pass resolutions that mandate sweeping international responses to terrorism.<sup>54</sup> This is not a new phenomenon, however; in fact, ever

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<sup>51</sup> *Al-Dulimi and Montana Management Inc v Switzerland* App No. 5809/08 (ECHR, 21 June 2016); *Nada v Switzerland* App No. 10593/08 (ECHR, 12 September 2012); Cases C-402/05 and C-415/05 *Yassin Abdullah Kadi and Al Barakaat International Foundation v Council of the European Union and Commission of the European Communities* [2008] ECR I-06351.

<sup>52</sup> Francesca Klug, this volume, ch 2.

<sup>53</sup> George W Bush, quoted by Falk (n 12) 590.

<sup>54</sup> Anghie (n 11) 291.

since the Lockerbie bombing, the UNSC's influence and legal authority have been harnessed by certain powers in order to create an international counter-terrorism regime that is legally binding upon states regardless of whether they have consented to any or all of the sectoral conventions. Anghie's prediction, made in 2005, rings 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].'<sup>55</sup>

This section explores the activity of the UNSC and of other UN principal organs influencing or enabling its work, highlighting the ways in which the UNSC has – since the 1980s – utilized its emergency powers under Chapter VII of the Charter in order to require states' implementation of a range of counterterrorism measures. It concerns not only the actual measures mandated by the UNSC – problematic as some may be – but also the language invoked by the Council and by its members during meetings. This is because language is instrumental in shaping how international issues like terrorism are understood and, by extension, in the creation of 'others' that threaten or compromise the international order.<sup>56</sup> While the language of each UNSC resolution represents and constructs issues in a particular way, it also reflects the outcome of a process of negotiation and contestation among Council members. During this process, deliberate choices are made as to whose perspectives are to be included in the final text of the resolution, and whose perspectives are to be omitted. Within this context, it is interesting to note that the human rights concerns voiced in UNSC meetings have seldom been recognized in – or significantly altered the substance of – resolutions relating to counterterrorism. Thus, through inclusion, omission and the exercise of its legal authority, the UNSC has often perpetuated the image of the terrorist as foreign and unknown, attributing terrorism to despotic regimes and illiberal states where democracy is absent and respect for the rule of law weak. The UNSC's role in shaping this narrative is particularly significant given that its membership is limited and all decisions are subject to the veto powers of the permanent five members. More than 60 states have never been members of the Council, and, in 1999 and 2001 – the years of the adoption of Resolutions 1267 and 1373 respectively – none of the states whose sovereignty and territorial integrity have been impacted by the war on terror were members of the UNSC. Thus, while the UNSC's mandate is to secure international peace and security, its narrative regarding the sources of insecurity is authored by a small number of actors.

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<sup>55</sup> Ibid, 305.

<sup>56</sup> Ibid, 306; David Kennedy, 'A New Stream of International Law Scholarship: Four Lectures' (1988) 7 *Wisconsin International Law Journal* 1.

While the UNSC's decisions have legitimized the image of the terrorist as an outside threat, the continual exercise of its Chapter VII powers has created – through the law of the UN Charter – a permanent state of emergency. This has furthered the othering effects of the Council's decisions; as we have seen throughout the war on terror, the view of the terrorist threat as a 'crisis' justifies the hasty adoption of exceptional measures in order to secure the threatened national or transnational 'self' against the threatening 'other'.<sup>57</sup> While – as Klug suggests – human rights' recognition in law often renders them remote and inaccessible, the ambiguity of the relationship between different areas of the law – in this case the Security Council's Chapter VII powers and IHRL – allows for human rights considerations to be subjugated to other, supposedly more pressing concerns. Thus, this section finally considers Resolution 2178 relating to foreign terrorist fighters and its implementation by states. This resolution – another example of the UNSC's exercise of its emergency powers – has given rise to significant issues relating to freedom of movement and arbitrary deprivation of nationality, with foreign fighters typically constructed as parasites carrying ideologies and violent tendencies that may infect 'us'.

### **Creating the 'Other'**

The othering discourse of the war on terror did not materialize in the moments following 9/11. International terrorism has been associated with developing states, the non-democratic world and specifically the Middle East and North Africa (MENA) region since the 1990s, with these acts of representation creating the conditions that allowed for 9/11 to be understood as a barbaric affront upon democracy and freedom. In January 1992, the UNSC adopted a resolution condemning the destruction of Pan Am flight 103 over Lockerbie, Scotland, and UTA flight 772 in Niger.<sup>58</sup> The resolution expressed concern 'over the results of investigations which implicate[d] officials of the Libyan government' in the bomb blasts that destroyed both aircraft.<sup>59</sup> 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.<sup>60</sup> 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 sus-

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<sup>57</sup> C.A.S.E. Collective, 'Critical Approaches to Security in Europe: A Networked Manifesto' (2006) 37 *Security Dialogue* 443, 452.

<sup>58</sup> UNSC Res 731 (21 January 1992) UN Doc S/Res/731, para 1.

<sup>59</sup> *Ibid*, Preamble.

<sup>60</sup> *Ibid*.

pects itself.<sup>61</sup> Thus, 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’.<sup>62</sup> Exercising its Chapter VII powers, the UNSC required Libya to comply with the extradition requests made by the United Kingdom, United States and France.<sup>63</sup> It demanded, further, that the ‘Libyan government must commit itself definitively to cease all forms of terrorist action and all assistance to terrorist groups’.<sup>64</sup> States were required to ban flights that had taken off from or were bound for Libya,<sup>65</sup> reduce diplomatic exchanges with Libya<sup>66</sup> 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.<sup>67</sup>

Later in 1992, the International Court of Justice (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.<sup>68</sup> The decision was unsurprising given that Article 103 of 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 law.<sup>69</sup> Nonetheless, the Court clearly refrained from ruling on the legality of the UNSC’s assertion of its authority to exercise its Chapter VII powers in order to ‘legislate’ international counterterrorism measures, which have historically been developed through treaties and interstate cooperation. This enabled the continuation of the UNSC’s transformation of the nature of international law-making, with the Council acting as a ‘vertical, uniform and global law-making mechanism’ that is not based upon state consent.<sup>70</sup> As Boyle points out, the UNSC is a ‘seriously deficient vehicle’ for the exercise of global legislative authority,

<sup>61</sup> Anghie (n 11) 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).

<sup>62</sup> UNSC Res 748 (31 March 1992) UN Doc S/Res/748, Preamble.

<sup>63</sup> Ibid, para 1.

<sup>64</sup> Ibid, para 2.

<sup>65</sup> Ibid, para 4(a).

<sup>66</sup> Ibid, para 6(a).

<sup>67</sup> Ibid, para 6(c).

<sup>68</sup> *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 [42].

<sup>69</sup> UN Charter, arts 25 and 103.

<sup>70</sup> 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.

in terms of ‘accountability, participation, procedural fairness, or transparency of decision-making’.<sup>71</sup> One of the key issues in this regard is that the UNSC seems able to perform a legislative function unconstrained by IHRL, and without any authoritative body reviewing the human rights implications of its decisions. 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 law-making activities were unfettered. The continual expansion of the Council’s legislative function was reflected in the adoption of Resolutions 1267, 1373 and 2178, all of which were unprecedented and well outside the ‘Council’s normal crisis management role’.<sup>72</sup> The UNSC’s response to the *Lockerbie* bombings thus marked the beginning of a reactive, legislative Council almost constantly operating in ‘crisis’ mode.

The UNSC’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, 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. None of the resolutions mentioned, for example, that nearly 50 of those who died on board UTA flight 772 were from the Congo and 25 from Chad. The right to be secure from terror, and the right to gain redress for attacks, was reserved for particular states. Meanwhile, a direct link was drawn between ‘international terrorism’ – whatever that might be – and the State of Libya. A deliberate choice was made to characterize Libya as a state sponsor of terrorism and a threat to international peace and security, even though the resolutions essentially pertained to the wrongdoings of Gaddafi and specific individuals within his regime.

Seven years later, the UNSC passed Resolution 1267. The Resolution was addressed to the Taliban, which was at that time the government of Afghanistan and was known to be providing safe haven to Osama bin Laden and his supporters. Exercising its Chapter VII powers, the Council required the Taliban to ‘turn over Usama bin Laden without further delay to appropriate authorities in a country where he has been indicted’.<sup>73</sup> The UNSC was, of course, referring to the United States, where bin Laden had been indicted for the 1998 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

<sup>71</sup> 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.

<sup>72</sup> Simon Chesterman, Ian Johnstone and David M Malone, ‘Legal Status’ in *Law and Practice of the United Nations* (Oxford University Press 2016) 145.

<sup>73</sup> UNSC Res 1267 (15 October 1999) UN Doc S/RES/1267, para 2.

individuals and entities that the newly established Resolution 1267 Sanctions Committee designated as Taliban members or affiliates of bin Laden.<sup>74</sup> States were also required to ban any aircraft owned or operated by the Taliban from taking off from or landing in their territory.<sup>75</sup> The UNSC only vaguely acknowledged the potential humanitarian implications of the sanctions regime, assigning the Sanctions Committee the authority to approve flights delivering humanitarian aid to Afghanistan or enabling the fulfilment of religious obligations such as performance of the Hajj.<sup>76</sup> This provision was not included in the draft resolution submitted by Canada, the Netherlands, Russia, Slovenia, the United Kingdom and the United States, but was rather an amendment proposed by the Chinese and Bahraini delegations.<sup>77</sup> Apart from this, the only reference to human rights was the UNSC's expression of 'concern over the continuing violations of international humanitarian law and of human rights, particularly against women and girls', by the Taliban.<sup>78</sup>

The UNSC's concerns regarding the Taliban were, of course, well founded; it was a malevolent regime, indifferent to international law, the cultural heritage of Afghanistan and the welfare of the Afghan people. Yet this does not change the fact that while the UNSC was highly critical of the Taliban's violations of human rights, it was almost silent on the human rights implications of its sanctions regime, which was unanimously adopted by the Council's members.<sup>79</sup> The United States delegate insisted that the sanctions 'are targeted very specifically to limit the resources of the Taliban authorities', and 'in no way harm the people of Afghanistan'.<sup>80</sup> However, it is well known that, by 1999, the Taliban controlled a large proportion of Afghan territory. It was the de facto government of Afghanistan by the time the resolution was adopted, even though the international community refused to recognize this situation so as to avoid legitimizing the organization. Thus, in reality, any restriction of the Taliban's resources was likely to affect the people reliant upon it. This point was raised 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

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<sup>74</sup> Ibid, paras 4–6.

<sup>75</sup> Ibid, para 4(a).

<sup>76</sup> Ibid.

<sup>77</sup> UNSC Verbatim Record (15 October 1999) UN Doc S/PV.4051.

<sup>78</sup> UNSC Res 1267 (15 October 1999) UN Doc S/RES/1267, Preamble.

<sup>79</sup> UNSC Verbatim Record (15 October 1999) UN Doc S/PV.4051.

<sup>80</sup> Ibid, 3.

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.<sup>81</sup>

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.'<sup>82</sup> Subsequent modifications of the sanctions regime addressed some of these concerns by, for example, establishing a procedure for states to unfreeze seized assets in order to allow sanctioned individuals to cover basic expenses such as payment of rent, medicine, medical treatment and food.<sup>83</sup> Yet the UNSC never recognized the need to ensure that the Resolution 1267 regime does not adversely affect individuals not targeted by sanctions.

The UNSC's actions in the 1990s are particularly significant as they were the beginnings of the Council's proactive, legislative approach to counterterrorism. One might argue that, by refraining from any substantial consideration of the human rights implications of its decisions, the Council simply acted in a manner consistent with its mandate of maintaining international peace and security. Yet the fact remains that both the Council and the Member States implementing its decisions bear an obligation to act in accordance with the purposes and principles of the UN,<sup>84</sup> including 'promoting and encouraging respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language, or religion'.<sup>85</sup> The UNSC's resolutions relating to Libya and the Taliban tell a particular story about international terrorism, one that is – contrary to the organization's above-mentioned purposes and principles – silent about certain human rights issues but not others. The human rights discourse was mobilized within this narrative, particularly as it related to Afghanistan, but only in order to further antagonize the terrorist enemy. Specifically, human rights were invoked in order to render the Taliban as an 'other'; not simply an indescribably violent actor, but one that is wholly incapable of acting in a manner consistent with 'our' principles and values. This approach was consonant with broader views of the Taliban, which focused

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<sup>81</sup> Ibid, 3–4.

<sup>82</sup> Ibid, 4.

<sup>83</sup> UNSC Res 1452 (20 December 2002) UN Doc S/Res/1452; UNSC Res 1735 (22 December 2006) UN Doc S/Res/1735.

<sup>84</sup> UN Charter, art 24.

<sup>85</sup> Ibid, art 1(3).

upon events such as the destruction of the Buddhist statues in the Bamiyan Valley and the organization's murders of journalists and musicians. These actions – 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 organization was painted as brutal, inhumane and beyond negotiation. Well before 9/11, then, the prospect of intervention in Afghanistan was rendered as a civilizing mission, a form of liberation and a means of promoting Western values. As Klug points out, therefore, periods of transition generally overlap, and it is difficult to identify a clear break between the acceptance and co-option stages.<sup>86</sup> The subversive deployment of human rights language to justify the West's pursuit of its geopolitical and military objectives began well before 9/11, at a time when world leaders and scholars were still celebrating the decade of humanitarian intervention and the birth of a responsibility to protect.

On 12 September 2001, the UNSC met to discuss draft Resolution S/2001/861, its response to the attacks of the previous day.<sup>87</sup> When reading the proceedings of that meeting, one is struck by the immediacy with which states – particularly the United Kingdom and United States – characterized terrorism as an affront upon democracy and civilization. 'These horrendous acts are an attack not only on the United States', said the British delegate, '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.<sup>88</sup>

What is most significant about this statement is the manner in which it draws a distinction between a threatened 'us' – defined by values of democracy, civility and humanity – and an uncivilized, terrorist 'them'. At the same time, terrorism is characterized as an attack upon all of human civilization, the implication being that terrorists ought not to be considered human beings at all but as a totally alien enemy. These sentiments were echoed by United States Ambassador Jim Cunningham: 'As others have noted, 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.'<sup>89</sup>

<sup>86</sup> Francesca Klug, this volume, ch 2.

<sup>87</sup> UNSC Verbatim Record (12 September 2001) UN Doc S/PV.4370.

<sup>88</sup> *Ibid.*, 2–3.

<sup>89</sup> *Ibid.*, 7.

Thus, within the context of the UNSC, terrorists were represented as threats to democracy, and as foreign to both humanity and the international community. This construction of terrorism determined the way in which the UNSC – and, by extension, Member States – acted upon it. Recognizing the deliberate, political manner in which the events of 9/11 were represented is not to suggest that the attacks – which deliberately targeted thousands of civilians – were “unreal” or negligible or condonable’. However, as Anghie points out: ‘Different ways of understanding and characterising those events had a profound impact on how to address them.’<sup>90</sup> The characterization of 9/11 as an act of war and of terrorism as an imminent, ongoing and omnipresent threat shaped both domestic demands for heightened national security and international acquiescence to the UNSC’s decisions relating to counterterrorism.<sup>91</sup> Most significantly, both UNSC resolutions adopted in response to 9/11 identified terrorism as a threat to international peace and security and, within that context, reaffirmed states’ inherent right of individual or collective self-defence.<sup>92</sup> This has widely been read as tacit approval of the United States’ invasion of Afghanistan, the latter having adopted Al Qaeda’s actions on 9/11 as its own by providing safe haven to members of the organization and refusing to surrender bin Laden.<sup>93</sup> These resolutions’ affirmation of the lawfulness of the invasion of Afghanistan is unsurprising; what is significant is the way in which they recognized the amorphous, general concept of ‘international terrorism’ as a threat to international peace and security, and recognized a right of self-defence against international terrorism without defining the temporal or geographic scope of that right, an issue examined by Andrea Birdsall elsewhere in this volume. This made a militaristic approach to counterterrorism – what Richard English calls the ‘war paradigm’ approach – seem necessary and logical.<sup>94</sup>

Clearly, the UN served the purpose willed by the United States and its allies in the aftermath of 9/11. The notion of a right of self-defence against terrorists, hastily and non-specifically recognized in those resolutions, has been stretched and reinterpreted since, and continues to provide justification

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<sup>90</sup> Anghie (n 11) 306.

<sup>91</sup> Maureen Duffy, *Detention of Terrorist Suspects: Political Discourse and Fragmented Practices* (Hart 2018) 86–8, 89–90.

<sup>92</sup> UNSC Res 1368 (12 September 2001) UN Doc S/RES/1368, Preamble; UNSC Res 1373 (28 September 2001) UN Doc S/RES/1373, Preamble.

<sup>93</sup> Sean Murphy, ‘Terrorism and the Concept of “Armed Attack” in Article 51 of the UN Charter’ (2002) 43 *Harvard International Law Journal* 41, 51.

<sup>94</sup> Richard English, *Terrorism: How to Respond* (Oxford University Press 2009).

for states' conduct in the war on terror.<sup>95</sup> While the UNSC has only directly authorized the use of force against the states to which terrorist attacks can be attributed, the recognition of a general right of self-defence against terrorism has grounded military action against terrorists in any setting in which a state is considered 'unwilling' or 'unable' to suppress terrorism through law enforcement.<sup>96</sup> Meanwhile, the fluidity of Resolution 1373 – its requirement that states take a range of actions against 'international terrorism' without defining the term – enabled the implementation of sweeping anti-terrorism legislation around the world. Many laws – including those implemented in the United Kingdom and Australia – criminalize a range of actions including incitement to terrorist violence, possession of materials that may be conducive to a terrorist attack and material support for terrorism.<sup>97</sup> The UNSC's requirement of such specific changes in national legislation and the sustained use of its Chapter VII powers – which were designed to enable the implementation of temporary measures to resolve threats to international peace and security – have enabled years of exceptional measures that have clear implications for the rights to freedom of religion, association and expression.<sup>98</sup> Of course, it cannot be said that the UNSC and its members intended to construct an international counterterrorism regime based upon marginalization and discrimination. As discussed above, the UNSC has intermittently reminded states that their counterterrorism measures must comply with IHRL and IHL, and take into account the broader circumstances conducive to terrorism, such as unresolved conflicts and marginalization.<sup>99</sup> Yet the construction of terrorists as foreign and alien, the continual recognition of a right to self-defence against 'international terrorism', the lack of definition of that term and the sustained use of the UNSC's Chapter VII powers have given credibility to the claim that the 'war on terror' is a Manichean struggle.<sup>100</sup> 'Far from being a neutral reflection of international realities', writes Jackson, 'the "war on terrorism" is both embedded within and

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<sup>95</sup> See, for example, Michael Bothe, 'Terrorism and the Legality of Pre-Emptive Force' (2003) 14 *EJIL* 227; Rosa Brooks, 'Drones and the International Rule of Law' (2014) 28 *Journal of Ethics and International Affairs* 83. See also Andrea Birdsall, this volume, ch 6.

<sup>96</sup> See Daniel Bethlehem, 'Principles Relevant to the Scope of a State's Right of Self-defense Against an Imminent or Actual Armed Attack by Nonstate Actors' (2012) 106 *AJIL* 1.

<sup>97</sup> 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).

<sup>98</sup> Recognized, for example, in ICCPR, arts 18, 19 and 22.

<sup>99</sup> See, for example, UNSC Res 1456 (20 January 2003) UN Doc S/Res/1269.

<sup>100</sup> Jackson (n 19) 154.

attempts to advance an ideological position and a set of ideological policies.<sup>101</sup> This ideology 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.<sup>102</sup>

## Responding to Foreign Terrorist Fighters

This narrative of a threatened ‘us’ and menacing ‘them’ has been both challenged and reaffirmed by the return of foreign terrorist fighters to their countries of residence. Thousands of individuals from around the world have travelled to Syria and Iraq in order to participate in the violent conflict taking place in the region. Many of them have been recruited to, or have fought alongside, organizations such as ISIL and Jabhat al-Nusra.<sup>103</sup> The fact that individuals residing in Western liberal democracies have voluntarily travelled to fight alongside – or live in territory controlled by – such organizations challenges the widespread assumption that terrorism is an alien threat that flourishes within a very different geographic setting and cultural context to ‘our’ own. At the same time, much of the international community’s consideration of the foreign terrorist fighter phenomenon has focused upon the ‘blowback effect’. Foreign terrorist fighters are not considered dangerous because of their potential actions as participants in overseas conflicts, but rather because they may return to the West after those conflicts’ conclusion, bringing with them a newfound hatred of the West and the ability to orchestrate terrorist violence.<sup>104</sup> This concept of a blowback effect – largely developed by defence and security experts – remains consistent with the othering discourse of the war on terror by constructing terrorism as a disease that is contracted by vulnerable individuals travelling to participate in overseas conflicts and might ‘infect’ the West.

A key component of this understanding of foreign fighters is the idea that they are susceptible to ideologies conducive to radical violence. For example, the Secretary General’s Plan of Action to Prevent Violent Extremism reads:

Narratives of grievance, actual or perceived injustice, promised empowerment and sweeping change become attractive where human rights are being violated, good

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<sup>101</sup> Ibid, 158.

<sup>102</sup> This complexity is explored by Yota Negishi, this volume, ch 3.

<sup>103</sup> Ginsborg (n 37) 197.

<sup>104</sup> 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.

governance is being ignored and aspirations are being crushed. 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.<sup>105</sup>

Yet again, human rights are invoked in order to portray terrorism as something that results from conditions very different to ‘ours’. However, in this particular instance, the use of the term ‘terrorist’ to describe foreign fighters is itself a deliberate choice, one allowing for the situation to be tied into the broader narrative of the war on terror. In reality, there are seldom links of direct control or command between ISIL operatives in Syria and Iraq and the attacks that individuals in other states commit in the organization’s name. And, by extension, there is little to suggest that returning fighters have indeed been instructed to carry out particular attacks, or are likelier to do so than other individuals who have simply encountered propaganda on the Internet. In this sense, the designation of ‘foreign terrorist fighter’ – which has become part of UN vernacular – supports the view that the West is besieged by the outside threat of terror.

UN organs involved in the international response to foreign fighters appear aware, to some extent, that the issue cannot be reduced to the us/them binary driving the war on terror. In 2006, for example, the Secretary General recognized that ‘the threat of violent extremism is not limited to any one religion, nationality or ethnic group’.<sup>106</sup> The Plan of Action to Prevent Violent Extremism, presented by the Secretary General in that address, focuses on political, socio-economic and personal factors that drive individuals to engage in violent extremism. The need to address these ‘push factors’ was also recognized by the UNSC in the Preamble to Resolution 2178, its key legal response to foreign fighters:

Addressing the threat posed by foreign terrorist fighters requires comprehensively addressing underlying factors, including by preventing radicalisation to terrorism, stemming recruitment, inhibiting foreign terrorist fighter travel, disrupting financial support [...] promoting religious tolerance, economic development and social

<sup>105</sup> UNGA ‘Plan of Action to Prevent Violent Extremism: Report of the Secretary-General’ UN GAOR 70th sess UN Doc A/70/674 (2015) para 3.

<sup>106</sup> Ban Ki-moon, ‘UN Secretary-General’s Remarks at General Assembly Presentation of the Plan of Action to Prevent Violent Extremism’ (*United Nations Secretary-General*, 15 January 2016) <https://www.un.org/sg/en/content/sg/statement/2016-01-15/un-secretary-generals-remarks-general-assembly-presentation-plan> accessed 22 April 2020.

cohesion and inclusiveness, ending and resolving armed conflicts, and facilitating reintegration and rehabilitation.<sup>107</sup>

However, a majority of the operative part of the resolution, adopted under the UNSC's Chapter VII powers, relates to the criminalization of international travel for the purposes of planning, perpetrating or participating in terrorist acts.<sup>108</sup> The resolution also requires states to acquire advance passenger information from all airlines in order to detect the arrival or departure of foreign terrorist fighters.<sup>109</sup> It is particularly urgent, according to the UNSC, that states implement the resolution in relation to ISIL, al-Nusra and affiliates of Al Qaeda.<sup>110</sup>

While Resolution 2178 recognizes the importance of addressing root causes and of implementing counterterrorism policies that are consistent with IHL and IHRL, its most consequential elements are the provisions requiring states – once again – to adopt or amend existing anti-terrorism legislation. Martin Scheinin, former UN Special Rapporteur on human rights and counterterrorism, characterized the Resolution as a ‘backlash in the UN counter-terrorism regime’ that ‘wipes out the piecemeal progress made over 13 long years in introducing protections of human rights and the rule of law into the highly problematic manner in which the Security Council exercises its supranational powers’.<sup>111</sup> The Resolution has resulted in the implementation of laws around the world that have serious implications for various human rights, including the right to freedom of movement and the right not to be rendered stateless.<sup>112</sup> In an analysis of 47 countries’ implementation of Resolution 2178, Tayler writes:

Common themes in ‘FTF’ laws and regulations include expansion of police powers of search and seizure, in some cases without judicial authorisation; gag orders and other restrictions on speech; banishment measures including revocation of citizenship, in some cases without a criminal conviction or adequate legal safeguards; and unfettered collection of individuals’ metadata.<sup>113</sup>

<sup>107</sup> UNSC Res 2178 (24 September 2014) UN Doc S/Res/2178, Preamble.

<sup>108</sup> Ibid, paras 5–6.

<sup>109</sup> Ibid, para 8.

<sup>110</sup> Ibid, para 10.

<sup>111</sup> Martin Scheinin, ‘Back to Post-9/11 Panic? Security Council Resolution on Foreign Terrorist Fighters’ (*Just Security*, 23 September 2014) <https://www.justsecurity.org/15407/post-911-panic-security-council-resolution-foreign-terrorist-fighters-scheinin/> accessed 22 April 2020.

<sup>112</sup> Ginsborg (n 37) 204.

<sup>113</sup> Letta Tayler, ‘Foreign Terrorist Fighter Laws: Human Rights Rollbacks under UN Security Council Resolution 2178’ (2016) 18 *International Community Law Review* 455, 462. For an overview of legal responses within Europe, see Christophe

Particularly problematic in recent times has been the revocation of citizenships of returning foreign fighters. Since the adoption of Resolution 2178, both Australia and the United Kingdom have enacted laws allowing their respective governments to revoke the citizenships of returning foreign terrorist fighters. While the Australian legislation allows the government to revoke the citizenships of individuals who are dual nationals,<sup>114</sup> the 2014 Immigration Act allows the United Kingdom 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’.<sup>115</sup> These laws resulted in two parallel cases in 2019 in which the governments of Australia and the United Kingdom revoked an individual’s citizenship based upon their eligibility 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 – had never been or applied to be a Fijian citizen.<sup>116</sup> Similarly, the United Kingdom 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.<sup>117</sup>

These two cases are undoubtedly among many others, and illustrate the problematic ways in which Resolution 2178 has been implemented around the

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).

<sup>114</sup> 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) <https://www.justsecurity.org/15937/australias-draconian-response-security-councils-resolution-foreign-terrorist-fighters/> accessed on 22 April 2020.

<sup>115</sup> Immigration Act 2014, s 66(1).

<sup>116</sup> Helen Davidson and Amy Remeikis, ‘Neil Prakash “not a Fiji citizen”: Dutton Move to Strip Australian Citizenship in Doubt’ (*The Guardian*, 2 January 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 22 April 2020.

<sup>117</sup> ‘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 22 April 2020.

world. The revocation of an individual's citizenship on the grounds that they *can* apply for citizenship of another state – an application that any state has the sovereign right to decline – is tantamount to rendering that person stateless. The UNSC's requirement that states enact stricter border controls in response to the return of foreign fighters, as well as states' willingness to do so, reflect the lasting significance of the understanding of terrorism as an outside threat. Whereas the Council's actions in the 1990s situated terror at the margins of international society – namely, within the despotic regimes of Gaddafi and the Taliban – its recent decisions situate terror at the physical borders of threatened states. Yet the narrative remains the same, revolving around the binaries of us/them, self/other, civilized/uncivilized. Meanwhile, the widespread implementation of stricter citizenship laws and travel restrictions – clearly in violation of various international human rights standards – conveys a simple message: that 'our' right to be secure from terrorism is unqualified and unfettered by well-established legal standards.

## CONCLUSION

In 2006, New York City mayor Rudolph Giuliani described 9/11 as 'the attack that changed our world'.<sup>118</sup> The attack was certainly transformative; aviation security was reimagined, terrorism became the subject of countless films and literary works, and Al Qaeda and Osama bin Laden became household names. Yet the attack was not cataclysmic so much as it was catalytic. As discussed above, 9/11 was constructed as an affront upon humanity, a symbol of the barbaric, uncivilized nature of the terrorist enemy. The foundations for this narrative representation of the terrorist as foreign and unknown were laid well before the turn of the millennium, in international responses to the actions of the Qaddafi regime and of Al Qaeda. The crux of this narrative was not a clear definition of terrorism but rather an image of the terrorist as someone we cannot identify, predict or understand. September 11 gave impetus to this ambiguous yet ominous conception of international terrorism, cementing global perceptions of terrorist organizations as brutish and uncivilized actors that operate at – and threaten – the boundaries of the international community and humanity itself.

This narrativization of terrorism symbolizes the world's transition from the 'acceptance' to 'co-option' phases of human rights. The story of 9/11 and the war on terror celebrates the West as a bastion of democracy, freedom and

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<sup>118</sup> City of New York, 'Text of Readings for New York City's 2006 September 11th Commemoration Ceremony' (11 September 2006) [www.nyc.gov/html/om/pdf/2006\\_text\\_of\\_readings.doc](http://www.nyc.gov/html/om/pdf/2006_text_of_readings.doc) accessed 22 April 2020.

human rights but simultaneously challenges the universal human rights discourse that gained traction in the preceding decades. Terrorism is approached as violence against freedom and democracy, terrorists are understood as the products of despotism and illiberalism, military action against state sponsors of terrorism is characterized as a mission to promote human rights, and yet the war on terror has seen continuous and widespread violations of human rights by the states purporting to fight for democracy and freedom. Thus, a key claim underpinning the narrative of the war on terror is that as gentle, principled victims, ‘we’ have a collective right to be secure from terrorism. The UDHR and core human rights treaties aim to promote the universality and indivisibility of human rights, recognizing the need to protect all individuals from violations of dignity at the hands of the state, as well as the need to compel states to guarantee certain conditions of life for all. Yet in the aftermath of 9/11, certain actors attempted to seize control of the meaning and application of human rights. The West’s ostensible commitment to human rights has underpinned arguments in favour of military counterterrorism operations, and has been used to mark out the differences between ‘us’ and the terrorist enemy. Thus, only years after the concept of universal human rights gained traction internationally, it was deployed in order to assert the existence of a collective right to be secure from terrorism.

This narrative of a threatened, transnational ‘self’ and a treacherous ‘other’ was written by the United States and its allies in the immediate aftermath of 9/11, but it has been reproduced and entrenched by various international actors. This chapter has explored the ways in which the power and legal authority of the UNSC have been harnessed in order to further the othering discourses underpinning the war on terrorism. Choices of language matter because they shape the ways in which issues are understood and responded to. This is particularly the case in relation to the UNSC because, as a principal organ of the world’s primary intergovernmental organization, the Council plays a significant role in determining what constitutes an international security issue and in shaping global responses. Thus, the Council’s approach to counterterrorism – a result of deliberate choices and political processes – has invigorated certain powers’ attempts to posit the war on terror as a global battle between good and evil. Human rights considerations have generally been relegated to the preambles of UNSC decisions, with many of the Council’s resolutions reinforcing the problematic and subverted role that human rights play within the discourse of the war on terror. Like the states within the international coalition against terrorism, the UNSC effaces its commitment to universal human rights, but only to align terrorism with despotism and counterterrorism with human rights promotion. In co-authoring this transnational right to be secure from terrorism, the Council has hastily adopted a range of emergency measures that undermine the universality of human rights and the core principle of non-discrimination.

As a conflict spanning the entire world and involving a vast number of actors, the war on terror has given rise to a vast number of competing claims to rights, but some have been silenced by others. The narrative of this war might have been quite different if alternative choices had been made in the aftermath of 9/11. The struggle against terrorism might have been based upon universal human rights, as the architects of the contemporary international legal system intended at the end of the Second World War. Instead, what we have seen is the co-option of human rights in the security discourses of major powers, and an assertion that human civilization has a right to secure itself against terror by any means necessary. These powers have harnessed the authority of the UNSC to give international legal and political impetus to the narrative of the war on terror. It is unlikely, however, that when the drafters of the UN Charter decided to open that document with the phrase, ‘We the people of the United Nations’, they intended for certain individuals and communities to be situated beyond the parameters of the community – humanity – that the organization sought to bring together.