

International Cooperation in Counter- terrorism

The United Nations and Regional
Organizations in the Fight Against Terrorism

EDITED BY
Giuseppe Nesi

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Fight Against Terrorism

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GIUSEPPE NESI
University of Trento, Italy

ASHGATE

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List of Participants

Professor Georges ABI-SAAB, Graduate Institute of International Studies, University of Geneva, and Member of the WTO Appellate Body
Ms. Roberta ARNOLD, Ministry of Defence, Berne
Mr. Roberto BELLELLI, President of the Military Tribunal of Turin
Professor Patrizia DE CESARI, University of Trento
Mr. Michael DE FEO, United Nations Office on Drugs and Crime, Vienna
Professor Luigi FERRARI BRAVO, University of Rome, 'La Sapienza', former Judge of the European Court of Human Rights
Professor Andrea GIOIA, University of Modena and Reggio Emilia
Professor Pietro GARGIULO, University of Teramo
Professor Gerhard HAFNER, University of Vienna
Professor Matthias HARTWIG, Max Plank Institute, Heidelberg
Mr. Mahmoud HMOUD, Legal Adviser, Permanent Mission of Jordan to the UN – New York
Ambassador Allieu Ibrahim KANU, Deputy Permanent Representative of Sierra Leone to the UN – New York
Professor Kalliopi KOUFA, University of Thessaloniki, Rapporteur of the UN Sub-Commission on the Promotion and Protection of Human Rights
Mr. Alexander MARSCHIK, Deputy Permanent Representative of Austria to the UN – New York
Ms. Egeria NALIN, Research Fellow, University of Bari
Professor Giuseppe NESI, University of Trento
Professor Jordan J. PAUST, University of Houston
Mr. Marco PERTILE, Research Fellow, University of Trento
Mr. Eric ROSAND, Deputy Legal Adviser, Permanent Mission of the US to the UN – New York
Mr. Mahmoud SAMY, Legal Adviser, Permanent Mission of Egypt to the UN – New York
Ms. Valeria SANTORI, Research Fellow, University of Teramo
Professor Tullio TREVES, University of Milan – Judge of the International Tribunal for the Law of the Sea
Mr. Renan VILLACIS, UN Secretariat, Office of Legal Affairs, Codification Division – New York
Professor Ugo VILLANI, University of Rome 'La Sapienza'
Ms. Elizabeth WILMSHURST, Chatham House, The Royal Institute of International Affairs, London

Foreword

The United Nations' response to acts of terrorism on such a grand scale as those committed on September 11, 2001 and thereafter, has essentially been determined by exigency. Immediate and unwavering action was necessary. Today, a more comprehensive approach must be found. Upon some reflection and with critical distance, future action must be grounded on a solid and sustainable basis. In this connection, the law must play an essential role. We will only be able to adopt measures that will ultimately endure, if the rule of law, democracy and human rights are strengthened in this struggle. Law strengthens security. Security cannot be achieved in the absence of a strong legal framework. Today's efforts to reconcile law and security require, however, flexibility and creativity. This tome, published under the able leadership of Professor Giuseppe Nesi with the participation of eminent contributors, provides valuable guidance for those efforts.

Collaboration between academic circles and practitioners is essential to enrich this debate and to provide it with the profoundness and substance it requires. This is why I warmly welcome the publication of this book and would like to take this opportunity to express to all who helped in making it possible my congratulations and gratitude.

Professor Nicolas Michel
Under-Secretary-General for Legal Affairs
The Legal Counsel of the United Nations

Preface

The terrorist attacks of 2001 brought about a sea change in the way terrorism as a global phenomenon was perceived by international institutions, States, and individuals.

After 9/11 there was a multiplication of efforts to develop a coordinated response to terrorism at the global and regional levels. At the global level, the United Nations assumed a leading role in the fight against terrorism, which was perceived as ‘one of the most serious threats to international peace and security.’ In this context, it appeared natural that – while the General Assembly continued (amid many difficulties) its efforts to set up a normative framework that by the end of 1999 included 12 international conventions – the Security Council exercised its institutional competences in the maintenance of international peace and security.

After the attacks of 2001, the Security Council acted in a manner that seemed to be somehow ‘frenetic’ by comparison to its previous behaviour. In the first 55 years of its existence it had only adopted a handful of resolutions condemning terrorist acts. By contrast, in the four years after 9/11 it has adopted almost twenty resolutions on the topic: some of these resolutions were immediate reactions by the Security Council to specific terrorist attacks; others framed a coordinated international response to terrorism in a substantive way. In the fight against terrorism Security Council resolutions adopted under Chapter VII of the UN Charter placed legal obligations on Member States that went beyond the conclusion of an international convention.

Security Council resolutions also created mechanisms and subsidiary bodies such as the Counter-Terrorism Committee (CTC), whose task is to help States to adopt internal counter-terrorism measures as well as monitoring States’ conduct in the struggle against terrorism. Some States that had ignored the issue of terrorism in their internal legal order before 2001 were obliged to adopt measures to define it, at the same time creating the basis for concrete internal action against terrorism and the promotion of international cooperation in the prevention and suppression of terrorism.

The system created by the Security Council was recently improved when a series of resolutions were adopted, including Resolution 1535 (2004), which set up the Counter-Terrorism Executive Directorate to enhance the Counter-Terrorism Committee’s ability to monitor the implementation of Resolution 1373 (2001) and continue its capacity building. On the other hand, Resolution 1540 (2004) broadened the Council’s attention to the fact that terrorists acquire weapons of mass destruction. In all those resolutions the Security Council reiterated the crucial role played by international cooperation in the fight against terrorism.

Regional organizations put the struggle against terrorism at the very core of their activities. They adopted normative or quasi-normative instruments such as Conventions, Protocols, Plans of Action, often recalling relevant Security Council's counter-terrorism resolutions as the main 'trigger mechanisms' for their action. At the same time, various pragmatic initiatives were adopted at the regional level, mainly to better define, in that context, the crime of terrorism, the conditions for the exercise of criminal jurisdiction by States and regional judicial bodies, and the instruments of intergovernmental coordination and cooperation. Special emphasis was given, in some cases, to the need for respect for human rights in the fight against terrorism.

The global and the regional responses to international terrorism are examined in the present volume that collects the proceedings of a meeting held at the University of Trento on 27 and 28 May 2004. Scholars, diplomats, and representatives of international organizations met to analyse various legal aspects of the international cooperation in the fight against terrorism. They also examined whether counter-terrorism activities (or other types of activities presented as such) ended up affecting some fundamental principles of international law, such as the international protection of human rights or the use of force.

The different backgrounds of the contributors to the conference explains the twofold approach of this volume: (i) a more practical one, focused on the problems and policy options that States and practitioners face in their everyday in-the-field activity; and (ii) a more academic/theoretical one, aimed at studying the broader legal implications of the global counter-terrorism effort.

In the period following the Trento meeting, there have been further important developments in counter-terrorism, both within the UN and beyond:

- Resolution 1566 (2004) was adopted in October 2004. According to some practitioners, it contains a 'rough' definition of terrorist acts and establishes a new Working Group of the Security Council to, *inter alia*, review the Council's Chapter VII counter-terrorism measures;
- The UN reform process suddenly accelerated with the issuance of the High-level Panel's Report and the subsequent Secretary-General's Report *In Larger Freedom*. These crucial documents both make important recommendations in the field of international cooperation in the fight against terrorism. The Secretary-General further clarified his proposals for a global counter-terrorism strategy that became known as the '5 D strategy', presented in Madrid on 11 March 2005;
- In April 2005 the General Assembly, overcoming the difficulties that had blocked for seven years any development on the draft Convention on the Suppression of Acts of Nuclear Terrorism, decided that the Convention shall be open for signature at the UN Summit, in September 2005.

These developments and their possible legal and political consequences were analysed in a workshop at Columbia University in June 2005, whose proceedings will, it is hoped, be published in a separate volume.

This volume opens with an analysis of the role of the United Nations in the fight against terrorism that encompasses the activities of the various organs of the UN (in particular, the General Assembly and the Security Council) and the main legal questions that have arisen in that framework. The second part of the volume is devoted to the activity of regional organizations, both in their 'individuality' and in their connection with the United Nations' counter-terrorism efforts. The book then ends with the results of a panel discussion on whether, to what extent and how the fight against terrorism encroaches upon some fundamental international law rules affecting the use of force among States and international security. The appendix includes a list of relevant international documents of universal and regional character on counter-terrorism prepared by Marco Pertile, and an updated bibliography prepared by Valerie Santori.

This volume is one of the products of a research project started in January 2002 and co-financed by the Italian Ministry of University and Scientific Research and the University of Trento.

The most recent developments indicate that international cooperation will remain at the core of the struggle against terrorism in the years to come. This volume aims to provide a point of reference on the achievements made so far in this field.

Giuseppe Nesi
New York, 17 July 2005

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From the scholarly point of view I would like to thank Pietro Gargiulo, Marco Pertile and Valeria Santori. All of them contributed actively to organizing the meeting and were extremely helpful with their suggestions and support. The distance between Trento and New York was bridged thanks to the extraordinary efforts of the personnel of the Department of Legal Sciences, Ornella Bernardi, Carla Boninsegna, Valentina Lucatti and, last but not least, Stefano Talassi. To all of them my warmest thanks.

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PART I

The United Nations and the Fight Against International Terrorism

Chapter 1

The UN Conventions on the Prevention and Suppression of International Terrorism

ANDREA GIOIA¹

The 1937 Geneva Convention on the Prevention and Punishment of Terrorism

The first attempt to articulate a definition of terrorist acts for the purposes of international criminal law is represented by the Geneva Convention on the Prevention and Punishment of Terrorism,² which was adopted, on 16 November 1937, on the initiative of the League of Nations (LN), the predecessor of the United Nations, following the assassination in Marseilles, on 9 October 1934, of the King of Yugoslavia and of the French Minister of Foreign Affairs by a Croatian exile. The 1937 Convention was intended, *inter alia*, to oblige parties thereto to establish as offences in their national criminal legislation certain specific acts listed in Article 2 thereof, as well as to prosecute, or extradite, the alleged offenders if certain conditions were met.³ Without going into unnecessary details, it may be interesting to recall that the acts listed in Article 2 of the convention were: (a) intentional acts directed against the life, bodily integrity, health or freedom of Heads of State, or members of their families, or other persons exercising governmental functions; (b) intentional acts resulting in the destruction of, or in damage to, foreign state property; (c) intentional acts of a nature to endanger human life through the creation of a collective danger; (d) attempts to perform any such acts; (e) the manufacture, acquisition, detention or transfer of arms, ammunition, explosive products or noxious substances with a view to committing in any country any such acts.

However, the acts in question were only covered by the convention if they were directed against a party thereto and, more crucially, if they constituted 'acts of terrorism'. Article 1, paragraph 2, of the convention gave a general definition of 'acts

1 University of Modena and Reggio Emilia.

2 LN Doc. C.546.M.383.1937.V; *International Legislation, A Collection of the Texts of Multipartite International Instruments of General Interest*, Edited by Manley O. Hudson, 9 volumes. Originally Published: Washington; Carnegie Endowment for International Peace; 1931-1949, Reprinted: Buffalo; William S. Hein & Co., Inc.; 2000.

3 See: Articles 8-10.

of terrorism' as 'criminal acts directed against a State and *intended or calculated* to create a state of terror in the minds of particular persons, or groups of persons, or the general public' (emphasis added). Thus, at least the English text of the convention appeared to make it clear that what turned the acts therein listed into terrorist acts was the existence of a special intent on the part of the offender; in other words, that of creating a state of terror.

On the other hand, if the French text of the convention is examined, the picture appears to change: acts of terrorism are therein defined as '*faits criminels dirigés contre un Etat et dont le but ou la nature est de provoquer la terreur chez des personnalités déterminées, des groupes de personnes ou dans le public*' (emphasis added). It may well be that the drafters' intention was, indeed, to signify that, whereas some acts can only be regarded as terrorist acts if there is a specific intent on the part of the offender, others can in themselves be so regarded, irrespective of such intent.⁴ The fact that this is, in principle, a reasonable assumption has, indeed, been confirmed by later practice. However, there is little guidance in the 1937 Convention as to which of the offences specifically covered in Article 2 are in themselves of a terrorist nature.

The conventions adopted under the auspices of UN specialized agencies and other world organizations

The 1937 Convention never entered into force, partly as a result of the outbreak, only two years after its adoption, of the Second World War.⁵ Although it undoubtedly served as a model for later conventions dealing with the prevention and suppression of terrorism, most of these conventions were adopted on the basis of a different approach; this so-called 'sectoral' approach aimed at identifying offences which were seen as belonging to the activities of terrorists and working out treaties in order to deal with specific categories thereof.

This step by step approach has been followed, in the first place, by the UN specialized agencies. The way was opened by the International Civil Aviation Organization (ICAO), under whose auspices a number of conventions have been adopted dealing with acts directed at, or undermining, the safety of civil aviation, a phenomenon which had not been envisaged by the drafters of the 1937 Convention and which became of special concern to the international community as from the

4 This would seem to be the interpretation given by Y. Sandoz, 'Lutte contre le terrorisme et droit international: risques et opportunités', *Swiss Review of International and European Law*, vol. 12, 2002, pp. 319 ff., at p. 325.

5 In addition, there appears to be some indication that the definition of terrorism therein contained was considered as too wide by some states: see, for example, T.M. Franck, B.B. Lockwood, 'Preliminary Thoughts Towards an International Convention on Terrorism', *American Journal of International Law*, vol. 68, 1974, pp. 69 ff., at p. 70.