

The Emergence of Terrorism as a Distinct Category of International Law

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A considerable body of international norms, institutions, and procedures specifically designed to deal with terrorism has emerged over the last few years. This body of international law increasingly bears the characteristics of a “special regime.” At the same time, legal scholars have started to treat terrorism as a “branch” of international law in its own right, both in terms of research and teaching. This article argues that the emergence of a distinct category of terrorism law is due to reasons that are very different from those that account for the general trend towards the fragmentation and compartmentalization of international law. It is primarily the result of political pressure by certain powerful states to establish, at the international level, a separate legal system for terrorism that mirrors their own domestic special regimes, so as to give expression to the “international community’s” sense of outrage at terrorist acts, stigmatize the perpetrators, and reassure the public. As these objectives can only be achieved if those who fall under the anti-terrorism regime are singled out for particularly harsh treatment, the special treatment model inevitably undermines the fundamental principle that all human beings deserve equal protection of the law.

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[T]errorism is not a discrete topic of international law with its own substantive legal norms.

Rosalyn Higgins, 1997¹

There is no category of the “law of terrorism” and the problems must be characterized in accordance with the applicable sectors of public international law: jurisdiction, international criminal justice, State responsibility, and so forth.

Ian Brownlie, 2003²

INTRODUCTION

In recent years, and especially since the terrorist attacks of September 11, 2001, a substantial set of international norms, procedures, and institutions relating to terrorism has emerged. Arguably, this body of international law on terrorism, which continues to grow at a frantic pace, increasingly bears the characteristics of a “special regime,” *i.e.*, an interrelated cluster of primary and secondary rules on a limited problem. At the same time, legal scholars have started to treat the subject of terrorism as a “branch” of international law in its own right. These developments are eroding Rosalyn Higgins’ and Ian Brownlie’s claim that terrorism is not a discrete “topic” or “category” of international law, at least if these terms are understood, as they generally are,³ as umbrella terms encompassing the notions of legal “regime” and academic “branch.” Terrorism law, it seems, is going through the same process as human rights law, trade law, space law, or environmental law in earlier years.⁴

1. Rosalyn Higgins, *The General International Law of Terrorism*, in *TERRORISM AND INTERNATIONAL LAW* 13, 13–14 (Rosalyn Higgins & Maurice Flory eds., 1997).

2. IAN BROWNLIE, *PRINCIPLES OF PUBLIC INTERNATIONAL LAW* 745 (7th ed. 2008).

3. *See, e.g.*, Robert Jennings, *International Law*, in 7 *ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW* 278, 288 ff (1984).

4. *See generally, e.g.*, Brett Frischmann, *A Dynamic Institutional Theory of International Law*, 51 *BUFF. L. REV.* 679 (2003) (discussing trade law and environmental law regimes); Jo M. Pasqualucci,

However, it is not the primary purpose of this article to give a definitive answer to the rather academic question of whether terrorism law has now indeed turned into a separate category of international law. I am more interested in the reasons for, and the implications of, the emergence of terrorism as an increasingly significant and distinct subject area of international law. Considering that “la question de la fragmentation du droit international constitue par excellence le débat doctrinal à l’ère de la globalisation,”⁵ relatively little attention has been paid to the fact that the materialization of new sub-systems of international law is not always triggered by the same factors and, accordingly, may have widely divergent implications. There are, in other words, very different types of fragmentation. The reasons why a category of terrorism law is emerging are completely different from those behind such categories as trade law or space law, and this development therefore raises very peculiar concerns.

Part I is an overview of the rapidly growing body of international law specifically designed to deal with terrorism and will highlight some features that suggest that this body of law now constitutes a special regime. Part II will demonstrate that since September 11, legal academia has not only given unprecedented attention to the subject of terrorism but has also started to treat it as a separate branch of international law. Part III will explore the reasons for the emergence of terrorism as a separate category of international law. Finally, Part IV will briefly sketch why this development matters: what is at stake in the debate about the distinctness of terrorism?

I. THE GROWING BODY OF LAW ON TERRORISM: A SPECIAL REGIME?

The phenomenon of the fragmentation of international law refers to the increased emergence in recent years of special regimes or sub-systems within the international legal system. International relations scholars define regimes as “sets of implicit or explicit principles, norms, rules, and decision-making procedures around which actors’ expectations converge in a given area of international relations.”⁶ This notion of regime can be combined with H.L.A. Hart’s definition of a legal system as a union of primary and secondary rules⁷ to arrive at a definition of regime that can be usefully applied in the international law context. Accordingly, the chairman of the International Law Commission’s (“ILC”) Study Group on Fragmentation of International Law, Martti Koskenniemi, has defined the term regime as follows:

[L]egal rules appear in clusters that contain not only rules laying down substantive rights, duties and powers (primary rules) but also rules that

Advisory Practice of the Inter-American Court of Human Rights, 38 STAN. J. INT’L L. 241 (2002) (discussing the emergence of international human rights law as a separate branch of public international law).

5. Pierre-Marie Dupuy, *Un Débat Doctrinal à l’Ère de la Globalisation: Sur la Fragmentation du Droit International*, 1 EUR. J. LEGAL STUD. 1, 1 (2007) (“The question of the fragmentation of international law constitutes the leading doctrinal debate in the era of globalization.”).

6. Stephen D. Krasner, *Structural Causes and Regime Consequences: Regimes as Intervening Variables*, in INTERNATIONAL REGIMES 1, 2 (Stephen D. Krasner ed., 1983). See also ANDREAS HASENCLEVER, PETER MAYER & VOLKER RITTBERGER, *THEORIES OF INTERNATIONAL REGIMES* 8–22 (1997) (discussing conceptual issues inherent in defining international regimes).

7. H.L.A. HART, *THE CONCEPT OF LAW* 79–99 (2d ed. 1994).

have to do with the administration of primary rules (secondary rules). Such clusters[,] freely following from international relations, [may be] termed *regimes*. A regime is a union of rules laying down particular rights, duties and powers and rules having to do with the administration of such rules, including in particular rules for reacting to breaches.⁸

The final report of the ILC Study Group similarly defines a (special) regime as “any interrelated cluster (set, regime, subsystem) of rules on a limited problem together with the rules for the creation, interpretation, application, modification, or termination—in a word, administration—of those rules.”⁹ Such special regimes may enjoy varying degrees of autonomy from general international law, and regimes with a high degree of autonomy have sometimes been referred to as “self-contained regimes.”¹⁰ The Study Group report, however, rejects this term as “a misnomer,” since “[n]o legal regime is isolated from general international law,” and it is “doubtful whether such isolation is even possible.”¹¹ Instead, the report suggests the general use of the term “special regime.”¹²

Can the increasingly significant cluster of international norms and procedures pertaining to terrorism be described as a special regime within the terms set out above? To answer this question I first examine the growing body of primary rules, rules creating a set of duties, rights, and powers, relating to terrorism. Next, I examine the corresponding cluster of secondary rules, rules that have to do with the administration and enforcement of the primary rules on terrorism.

A. *Primary Rules*

The vast majority of states have committed themselves to take a number of measures specifically designed to counter terrorism. Starting with the 1963 Convention on Offences and Certain Other Acts Committed on Board Aircraft, thirteen widely ratified international treaties¹³ have been concluded to address specific manifestations of terrorism, such as the hijacking of planes or hostage taking.¹⁴ This specialized body of primary rules on terrorism obliges states parties to

8. MARTTI KOSKENNIEMI, INT'L L. COMMISSION, STUDY GROUP ON FRAGMENTATION, FRAGMENTATION OF INTERNATIONAL LAW 8-9 (2003), available at http://untreaty.un.org/ilc/sessions/55/fragmentation_outline.pdf.

9. United Nations Int'l. L. Comm'n, *Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law: Report of the Study Group of the International Law Commission*, para. 152, U.N. Doc. A/CN.4/L.682 (Apr. 13, 2006) [hereinafter *Report on Fragmentation*].

10. United States Diplomatic and Consular Staff in Tehran (U.S. v. Iran), 1980 I.C.J. 3, 40 (May 24). See also Bruno Simma & Dirk Pulkowski, *Of Planets and the Universe: Self-contained Regimes in International Law*, 17 EUR. J. INT'L L. 483 (2006); Bruno Simma, *Self-Contained Regimes*, 16 NETH. Y.B. INT'L L. 111, 115 (1985).

11. *Report on Fragmentation*, supra note 9, para. 193. See also *id.* para. 152 (drawing conclusions of the treatment of “self-contained” regimes by the International Law Commission in the context of State responsibility).

12. *Id.* para. 152.

13. BEN SAUL, *DEFINING TERRORISM IN INTERNATIONAL LAW* 134 (2006).

14. Convention on the Marking of Plastic Explosives for the Purposes of Detection, Mar. 1, 1991, 2122 U.N.T.S. 359; Protocol for the Suppression of Unlawful Acts of Violence at Airports Serving International Civil Aviation, Supplementary to the Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation, Feb. 24, 1988, 1589 U.N.T.S. 474; Convention for the Suppression of Unlawful Acts

prohibit in domestic law the specified acts and to either extradite or prosecute (*aut dedere aut judicare*) all alleged offenders.¹⁵

In 1972 the United Nations General Assembly, which in previous years had referred to terrorist acts only incidentally,¹⁶ started to address terrorism as a discrete subject.¹⁷ It has since adopted several resolutions that call on states to combat terrorism,¹⁸ including the 1994 Declaration on Measures to Eliminate International Terrorism, which has been reiterated in many later resolutions.¹⁹ Furthermore, in 1996 the Assembly set up a committee to develop “a comprehensive legal framework of conventions dealing with international terrorism.”²⁰ This Ad Hoc Committee on Terrorism has elaborated a draft Comprehensive Convention on International Terrorism, intending to supplement the existing anti-terrorism conventions.²¹ In 2006, the Assembly unanimously adopted the U.N. Global Counter-Terrorism Strategy, in which the member states resolved to undertake a number of concrete steps to prevent and combat terrorism.²²

Similarly, the U.N. Security Council, which had originally limited itself to addressing particular terrorist acts, has, in recent years and especially since September 11, started to impose measures against terrorism as such. For instance, the Council has called on states to work together to prevent and suppress all terrorist

against the Safety of Maritime Navigation, Mar. 10, 1988, 1678 U.N.T.S. 221; Protocol for the Suppression of Unlawful Acts Against the Safety of Fixed Platforms Located on the Continental Shelf, Mar. 10, 1988, 1678 U.N.T.S. 304; Convention on the Physical Protection of Nuclear Material, Mar. 3, 1980, 1456 U.N.T.S. 124; International Convention against the Taking of Hostages, Dec. 17, 1979, 1316 U.N.T.S. 205; Convention on the Prevention and Punishment of Crimes Against Internationally Protected Persons, Including Diplomatic Agents, Dec. 14, 1973, 1035 U.N.T.S. 167; Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation, Sept. 23, 1971, 974 U.N.T.S. 177; Convention for the Suppression of Unlawful Seizure of Aircraft, Dec. 16, 1970, 860 U.N.T.S. 105; Convention on Offences and Certain Other Acts Committed on Board Aircraft, Sept. 14, 1963, 704 U.N.T.S. 219; International Convention for the Suppression of Acts of Nuclear Terrorism, G.A. Res. 59/290, U.N. Doc. A/RES/59/290 (Apr. 13, 2005); International Convention for the Suppression of the Financing of Terrorism, G.A. Res. 54/109, U.N. Doc. A/RES/54/109 (Dec. 9, 1999); International Convention for the Suppression of Terrorist Bombings, G.A. Res. 52/164, U.N. Doc. A/RES/52/653 (Dec. 15, 1997).

15. *Id.*

16. See Declaration on Principles of International Law Concerning Friendly Relations and Co-operation Among States in Accordance with the Charter of the United Nations, annexed to G.A. Res. 2625 (XXV), U.N. Doc. A/1883 (Oct. 24, 1970) (stating every State’s duty to refrain from organizing, participating, or acquiescing in any acts of civil strife or terrorism in another State); Declaration on the Inadmissibility of Intervention in the Domestic Affairs of States and the Protection of their Independence and Sovereignty, annexed to G.A. Res. 2131 (XX), U.N. Doc. A/1408 (Dec. 21, 1965) (stating that no State shall incite terrorist activities for the purpose of regime change).

17. See G.A. Res. 3034 (XXVII), U.N. Doc. A/2114 (Dec. 18, 1972). In this resolution, adopted shortly after the attack at the Munich Olympics, the General Assembly, “[d]eeply perturbed over acts of international terrorism which are occurring with increasing frequency,” invited states to become parties to the existing anti-terrorism conventions and to “take all appropriate measures at the national level with a view to the speedy and final elimination of the problem.”

18. See SAUL, *supra* note 13, at 198–213 (listing various U.N. resolutions adopted since the 1960’s).

19. Declaration on Measures to Eliminate International Terrorism, G.A. Res. 49/60, UN Doc. A/RES/49/60 (Dec. 9, 1994).

20. G.A. Res. 51/210, para. 9, U.N. Doc. A/RES/51/210 (Dec. 17, 1996).

21. See Draft Convention on International Terrorism: Working Document Submitted by India, UN Doc. A/C6/55/1 (Aug. 28, 2000) (containing original text of the draft convention); G. A., Report of the Ad Hoc Committee Established by G.A. Resolution 51/210: Sixth Session (Jan. 28–Feb. 1, 2002), UN Doc. A/57/37. The convention has not yet progressed further than the drafting stage.

22. G.A. Res. 60/288, U.N. Doc. A/RES/60/288 (Sept. 8, 2006).

acts,²³ to become parties to the relevant international conventions relating to terrorism,²⁴ and to adopt the draft Comprehensive Convention on International Terrorism.²⁵ Furthermore, deviating from its normal practice of taking action only against state entities, it has established a unique system of sanctions against individuals and groups allegedly involved in international terrorism. In a string of resolutions all adopted under Chapter VII of the U.N. Charter and thus legally binding, the Security Council has required states to take measures against individuals and entities associated with Al Qaeda, Osama bin Laden, and the Taliban.²⁶ In particular, states must freeze funds and other financial assets or economic resources of designated individuals and entities; impose travel bans on them; and prevent the supply, sale, and transfer of arms and related materials to them.²⁷

The most significant Security Council measure adopted against terrorism is Resolution 1373 of September 28, 2001.²⁸ This resolution, also adopted under Chapter VII of the U.N. Charter, requires member states to create a legal and institutional framework to prevent and suppress the financing, preparation, and commission of terrorist acts and to cooperate with other states in this effort. In particular, states must (1) ensure that “terrorist acts are established as serious criminal offences in domestic laws and regulations and that the punishment duly reflects the seriousness of such terrorist acts;”²⁹ (2) put in place effective border controls and ensure that asylum-seekers who are involved in terrorism are not granted refugee status;³⁰ and (3) deny financial support and safe haven to terrorists.³¹ Resolution 1373 has been described as “one of the most comprehensive and far-reaching resolutions adopted in the history of the Security Council.”³² It is groundbreaking in that it was adopted not in response to a specific conflict or to a situation in a particular country but in response to the abstract phenomenon of international terrorism.³³ Accordingly, it imposes on all states a set of detailed obligations, to combat this phenomenon, a body of rules with general application. In

23. *E.g.*, S.C. Res. 1566, paras. 2–3, U.N. Doc. S/RES/1566 (Oct. 8, 2004); S.C. Res. 1368, U.N. Doc. S/RES/1368 (Sept. 12, 2001); S.C. Res. 1269, U.N. Doc. S/RES/1269 (Oct. 15, 1999).

24. S.C. Res. 1566, para. 4, U.N. Doc. S/RES/1566 (Oct. 8, 2004); S.C. Res. 1373, para. 3(d), U.N. Doc. S/RES/1373 (Sept. 28, 2001).

25. S.C. Res. 1566, para. 5, U.N. Doc. S/RES/1566 (Oct. 8, 2004).

26. S.C. Res. 1735, U.N. Doc. S/RES/1735 (Dec. 22, 2006); S.C. Res. 1617, U.N. Doc. S/RES/1617 (Jul. 29, 2005); S.C. Res. 1526, U.N. Doc. S/RES/1526 (Jan. 20, 2004); S.C. Res. 1455, U.N. Doc. S/RES/1455 (Jan. 17, 2003); S.C. Res. 1390, U.N. Doc. S/RES/1390 (Jan. 28, 2002); S.C. Res. 1333, U.N. Doc. S/RES/1333 (Dec. 19, 2000); S.C. Res. 1267, U.N. Doc. S/RES/1267 (Oct. 15, 1999).

27. S.C. Res. 1333, U.N. Doc. S/RES/1333 (Dec. 19, 2000); S.C. Res. 1267, U.N. Doc. S/RES/1267 (Oct. 15, 1999).

28. S.C. Res. 1373, U.N. Doc. S/RES/1373 (Sept. 28, 2001).

29. *Id.* para. 2(e).

30. *Id.* paras. 2(g), 3(f).

31. *Id.* paras. 2(c), 2(d).

32. Curtis A. Ward, *Building Capacity to Combat International Terrorism: The Role of the United Nations Security Council*, 8 J. CONFLICT & SEC. L. 289, 298 (2003).

33. Preambulary paragraph three of S.C. Res. 1373 declares that “any act of international terrorism” constitutes a threat to peace and security. On this point, see Jurij Daniel Aston, *Die Bekämpfung abstrakter Gefahren für den Weltfrieden durch legislative Massnahmen des Sicherheitsrats—Resolution 1373 (2001) im Kontext*, 62 ZEITSCHRIFT FÜR AUSLÄNDISCHES ÖFFENTLICHES RECHT UND VÖLKERRECHT 257 (2002); Jane E. Stromseth, *The Security Council’s Counter-Terrorism Role: Continuity and Innovation*, 97 AM. SOC’Y INT’L L. PROC. 41 (2003). (stating that the resolution was “in response to the more global threat to peace and security posed by terrorism.”).

this sense, it can be described as legislative in nature.³⁴ The list of measures that states must adopt against terrorism was further expanded in 2004 and 2005 by Resolution 1540, which obliges states to prevent non-state actors, in particular terrorist groups, from acquiring weapons of mass destruction,³⁵ and by Resolution 1624, which calls on states to prohibit by law incitement to commit terrorist acts.³⁶ Thus, in the anti-terrorism field the Security Council has assumed a comprehensive law-making function.³⁷

A substantial body of primary rules on terrorism exists not only at the U.N. but also at the regional level. In most regions legislative frameworks to combat terrorism were already in place before September 11.³⁸ After that date, many regional organizations adopted new declarations, plans of action, and, in some instances, treaties. The European Union (EU) adopted a range of measures designed to enhance its anti-terrorism capabilities after September 11,³⁹ the most important of which is the Framework Decision on Combating Terrorism.⁴⁰ This Framework Decision lists a number of acts that member states must deem “terrorist offences” in their jurisdictions, and it establishes minimum sentences for these offences.⁴¹ In this way, it requires member states to harmonize their domestic criminal laws in relation to the definition and punishment of terrorist offenses. The Inter-American Convention Against Terrorism, which was passed by the Organization of American States (OAS) in 2002 and entered into force in 2003, was the first international treaty on this subject after the September 11 attacks. It requires states parties to take measures to prevent the financing of terrorism, enhance cooperation in anti-terrorism law enforcement, and afford one another greater mutual legal assistance in terrorism matters.⁴² In 2003, the Council of Europe

34. Matthew Happold, *Security Council Resolution 1373 and the Constitution of the United Nations*, 16 LEIDEN J. INT'L L. 593 (2003); Eric Rosand, *The Security Council as “Global Legislator”: Ultra Vires or Ultra Innovative?*, 28 FORDHAM INT'L L.J. 542 (2005); Paul C. Szasz, *The Security Council Starts Legislating*, 96 AM. J. INT'L L. 901 (2002); Stefan Talmon, *The Security Council as World Legislature*, 99 AM. J. INT'L L. 175 (2005).

35. S.C. Res. 1540, U.N. Doc. S/RES/1540 (Apr. 28, 2004).

36. S.C. Res. 1624, para. 1(c), U.N. Doc. S/RES/1624 (Sept. 14, 2005).

37. See Andrea Bianchi, *Assessing the Effectiveness of the UN Security Council's Anti-terrorism Measures: The Quest for Legitimacy and Cohesion*, 17 EUR. J. INT'L L. 881 (2006) (stating that no convincing argument against the Security Council's law-making powers has been made).

38. The regional treaties concluded before that date include the following: OAU Convention on the Prevention and Combating of Terrorism, July 14, 1999; Convention of the Organization of the Islamic Conference on Combating International Terrorism, July 1, 1999; Treaty on Cooperation among States Members of the Commonwealth of Independent States in Combating Terrorism, June 4, 1999; Arab Convention for the Suppression of Terrorism, Apr. 22, 1998; SAARC Regional Convention on Suppression of Terrorism, Nov. 4, 1987; European Convention on the Suppression of Terrorism, Jan. 27, 1977, EUROP. T.S. No. 090; OAS Convention to Prevent and Punish Acts of Terrorism Taking the Form of Crimes against Persons and Related Extortion that are of International Significance, Feb. 2, 1971, 27 U.S.T. 3949, 1438 U.N.T.S. 194.

39. For overviews, see Jörg Monar, *Die EU und die Herausforderung des internationalen Terrorismus: Handlungsgrundlagen, Fortschritte und Defizite*, in HERAUSFORDERUNG TERRORISMUS: DIE ZUKUNFT DER SICHERHEIT 136 (Werner Weidenfeld ed., 2004); Jörg Monar, *Common Threat and Common Response? The European Union's Counter-Terrorism Strategy and its Problems*, 42 GOV'T & OPPOSITION 292 (2007); Steve Peers, *EU Responses to Terrorism*, 52 INT'L & COMP. L.Q. 227 (2003).

40. Council Decision 2002/475, 2002 O.J. (L164) (EU).

41. *Id.* arts. 1(1), 4.

42. Inter-American Convention against Terrorism arts. 4, 8, 9, June 3, 2002, 42 I.L.M. 19.

adopted a protocol that amended the European Convention on the Suppression of Terrorism by extending the list of offenses that are not to be regarded as political offenses preventing extradition.⁴³ This was followed, in 2005, by a convention designed to contribute to the prevention of terrorism.⁴⁴ Regional instruments have also been passed by the African Union (AU),⁴⁵ the South Asian Association for Regional Cooperation (SAARC),⁴⁶ the Association of Southeast Asian Nations (ASEAN),⁴⁷ the Organization of the Islamic Conference (OIC),⁴⁸ the Organisation for Security and Cooperation in Europe (OSCE),⁴⁹ and the Commonwealth of Nations.⁵⁰ These instruments, mainly intended to enhance cooperation in anti-terrorism matters, contain various specific measures that member states must adopt to combat terrorism.

Whereas these primary norms have been specifically laid down in anti-terrorism treaties and instruments, other terrorism-related aspects of international law appear to be in the process of reshaping, with the content and scope of the respective norms still unclear and contentious. For example, it has been claimed that the terrorist attacks of September 11 and the reaction they provoked have resulted in a change in the law on the use of force. Some states and authors argue that the law on self-defense has been, or needs to be, adapted to the specific capabilities and objectives of today's terrorists. They argue in particular that the right of self-defense against terrorism now covers the use of force "to preempt emerging threats."⁵¹ Similarly, as far as the *jus in bello* is concerned, some have claimed that the fight against terrorism

43. Protocol Amending the European Convention on the Suppression of Terrorism, May 15, 2003, EUROP. T.S. NO. 190.

44. Convention on the Prevention of Terrorism, May 16, 2005, EUROP. T.S. NO. 196.

45. Protocol to the OAU Convention on the Prevention and Combating of Terrorism, July 8, 2004, available at <http://www.africa-union.org/root/au/Documents/Treaties/treaties.htm>; African Union [AU], *Plan of Action of the African Union High-Level Inter-Governmental Meeting on the Prevention and Combating of Terrorism in Africa*, AU Doc. Mtg/HLIG/Conv.Terror/Plan.(I) (Sept. 14, 2002).

46. Additional Protocol to the SAARC Regional Convention on Suppression of Terrorism, Jan. 6, 2004, available at <http://www.saarc-sec.org/data/summit12/additionalprotocolterrorism.pdf>.

47. ASEAN Convention on Counter-Terrorism, Jan. 13, 2007, available at <http://www.aseansec.org/19250.htm>; Ass'n of Southeast Asian Nations [ASEAN], *ASEAN Declaration on Joint Action to Counter Terrorism*, (Nov. 5, 2001), available at <http://www.aseansec.org/5620.htm>.

48. Org. of the Islamic Conference [OIC], *Kuala Lumpur Declaration on International Terrorism* (Apr. 3, 2002), available at http://www.oic-oci.org/english/conf/fm/11_extraordinary/declaration.htm.

49. Org. for Security and Co-Operation in Eur. [OSCE], *Decision No. 1 on Combating Terrorism*, OSCE Doc. MC(9).DEC/1 (Dec. 4, 2001), available at <http://www.osce.org/item/2229.html>; OSCE, *Bucharest Plan of Action for Combating Terrorism*, OSCE Doc. MC(9).DEC/1 Annex (Dec. 4, 2001) available at <http://www.osce.org/item/851.html>; *OSCE Charter on Preventing and Combating Terrorism*, OSCE Doc. MC(10).JOUR/2 (Dec. 7, 2002), available at <http://www.osce.org/item/1654.html>.

50. COMMONWEALTH OF NATIONS, REPORT OF THE COMMONWEALTH COMMITTEE ON TERRORISM (CCT): COMMONWEALTH PLAN OF ACTION (2001), available at http://www.thecommonwealth.org/document/181889/34293/35144/35145/report_of_the_commonwealth_committee_on_terrorism.htm.

51. THE NAT'L SEC. COUNCIL, THE NATIONAL SECURITY STRATEGY OF THE UNITED STATES OF AMERICA 6, 15 (2002). See also Ruth Wedgwood, *The Fall of Saddam Hussein: Security Council Mandates and Preemptive Self-Defense*, 97 AM. J. INT'L L. 576, 582-83 (2003) (arguing that traditional doctrines are no longer reliable and "one must consider acting against terrorist capability before it is employed."); John Yoo, *Using Force*, 71 U. CHI. L. REV. 729, 729-30 (2004) (contending that the "consensus academic view on self-defense . . . which was largely borrowed from the criminal law, makes little sense . . . [in] the international context."). For a critical assessment, see Michael Bothe, *Terrorism and the Legality of Pre-Emptive Force*, 14 EUR. J. INT'L L. 227 (2003) (claiming that the National Security Strategy "constitute[s] an unacceptable expansion of the right of anticipatory self-defence.").

is “a new kind of war”⁵² “not envisaged when the Geneva Convention was signed in 1949”⁵³ and requires “a new approach . . . towards captured terrorists,” which renders obsolete some of the general rules of international humanitarian law.⁵⁴ Finally, some authors have called for the creation of a discrete international crime of terrorism,⁵⁵ while others argue that such a prohibition of terrorism as a distinct category of international crimes has already become part of customary international law.⁵⁶

B. Secondary Rules

The primary rules on terrorism described in the previous section are supported by a special set of secondary rules, rules that have to do with the administration of the primary law. In particular, these rules provide for the powers of specialized bodies to create, modify, apply, and enforce the primary rules.

At the U.N. level, the General Assembly has established the Ad Hoc Committee on Terrorism to develop new primary norms on terrorism.⁵⁷ The Security Council, for its part, has created a host of subsidiary bodies to monitor and enforce states’ compliance with its different resolutions on terrorism. These committees coordinate their work and cooperate closely.⁵⁸ In 1999, Resolution 1267 established a committee known as “The Al-Qaida and Taliban Sanctions Committee,” which maintains the consolidated list of individuals and entities associated with Al Qaeda, Osama bin Laden, and the Taliban, and oversees the implementation of sanction measures against them.⁵⁹ U.N. member states are obliged to inform the committee on the actions taken to implement the sanctions regime.⁶⁰ The Analytical Support and Sanctions Monitoring Team, which is composed of independent experts appointed by the Secretary-General, supports the committee.⁶¹

The most important special enforcement mechanism is the Counter-Terrorism Committee (CTC). Established by the Security Council shortly after the events of September 11, it is charged with monitoring implementation of the detailed and far-

52. Memorandum from Alberto Gonzales, White House Counsel, to George W. Bush, President of the U.S., Decision Re Application of the Geneva Convention on Prisoners of War to the Conflict With Al Qaeda and the Taliban (Jan. 25, 2002), *available at* http://www.washingtonpost.com/wp-srv/politics/documents/cheney/gonzales_addington_memo_jan252001.pdf [hereinafter Jan. 2002 Gonzales Memorandum].

53. Ari Fleischer, White House Press Secretary, Statement by the Press Secretary on the Geneva Convention (May 7, 2003), *available at* <http://www.whitehouse.gov/news/releases/2003/05/20030507-18.html>.

54. Jan. 2002 Gonzales Memorandum, *supra* note 52.

55. SAUL, *supra* note 13, at 27.

56. Antonio Cassese, *Terrorism as an International Crime*, in ENFORCING INTERNATIONAL LAW NORMS AGAINST TERRORISM 213, 213–225 (Andrea Bianchi ed., 2004).

57. G.A. Res. 51/210, *supra* note 20, para. 9.

58. *See, e.g.*, S.C. Res. 1617, paras. 12–13, U.N. Doc. S/RES/1617 (July 29, 2005).

59. S.C. Res. 1333, para. 16, U.N. Doc. S/RES/1333 (Dec. 19, 2000); S.C. Res. 1267, para. 6, U.N. Doc. S/RES/1267 (Oct. 15, 1999).

60. S.C. Res. 1617, paras. 10–12, U.N. Doc. S/RES/1617 (July 19, 2005); S.C. Res. 1455, paras. 5–6, U.N. Doc. S/RES/1455 (Jan. 17, 2003).

61. S.C. Res. 1617, *supra* note 58, paras. 19–20; S.C. Res. 1363, paras. 4–5, U.N. Doc. S/RES/1363 (July 30, 2001).

reaching obligations of Resolution 1373.⁶² Based on states' reports on the steps taken to comply with the requirements of the resolution, the CTC assesses their compliance and may ask them to submit further information.⁶³ In 2004, the Security Council also set up the Counter-Terrorism Committee Executive Directorate (CTED), a body of experts assisting the CTC.⁶⁴ The CTED carries out visits to states, particularly to monitor the adoption by states of an adequate executive machinery to implement their anti-terrorism legislation.⁶⁵

The U.N. established two additional bodies related to counter-terrorism in 2004. The 1540 Committee monitors member states' compliance with Resolution 1540, which aims to prevent the proliferation of weapons of mass destruction to non-state actors, including terrorist groups.⁶⁶ States are required to report on the steps they have taken to implement the resolution, an obligation that the Security Council reinforced in Resolution 1673.⁶⁷ In Resolution 1566, the Security Council established a working group to recommend "practical measures to be imposed upon individuals, groups or entities involved in or associated with terrorist activities, other than those designated by the Al-Qaida [and] Taliban Sanctions Committee."⁶⁸

Special procedures relating to the creation and enforcement of the primary law on terrorism also exist at the regional level. For example, the OAS has established the Inter-American Committee Against Terrorism (CICTE), which coordinates regional efforts by enhancing exchange of information, assisting states in drafting counter-terrorism legislation, and improving border cooperation and travel document security measures.⁶⁹ In 2001, the Council of Europe set up the Multidisciplinary Group on International Action against Terrorism (GMT), a governmental committee of experts tasked with identifying priorities of action by the Council of Europe and reviewing its international instruments.⁷⁰ The GMT prepared the Protocol Amending the European Convention on the Suppression of Terrorism.⁷¹ In 2003, the Council of Europe created a Committee of Experts on Terrorism (CODEXTER).⁷² This body, responsible for coordinating the Council's

62. S.C. Res. 1373, para. 6, U.N. Doc. S/RES/1373 (Sept. 28, 2001).

63. United Nations Econ. & Soc. Council [ECOSOC], United Nations High Comm'r for Human Rights, Report of the United Nations High Commissioner for Human Rights and Follow-up to the World Conference on Human Rights, paras. 6-9 annex, U.N. Doc. E/CN.4/2002/18 (Feb. 27, 2002), available at <http://daccess-ods.un.org/access.nsf/Get?Open&DS=E/CN.4/2002/18&Lang=E> (Proposals for "Further Guidance" for the submission of reports pursuant to Paragraph 6 of Security Council Resolution 1373 (2001)).

64. S.C. Res. 1535, paras. 2-3, U.N. Doc. S/RES/1535 (Mar. 26, 2004).

65. See Counter Terrorism Comm. [CTC], *Framework Document for CTC Visits to States in Order to Enhance the Monitoring of the Implementation of Resolution 1373 (2001)*, paras. II(1)-(4) (Mar. 9, 2005), available at <http://www.un.org/sc/ctc/documents/frameworkdocument.htm>. (defining the four main objectives of CTED State visits as: the analysis of States' implementation of Resolution 1373 obligations, analysis of the capacity to implement 1373 obligations, identifying areas of needed technical assistance, and the recommendation of steps to be taken for full implementation of Resolution 1373).

66. S.C. Res. 1540, para. 1, U.N. Doc. S/RES/1540 (Apr. 28, 2004).

67. S.C. Res. 1673, para. 2, U.N. Doc. S/RES/1673 (Apr. 27, 2006).

68. S.C. Res. 1566, para. 9, U.N. Doc. S/RES/1566 (Oct. 8, 2004).

69. G.A. Res. 1650, OAS Doc. AG/RES 1650 (XXIX-O/99) (June 7, 1999).

70. Council of Eur., Human Rights and Legal Affairs, *The Multidisciplinary Group on International Action Against Terrorism (GMT)*, http://www.coe.int/t/e/legal_affairs/legal_cooperation/fight_against_terrorism/3_codexter/The_GMT/.

71. *Id.*; Protocol Amending the European Convention on the Suppression of Terrorism, *opened for signature* May 15, 2003, EUROP. T.S. NO. 190.

72. Council of Europe: Human Rights and Legal Affairs, Committee of Experts on Terrorism

counter-terrorist activities, prepared the draft of the Council of Europe Convention on the Prevention of Terrorism. Similarly, the OSCE has established the Action Against Terrorism Unit, a focal point for the coordination of counter-terrorism initiatives.⁷³ The OIC has set up a ministerial-level body, the Committee on International Terrorism with the mandate to strengthen OIC cooperation in the counter-terrorism field and to implement the OIC Convention on Combating International Terrorism.⁷⁴

In addition to founding these specialized bodies engaged in the creation and enforcement of primary rules on terrorism, there is also a trend towards establishing distinct international judicial structures to deal with terrorist crimes. In 1998, the Security Council mandated the creation of the Lockerbie court,⁷⁵ a specially convened Scottish court sitting in the Netherlands that tried the two Libyan nationals accused of the bombing of Pan Am flight 103 over Lockerbie.⁷⁶ After the attacks of September 11, some scholars suggested the establishment of a similar international tribunal to try those involved in the attacks or even suspected international terrorists in general.⁷⁷ More recently, in 2007 the Security Council set up a special international tribunal to try those responsible for the terrorist bombing that killed, among others, the former Lebanese Prime Minister Rafiq Hariri and subsequent connected terrorist attacks.⁷⁸ This Special Tribunal for Lebanon, which will sit in the Netherlands, has jurisdiction over crimes of terrorism and illicit association as well as offences against life and personal integrity as defined under Lebanese law.⁷⁹ It will be the first international tribunal with a subject-matter jurisdiction framed exclusively with reference to domestic law.⁸⁰

C. A Special Regime?

In summary, a considerable body of norms, institutions, and mechanisms specifically designed to deal with terrorism has emerged over the last few years and

(CODEXTER), http://www.coe.int/t/e/legal_affairs/legal_cooperation/flight_against_terrorism/3_CODEXTER/.

73. OSCE, *Decision No. 1 on Combating Terrorism*, *supra* note 49; OSCE, *Bucharest Plan of Action for Combating Terrorism*, *supra* note 49.

74. OIC, *Kuala Lumpur Declaration on International Terrorism*, *supra* note 48, para. 1.

75. S.C. Res. 1192, U.N. Doc. S/RES/1192 (Aug. 27, 1998).

76. *See Her Majesty's Advocate v. Megrahi*, No. 1475/99, (H.C.J. at Camp Zeist 2001) (Scot.), available at <http://www.scotcourts.gov.uk/opinions/opinion%20no%203.html>; *see also Megrahi v. Her Majesty's Advocate*, No. C104/01, (H.C.J. Appeal Ct. 2002) (Scot.), available at <http://www.scotcourts.gov.uk/opinions/KIRK1307.html> (for the appeal decision).

77. KEN GUDE, *CTR. FOR AM. PROGRESS, AFTER GUANTANAMO: A SPECIAL TRIBUNAL FOR INTERNATIONAL TERRORIST SUSPECTS* 8 (2006), available at <http://www.americanprogress.org/kf/AFTER%20GUANTANAMO%20REPORT.PDF>; Leila Sadat, *International Court Should Try Defendants*, ST. LOUIS POST DISPATCH, November 18, 2001; Anne-Marie Slaughter, *Al Qaeda Should Be Tried Before the World*, N.Y. TIMES, Nov. 17, 2001, at 23; Anne-Marie Slaughter, *Terrorism and Justice: An International Tribunal Comprising US and Islamic Judiciary Should Be Set Up to Try Terrorists*, FIN. TIMES, Oct. 12, 2001.

78. S.C. Res. 1757, Art. 1, U.N. Doc. S/RES/1757 (May 30, 2007).

79. *Id.* art. 2.

80. *See* Nidal Nabil Jurdi, *The Subject-Matter Jurisdiction of the Special Tribunal for Lebanon*, 5 J. INT'L CRIM. JUST. 1125, 1125 (2007) (explaining that the tribunal is *sui generis* in "its sole dependence on domestic substantive crimes.").

continues to grow. This body has the most important characteristics of a special legal regime: it appears as an interrelated cluster of primary rules on a limited problem, namely terrorism, together with rules for the administration of those primary rules. The set of rules and procedures relating to terrorism that has been established by the U.N. Security Council could even be described as unique in the international legal system. In an unprecedented move, the Security Council has required states to impose sanctions against individuals and groups, rather than other states.⁸¹ Additionally, in what is arguably its first resolution of a legislative nature, the Council has imposed a detailed set of obligations on states to combat international terrorism.⁸² This set of duties, or, in Hart's terms,⁸³ primary rules relating to the particular subject matter of terrorism is supported by a range of secondary rules that create a web of specialized monitoring mechanisms with extraordinary enforcement tools at their disposal.

In addition to the anti-terrorism regime established by the Security Council, there are various other primary and secondary rules on terrorism, including international and regional anti-terrorism treaties, alleged special norms in the law of armed conflict and international criminal law, international and regional bodies and mechanisms engaged in the creation and enforcement of anti-terrorism instruments, and special international tribunals. That these different sets of norms and mechanisms could also be described as separate regimes themselves does not necessarily preclude the existence of one international anti-terrorism regime. In human rights law, for example, one also speaks of "the international human rights regime,"⁸⁴ even though this regime in fact consists of a web of different international and regional sub-regimes.

II. ACADEMIC TREATMENT: A SEPARATE BRANCH?

To consider whether terrorism law is emerging as a separate topic or category of international law, it is also important to look at the way legal scholars have treated terrorism, as it is often the academic world that first divides a subject such as international law into different branches in order "to arrange [it] in a comprehensible (and teachable) manner."⁸⁵ In wider academia, terrorism has evolved into an increasingly important subject in its own right after September 11, with its own journals, conferences, and courses.⁸⁶ Reflecting this general trend, legal scholars have given unprecedented attention to the law of terrorism and have started to treat it as a discrete branch, both as far as research and teaching is concerned.

In the last few years, legal writing on different aspects of terrorism and counter-terrorism has mushroomed; a plethora of books and articles on terrorism and international law have been published and chapters on terrorism have been added to

81. See *supra* note 26.

82. See *supra* notes 23–35 and accompanying text.

83. See HART, *supra* note 7, at 95.

84. See, e.g., MANFRED NOWAK, INTRODUCTION TO THE INTERNATIONAL HUMAN RIGHTS REGIME (Verena Tomasik trans., Christopher Cassetta ed., Martinus Nijhoff Publishers 2003).

85. See Peter Malanczuk, *Space Law as a Branch of International Law*, in DIVERSITY IN SECONDARY RULES AND THE UNITY OF INTERNATIONAL LAW 143, 146 (L.A.N.M. Barnhoorn & K.C. Wellens eds., 1995).

86. Avishag Gordon, *Terrorism as an Academic Subject after 9/11: Searching the Internet Reveals a Stockholm Syndrome Trend*, 28 STUD. IN CONFLICT & TERRORISM 45 (2005).

international law textbooks.⁸⁷ The Library of Congress Subject Headings, accepted as the worldwide standard for subject heading classifications, lists “Terrorism” and “War on Terrorism 2001” as separate main subjects.⁸⁸ A search of the catalogues of the major law libraries reveals that there are very substantial holdings under these headings. At the time of writing, the Yale Law School library catalogue, for example, lists 362 books under “Terrorism” and 235 books under “War on Terrorism 2001.”⁸⁹ International law bibliographies and other legal research tools now regularly include a separate heading for “Terrorism,” often as a sub-category of international law or as a sub-sub-category of international criminal law. In “Public International Law,” the current bibliography of books and articles compiled by the Max Planck Institute in Heidelberg, “Terrorism” is listed as a sub-category of “International Criminal Law.”⁹⁰ At the time of writing, there are 1,674 titles under that heading, more than 1,500 of which were published after 2001. In comparison, under “Refugees and Asylum” there are 1,192 entries, under “Air Law” 98, and under “Diplomatic Relations” 96.⁹¹ The Peace Palace Library maintains a regularly updated bibliography on “Terrorism and International Law” that consists of more than 6,000 articles and books.⁹² Electronic databases also frequently include separate sections on terrorism: Westlaw International lists Homeland Security, including Homeland Security and Anti-Terrorism, as a separate practice area; the Electronic Information System for International Law (EISIL) lists Terrorism as a sub-category of International Criminal Law;⁹³ JURIST has a webpage devoted to Terrorism Law & Policy;⁹⁴ and FindLaw provides Special Coverage on the War on Terrorism.⁹⁵ Finally, there are now very few international law conferences that do not have a panel specifically devoted to terrorism.⁹⁶

It is not only legal research that reflects this trend. Also as far as teaching is concerned, terrorism law has become a significant, and increasingly separate, branch of international law. Prior to 2001, terrorism had to some extent been part of the curriculum in international relations and political science programs, but not of that

87. *E.g.*, ANTONIO CASSESE, *INTERNATIONAL LAW* (2d ed. 2005); HENRY J. STEINER, PHILIP ALSTON & RYAN GOODMAN, *INTERNATIONAL HUMAN RIGHTS IN CONTEXT: LAW, POLITICS, MORALS* (3d ed. 2008); CHRISTINE GRAY, *INTERNATIONAL LAW AND THE USE OF FORCE* (2d ed. 2004).

88. Library of Congress: Cataloging Distribution Service, <http://www.loc.gov/cds/lcsh.html> (last visited Oct. 17, 2008); Library of Congress Authorities, <http://authorities.loc.gov/> (last visited Feb. 4, 2009).

89. Yale Law School, Morris Library Catalogue, <http://morris.law.yale.edu> (last visited Feb. 12, 2009).

90. Max Planck Institute for Comparative Public Law and International Law, Public International Law, http://www.mpil.de/ww/en/publ/library/catalogues_databases/doc_of_articles/pil.cfm (last visited Feb. 12, 2009).

91. *Id.* (last visited Feb. 12, 2009).

92. Peace Palace Library, Bibliographies, <http://www.ppl.nl/content.php?webpage=bibliographies> (follow “Bibliography on terrorism and international law” hyperlink) (last visited Feb. 12, 2009).

93. Electronic Information System for International Law, <http://www.eisil.org/> (last visited Oct. 17, 2008).

94. JURIST Legal Intelligence, <http://jurist.law.pitt.edu/terrorism.htm> (last visited Oct. 17, 2008).

95. FindLaw Legal News, <http://news.findlaw.com/legalnews/us/terrorism/> (last visited Oct. 17, 2008).

96. *See* The 2007 American Society of International Law Conference, www.asil.org/events/am07/agenda.html (offering three panel discussions related to terrorism and international law); The 2005 ESIL Forum, http://www.esil-sedi.eu/english/pdf/ESIL_2005_Forum_Programme.pdf (featuring a workshop on human rights and terrorism with three papers) (all last visited Oct. 17, 2008); and The 2004 European Society of International Law (ESIL) conference, http://www.esil-sedi.eu/english/florence_agora_papers.html (featuring two paper presentations on terrorism and international law).

of law schools.⁹⁷ Today, 35 out of the top 40 U.S. law schools⁹⁸ offer at least one, and in many cases several, courses on terrorism and the law.⁹⁹ Most of these courses focus on the international law dimensions of terrorism and counter-terrorism and have titles such as “International Law and Terrorism,”¹⁰⁰ “The War Against Terrorism and the Rule of Law,”¹⁰¹ or “Guantánamo, Law, and the War on Terror.”¹⁰² Law schools in Europe and other parts of the world have similarly started to make terrorism a distinct component of their curricula. Courses dealing with the international legal aspects of terrorism are offered by at least sixteen British academic institutions¹⁰³ as well as by universities in different regions of the world, including, for example, Australia,¹⁰⁴ Austria,¹⁰⁵ Canada,¹⁰⁶ Chile,¹⁰⁷ China,¹⁰⁸ Germany,¹⁰⁹ Hungary,¹¹⁰ Ireland,¹¹¹ New Zealand,¹¹² Spain,¹¹³ Sweden,¹¹⁴ and

97. See John F. Murphy, *International Legal Education*, 37 INT’L LAW. 623, 628 (2003) (noting that several law schools added courses on terrorism in response to student interest following the events of September 11, 2001, and providing a list of such schools).

98. U.S. News and World Report, *America’s Best Graduate Schools 2009, Best Law Schools (Ranked in 2008)*, <http://grad-schools.usnews.rankingsandreviews.com/grad/law/search> (last visited Oct. 17, 2008).

99. They include the law schools of the following universities: Yale University, Harvard University, Stanford University, New York University, Columbia University, University of Chicago, University of Pennsylvania, University of Michigan, Duke University, University of Virginia, Northwestern University, Cornell University, Georgetown University, University of Texas, UCLA, University of Southern California, Vanderbilt University, Washington University, Boston University, University of Minnesota, George Washington University, University of Iowa, Fordham University, University of Illinois, Boston College, University of Notre Dame, University of Washington, College of William and Mary, George Mason University, Indiana University, University of California (Hastings), University of Georgia, University of Maryland, University of North Carolina, and Wake Forest University. (The full list with links to the respective course descriptions is available from the author).

100. University of Michigan Law School, http://cgi2.www.law.umich.edu/_ClassSchedule/aboutCourse.asp?crse_id=041522 (last visited Oct. 17, 2008).

101. Yale University Law School, <http://www.yale.edu/bulletin/html/law/course.html> (last visited Oct. 17, 2008).

102. Stanford University Law School, <http://www.law.stanford.edu/program/courses/details/309/Guant%C3%A1namo%2C%20Law%2C%20and%20the%20War%20on%20Terror/> (last visited Oct. 17, 2008).

103. University of Aberdeen, University of Birmingham, University of Central Lancashire, University of Dundee, University of East London, King’s College London, University of Lancaster, University of Leeds, London School of Economics, University of Manchester, University of Newcastle, University of Nottingham, Nottingham Trent University, University of Reading, University of St. Andrews, and University of Southampton.

104. Monash University: “Terrorism and Human Rights,” <http://www.monash.edu.au/pubs/handbooks/units/LAW7320.html> (last visited Oct. 18, 2008).

105. University of Vienna: “Terrorism and the Use of Force,” http://public.univie.ac.at/fileadmin/user_upload/legal_studies/courses/Zemanek-Terrorism_and_the_Use_of_ForceNEU.pdf (last visited Oct. 18, 2008).

106. University of Toronto: “Comparative Anti-Terrorism and National Security Law,” http://www.law.utoronto.ca/students_content.asp?docNo=1190&itemPath=2/16/0/0/0&cType=coursespg (last visited Oct. 18, 2008).

107. Universidad Católica de Chile: “Derecho Internacional de la Guerra después del 11 de Septiembre de 2001 y la Guerra de Iraq,” <http://cursos.puc.cl/catalogo/programas/dei237.pdf> (last visited Oct. 18, 2008).

108. University of Hong Kong, Faculty of Law: “Religious Movements: Peace, Nationalism and Terrorism,” <http://www.hku.hk/student/all/uregcourse/pdf2003/ba.pdf> (last visited Oct. 18, 2008).

109. Universität Münster: “Rechtsfragen der Bekämpfung des Internationalen Terrorismus,” <http://www.jura.uni-muenster.de/go/organisation/institute/oeffentliches-recht/vr/studieren/veranstaltungen-se.html> (last visited Oct. 18, 2008).

Switzerland.¹¹⁵ Although the existence of an academic branch is not established simply by considering course offerings, these are a further indication of the trend towards treatment of terrorism as a separate branch of international law.

III. REASONS: WHY IS TERRORISM EMERGING AS A DISTINCT CATEGORY OF INTERNATIONAL LAW?

The emergence of a new category of international law may be caused by different reasons. Even within one special legal regime, the creation of different sub-regimes may be prompted by differing factors. The specific considerations behind the establishment of an international anti-terrorism regime such as that under Resolution 1373, for example, are not necessarily the same as those behind the establishment of a special international tribunal to deal with terrorist offenses. And the reasons why legal academia starts to treat a subject area such as terrorism as a distinct branch of international law might be different yet again. Nevertheless, there are a number of common concerns that underlie the creation of all the new special norms, institutions, and mechanisms pertaining to terrorism described above. It is on these generic rationales for the special treatment of terrorism that I want to focus. These rationales, I will argue, are very different from those behind the emergence of other categories of international law.

Generally, the most important reason for the emergence of a new category of international law is that a new social problem or phenomenon materializes, requiring regulation at the international level.¹¹⁶ As the ILC Study Group explained, fragmentation “reflects the rapid expansion of international legal activity into various new fields,”¹¹⁷ as “[n]ew types of specialized law . . . seek to respond to new technical and functional requirements.”¹¹⁸ Typical examples of such “new” areas of international law include international environmental law¹¹⁹ and space law.¹²⁰ The

110. Central European University: “Inside and Outside the Rule of Law: Guantánamo Bay and Other Legal Black Holes,” http://web.ceu.hu/downloads/admissions_bulletin_2007_2008.pdf (last visited Oct. 18, 2008).

111. National University of Ireland, Galway: “Counter-Terrorism and Human Rights,” http://www.nuigalway.ie/human_rights/documents/Course%20Docs/SoEmergencyCounterTerror%20syllabus%2007-08.doc (last visited Oct. 18, 2008); University of Cork: “Terrorism, Dissonance and Criminal Justice” http://www.ucc.ie/en/lawsite/postgrad/llmgeneral/llm_modules/#d.en.11063 (last visited Oct. 18, 2008).

112. University of Wellington: “International Law and the Use of Extraordinary Renditions and Other Methods of Irregular Rendition in the Fight Against Terrorism,” <http://www.victoria.ac.nz/home/study/postgrad/publications/law-pg-07.pdf> (last visited Oct. 18, 2008).

113. Universidad Rey Juan Carlos: “Terrorismo Internacional, Democracia y Derechos Humanos,” <http://www.fcjs.urjc.es/Doctorado/pdf/curso03.pdf> (last visited Oct. 18, 2008).

114. University of Växjö: “Terrorism,” http://www.vxu.se/english/education/2007_2008/aut_2007_fullsem/rv3401/ (last visited Oct. 18, 2008).

115. Universität Bern: “Terrorismusbekämpfung durch Strafrecht,” <http://evub.unibe.ch/pievub/?KursID=2285232&KursNr=WN115&UeberschriftID=378171&page=detail> (last visited Oct. 18, 2008).

116. See Report on Fragmentation, *supra* note 9, paras. 7–9, 20.

117. *Id.* para. 14.

118. *Id.* para. 15.

119. See Malgosia Fitzmaurice, *International Environmental Law as a Special Field*, in DIVERSITY IN SECONDARY RULES AND THE UNITY OF INTERNATIONAL LAW 181, 182–83 (L.A.N.M. Barnhoorn & K.C.

recent creation of an international anti-terrorism regime is often explained and justified on the same basis. As the argument goes, the sort of international terrorist networks that were behind the September 11 attacks are an unprecedented phenomenon and existing legal systems do not offer adequate instruments to deal with it.¹²¹ Contemporary international terrorism does not fit easily within existing categories of international law.¹²² The fight against it is “a new kind of war,”¹²³ and innovative international mechanisms for cooperation and enforcement are needed to bring states to effectively combat this phenomenon.¹²⁴ According to this account, the new body of law fills a gap in the international legal system, or at least creates “a more context-sensitive . . . regulation of a matter than what is offered under the general law.”¹²⁵

Yet the explanation that the new regulatory measures are a response to the unprecedented nature of international terrorism as a social phenomenon is unconvincing. In fact, international terrorism dates back a long time, as do international efforts to combat it. What could be termed the first international conference on terrorism, as well as a first move toward increased cooperation between the police forces of different states, was held as early as 1898.¹²⁶ The conference was a reaction to the terrorist attacks that rocked Europe and the United States at that time and were seen as the deeds of an international anarchist organization.¹²⁷ By the turn of the twentieth century, terrorism was at the top of the global political agenda.¹²⁸ Acts of international terrorism again started to become frequent in the 1960s and 1970s, in turn triggering renewed global counter-terrorism efforts.¹²⁹ As far as the more specific threat from Islamist terrorism is concerned, Islamist terrorist networks have been operating for many years, as illustrated, for example, by the World Trade Center bombing in 1993.¹³⁰ Hence, the situation is hardly comparable to the case of space law or international environmental law; the social problem that the new body of terrorism law is purportedly addressing is anything but new.

A second, closely related, factor for the emergence of new categories of law is linked to the requirements of legal practice. In technical legal areas, professionals

Wellens eds., 1995); Catherine Redgwell, *International Environmental Law*, in INTERNATIONAL LAW 657, 657–61 (Malcolm D. Evans ed., 2006).

120. Malanczuk, *supra* note 85, at 144–46.

121. Ruth Wedgwood, *Countering Catastrophic Terrorism: An American View*, in ENFORCING INTERNATIONAL LAW NORMS AGAINST TERRORISM 103, 103–04, 109–11 (Andrea Bianchi ed., 2004).

122. Christopher Greenwood, *International Law and the “War against Terrorism”*, 78 INT’L AFF. 301, 301 (2002).

123. Jan. 2002 Gonzales Memorandum, *supra* note 52, at 2.

124. Eric Rosand, *The UN-Led Multilateral Institutional Response to Jihadist Terrorism: Is a Global Counterterrorism Body Needed?*, 11 J. CONFLICT & SEC. L. 399, 399, 405–06 (2006).

125. Report on Fragmentation, *supra* note 9, para. 186.

126. Richard Bach Jensen, *The International Anti-Anarchist Conference of 1898 and the Origins of Interpol*, 16 J. CONTEMP. HIST. 323, 323 (1981); Rick Coolsaet, *The Business of Terror: Anarchist Outrages*, LE MONDE DIPLOMATIQUE, Sept. 2004, available at <http://mondediplo.com/2004/09/03anarchists>.

127. Jensen, *supra* note 126; Coolsaet, *supra* note 126.

128. David C. Rapoport, *The Four Waves of Rebel Terror and September 11*, in THE NEW GLOBAL TERRORISM: CHARACTERISTICS, CAUSES, CONTROLS 36, 36–40, 46 (Charles W. Kegley ed., 2003).

129. See CONOR GEARTY, TERROR 53–64 (1991) (describing various terrorist activities beginning in the 1970s); BRUCE HOFFMAN, INSIDE TERRORISM 67–86 (1998) (describing the internationalization of terrorism).

130. JASON BURKE, AL-QAEDA: CASTING A SHADOW OF TERROR 93–100 (2003).

active in those areas (judges, panel members, government lawyers, counsel, academics, etc.) acquire special expertise which, over time, may become a requirement to practice in such branches of law. Thus, the technicality of a subject matter generally entails a high degree of specialization, often with expert bodies needed to adjudicate disputes. Trade law is perhaps the most evident example of such a specialized branch of international law, where the requirements of technical legal expertise have led to the formation of a distinct professional culture over the years.¹³¹ Terrorism, however, cannot be seen as falling within this category. From the point of view of legal practice, terrorism is just an area of criminal law like many others; no special knowledge or expertise is needed to litigate or adjudicate terrorism cases.

Instead, the emergence of an anti-terrorism regime at the international level is mainly a reflection of a parallel development at the *national* level. Following September 11, many influential states have expanded their domestic capabilities to combat terrorism through the adoption of special anti-terrorism laws and the creation of specialized mechanisms and institutions, including tribunals and law enforcement agencies.¹³² This can be seen as part of a wider trend whereby criminal justice systems increasingly rely on special powers to deal with “special” crimes and risks.¹³³ Rather than being inevitable for practical legal reasons, this special treatment approach is largely prompted by political pressures: special criminal laws are typically “passed amidst great public outrage in the wake of sensational crimes of violence” and “designed to be expressive, cathartic actions, undertaken to denounce the crime and reassure the public.”¹³⁴ “Law-making [thus] becomes a matter of retaliatory gestures,” relegating the question of whether the new measures are practicable and effective to the background.¹³⁵ This particularly applies in the case of terrorism. Since political violence is seen as an especially serious danger that potentially undermines the political, economic, and social structures of the state, it reacts more resolutely to terrorism than other forms of crime, and seeks to attach a special stigma to it.

This symbolic function underlies virtually all anti-terrorism regimes and mirrors the symbolic nature of the type of violence that these regimes are designed to counter. The military commission system in the United States,¹³⁶ for example, was

131. For the particular case of international economic arbitration, see Catherine A. Rogers, *The Vocation of the International Arbitrator*, 20 AM. U. INT'L. L. REV. 957, 958–59 (2005).

132. Examples include the U.S. Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism (USA PATRIOT) Act of 2001, Pub. L. No. 107-56, §§ 101–1016, 115 Stat. 272, 272–402 (2001) (codified as amended in scattered sections of 8, 15, 18, 22, 31, 42, 49, and 50 U.S.C.); the British Anti-Terrorism, Crime and Security Act (ATCSA), 2001, 49 Eliz. 2, c. 24 (Eng.); the German Gesetz zur Bekämpfung des internationalen Terrorismus, Jan. 9, 2002, BGBl. I at 361 (F.R.G.); and the Indian Prevention of Terrorism Act (POTA) 2002, No. 15, Acts of Parliament, 2002. For a good overview, see generally GLOBAL ANTI-TERRORISM LAW AND POLICY (Victor V. Ramraj et al. eds., 2005).

133. Clive Walker, *Terrorism and Criminal Justice: Past, Present and Future*, CRIM. L. REV. 311, 325 (2004).

134. DAVID GARLAND, *THE CULTURE OF CONTROL: CRIME AND SOCIAL ORDER IN CONTEMPORARY SOCIETY* 133 (2001). See also Kent Roach, *The Criminal Law and Terrorism*, in GLOBAL ANTI-TERRORISM LAW AND POLICY, *supra* note 132, at 129, 131–35 (noting examples in the U.S., U.K., and Indonesia).

135. GARLAND, *supra* note 134, at 134.

136. Military Commissions Act of 2006, Pub. L. No. 109-366, 120 Stat. 2600 (codified at 10 U.S.C. §§ 948(a)–950(w) and scattered sections of 10, 18, 28, and 42 U.S.C.).

not created because there is a lack of suitable fora for the trial of suspected terrorists. From the point of view of practicability, civilian courts and ordinary courts-martial are, as they have demonstrated on many occasions, perfectly capable of trying terrorist suspects.¹³⁷ Instead, the creation of these special tribunals reflects the belief that international terrorists deserve exceptional treatment as enemies rather than ordinary criminals: trial by military commission primarily serves a symbolic, stigmatizing function.¹³⁸ There is not a gap in the existing system, but rather discontent with it; the ordinary courts are seen as too meek to deal with the exceptional danger posed by contemporary international terrorists¹³⁹ and, as one supporter of the military commissions puts it, to “wholly satisfy our sense of their evil acts.”¹⁴⁰

The perception that terrorist attacks require a resolute state response in the form of exceptional legislative measures has led some of the most powerful states to press for the establishment of a parallel special anti-terrorism regime at the international level. The pre-2001 anti-terrorism treaties were adopted mostly in reaction to particularly shocking terrorist incidents,¹⁴¹ and the same approach of giving expression to the “international community’s” sense of outrage and condemnation accounts for the post-September 11 anti-terrorism measures. This fits the general pattern, observed by a number of authors, that international law is mainly developed in reaction to “triggering events,”¹⁴² “incidents,”¹⁴³ or “crises.”¹⁴⁴ The problem with this crisis management approach and its focus on particular events is

137. U.S. Federal Courts, applying ordinary procedures, convicted 253 persons for “terrorism or terrorism-related [crimes] with an international connection” in the time between September 11, 2001 and May 2006. Deputy Attorney General Paul J. McNulty, U.S. Department of Justice, Remarks at the American Enterprise Institute (May 24, 2006), http://www.justice.gov/archive/dag/speeches/2006/dag_speech_060524.html (last visited Feb. 5, 2009).

138. President Bush has claimed that those tried before the military commissions “are more than criminal suspects. They are unlawful combatants who seek to destroy our country and our way of life.” Mike Allen & Susan Schmidt, *Bush Defends Secret Tribunals for Terrorism Suspects*, WASH. POST, Nov. 30, 2001, available at http://www.law.uchicago.edu/tribunals/docs/wp_13001.pdf. Similarly, Kenneth Anderson has argued that because of their fundamental opposition to the targeted state and society, contemporary terrorists should be treated as enemies rather than criminals; the civilian courts were the wrong forum not only for practical reasons but also for conceptual reasons. Kenneth Anderson, *What to Do with Bin Laden and Al Qaeda Terrorists?: A Qualified Defense of Military Commissions and United States Policy on Detainees at Guantanamo Bay Naval Base*, 25 HARV. J. L. & PUB. POL’Y 591, 609–11, 632–34 (2002).

139. See Harold H. Koh, *The Case against Military Commissions*, 96 AM. J. INT’L L. 337, 341 (2002) (arguing that those who promote military commissions “have been misled by the *O.J. Simpson* fiasco to conclude that standing American courts . . . are somehow incapable of rendering full, fair, and expeditious justice in such cases” and retorting that “the U.S. judicial system has amply demonstrated its ability to adapt to new, complex problems”); Frédéric Mégret, *Justice in Times of Violence*, 14 EUR. J. INT’L L. 327, 335 (2003) (claiming the support for commissions “reflects a conservative impatience with the ordinary judicial system, characterized as overly meek”).

140. Anderson, *supra* note 138, at 633.

141. SAUL, *supra* note 13, at 130–31.

142. Michael Bothe, *The Historical Evolution of International Humanitarian Law, International Human Rights Law, Refugee Law and International Criminal Law*, in KRISENSICHERUNG UND HUMANITÄRE SCHUTZ – CRISIS MANAGEMENT AND HUMANITARIAN PROTECTION 37 (Horst Fischer et al. eds., 2004).

143. W. Michael Reisman, *International Incidents: Introduction to a New Genre in the Study of International Law*, 10 YALE J. INT’L L. 1, 1 (1984–1985).

144. Hilary Charlesworth, *International Law: A Discipline of Crisis*, 65 MOD. L. REV. 377, 377 (2002) (examining “the way that international lawyers tend to focus on crises for the development of international law.”).

that it entails the creation of issue-related special regimes that rest on truncated understandings of events.¹⁴⁵ Reactive international law reform occurring quickly after terrorist acts tends to proceed without a thorough analysis of why the terrorists succeeded, or even of who they are,¹⁴⁶ and results in ill-considered and ineffective measures that simply borrow from domestic anti-terrorism policies.¹⁴⁷

The centerpiece of the U.N. special anti-terrorism regime, Security Council Resolution 1373, for example, was passed in the immediate aftermath of September 11. The two main pillars of the resolution, suppression of the financing of terrorism and the use of immigration law as an anti-terrorism tool, reflect the central elements underlying the domestic anti-terrorism policies of most Western states,¹⁴⁸ including the United States, which sponsored the resolution.¹⁴⁹ In the face of huge political pressure on the governments of all states to show a swift and strong reaction to the terrorist attacks, the resolution was approved with hardly any recorded debate in a formal meeting that took five minutes,¹⁵⁰ despite introducing exceptionally far-reaching obligations. This is all the more striking given that it is highly questionable whether the terrorist financing and immigration measures required by the resolution are an effective means of preventing terrorism or, even, whether they relate in any way to regulatory deficiencies exposed by the September 11 attacks.¹⁵¹ After a thorough review of the measures introduced by Resolution 1373, Kent Roach concluded that “[t]he Security Council, like domestic bodies struggling to do something to reassure the public, engaged in a form of bricolage.”¹⁵²

Similarly, Resolution 1624 was the result of pressure by the British government to target speech associated with terrorism, reflecting its own domestic anti-terrorism strategy adopted in the wake of the London bombings of July 7, 2005. Immediately after the bombings, the Home Secretary and the Prime Minister announced new legislation criminalizing indirect incitement to commit terrorist acts, including condoning and glorifying terrorism.¹⁵³ A respective draft bill, which eventually became the Terrorism Act 2006, was then put forward on September 13, 2005.¹⁵⁴ The

145. *Id.* at 382.

146. *See, e.g.*, Therese O'Donnell, *Naming and Shaming: The Sorry Tale of Security Council Resolution 1530 (2004)*, 17 EUR. J. INT'L L. 945 (2006) (discussing the hasty drafting of Security Council Resolution 1530 in response to the 2003 Madrid bombings).

147. Roach, *supra* note 134, at 131–32.

148. *See, e.g.*, Anti-Terrorism, Crime, and Security Act, 2001, c. 24, §§ 1–16, 21–36, sched. 1 (Eng.); Gesetz zur Bekämpfung des internationalen Terrorismus, Jan. 9, 2002, BGBl. I at 361, Arts. 1–3, 11–16 (F.R.G.); Anti-terrorism Act, 2001 S.C., ch. 41, §§ 47–75, 83–86, 105–11 (Can.).

149. *See* USA PATRIOT Act, Pub. L. No. 107-56, §§ 301–77, 401–28, 115 Stat. 272 (2001) (codified as amended in scattered sections of 8, 15, 18, 22, 31, 42, 49, and 50 U.S.C.); Hale E. Sheppard, *U.S. Actions to Freeze Assets of Terrorism: Manifest and Latent Implications for Latin America*, 17 AM. U. INT'L L. REV. 625, 628 (2002).

150. U.N. Security Council (U.N. SCOR), 56th Sess., 4385th mtg. at 2, U.N. Doc. S/PV.4385 (Sept. 28, 2001).

151. *See* Kent Roach, *Sources and Trends in Post-9/11 Anti-terrorism Laws*, in SECURITY AND HUMAN RIGHTS 227, 230–41 (Benjamin J. Goold and Liora Lazarus eds., 2007); Bianchi, *supra* note 37, at 892–903, 914–15.

152. Roach, *supra* note 151, at 234–35.

153. 436 PARL. DEB., H.C. (6th ser.) (2005) 1254; Tony Blair, Prime Minister's Press Conference (Aug. 5, 2005), <http://www.number10.gov.uk/Page8041> (last visited Feb. 5, 2009).

154. Draft of Terrorism Bill, (Sept. 13, 2005), available at www.statewatch.org/news/2005/sep/terrorism-bill.pdf.

following day, the Security Council adopted the text of Resolution 1624 as tabled by the United Kingdom, calling on states to prohibit by law incitement to commit terrorist acts.¹⁵⁵ In the debate in the Security Council, the British Prime Minister promoted the resolution on the basis that the root cause of terrorism was “a doctrine of fanaticism.” Therefore, not just the methods of terrorism had to be combated, “but also the terrorists’ motivation, twisted reasoning and wretched excuses for terror.”¹⁵⁶ Yet there is no evidence that prohibitions of speech such as criminalizing the glorification of terrorism that go beyond already existing laws against incitement of crimes and racial hatred help prevent acts of terrorism.¹⁵⁷

Nor can the creation of the special sanctions regime against terrorist suspects be characterized as a reaction to a new social problem that would fill a gap in the international legal system. There are many other forms of organized crime that could be countered with financial sanctions, yet no one has pointed to the lack of a respective U.N. sanctions system as a gap in the law. Only in the case of terrorism has a sanctions regime been established. This fact demonstrates that the states represented on the Security Council view terrorism as a special form of crime requiring a resolute international response through the adoption of especially stringent measures. These highly political and symbolic considerations seem also to have played a crucial role in the passage of Resolution 1566.¹⁵⁸ This resolution, which established a Working Group to review the U.N. terrorist sanctions system, was passed in response to the Beslan school hostage crisis and consequent pressure by the Russian Federation to expand the scope of sanctions beyond the Taliban and Al Qaeda.¹⁵⁹

Finally, similar rationales underlie proposals for the further extension of the international anti-terrorism regime, such as the Comprehensive Convention on International Terrorism. The High-level Panel on Threats, Challenges and Change, established by the U.N. Secretary-General, has admitted that there is no lack of legal regulation that would need to be addressed through the adoption of such a convention: “Legally, virtually all forms of terrorism are prohibited by one of [twelve] international counter-terrorism conventions, international customary law, the Geneva Conventions or the Rome Statutes.”¹⁶⁰ Rather, according to the panel, the lack of a comprehensive convention is “not so much a legal question as a political one,”¹⁶¹ since such a convention would send “an unequivocal message that terrorism is never an acceptable tactic.”¹⁶² In other words, the justification for the special regime is not that international terrorism is a new social phenomenon requiring adjustments at the legal level, but rather that it is such an exceptional threat it

155. S.C. Res. 1624, U.N. Doc. S/RES/1624 (Sept. 14, 2005); U.N. SCOR, 60th Sess., 5261st mtg. at 4, U.N. Doc. S/PV.5261 (Sept. 14, 2005).

156. UN SCOR, *supra* note 155, at 10.

157. Roach, *supra* note 151, at 245–49.

158. S.C. Res. 1566, *supra* note 68.

159. See U.N. SCOR, 59th Sess., 5053d mtg. at 3, U.N. Doc. S/PV.5053 (Oct. 8, 2004) (containing comments from the Russian Federation’s representative emphasizing the “unprecedented escalation of international terrorism,” urging more decisive action by SCOR, and thanking his colleagues for the passage of Resolution 1566).

160. Chairman of the High-level Panel on Threats, Challenges and Change, *A More Secure World: Our Shared Responsibility: Report of the High-level Panel on Threats, Challenges and Change*, para. 159, delivered to the General Assembly, U.N. Doc. A/59/565 (Dec. 2, 2004).

161. *Id.*

162. *Id.* para. 157.

necessitates some form of symbolic and particularly resolute response by the state community. The same reasoning underlies calls for the creation of a discrete international crime of terrorism. Ben Saul, for example, supports a distinct terrorism offense on the basis that “[t]he expressive function of the criminal law cannot be overstated; a conviction for *political* violence sends a symbolic message that certain kinds of violence, *as such*, cannot be tolerated, and reinforces the ethical values of the political community.”¹⁶³

To conclude, whereas other categories of international law have emerged as a reaction to the need for rules that are specifically tailored to a new social phenomenon or for actors and bodies with special expertise, the *raison d’être* of the distinct category of terrorism law is very different. What is special about international terrorism is the fact that states perceive it as a particularly dangerous form of violence that threatens their existence and thus necessitates the stigmatization of the perpetrators and reassurance of the public through the adoption of exceptional counter-measures. This has led certain states to exert political pressure to create an international anti-terrorism regime that mirrors the special regimes they have established at the national level—regimes that provide for exceptional powers to deal with conduct defined as terrorism, in deviance from the general criminal law. In this sense, the emergence of the international anti-terrorism regime is a reflection of the fragmentation and specialization of domestic criminal justice systems. At the same time, it is the result of a hegemonic move by certain states. By claiming that the international anti-terrorism regime embodies the interests of the “international community”, they attempt to formulate their particular interests in universal terms and to have their special interests identified with the general interest.¹⁶⁴ Thereby, they not only give their domestic counter-terrorism policies a global reach, but also imbue them with international legitimacy.¹⁶⁵

IV. IMPLICATIONS: WHY DOES IT MATTER?

Even though international terrorism might not be a new phenomenon, it is undoubtedly true that this particular form of crime presents a major challenge to the community of states. Surely, this justifies its special treatment in international law? What is wrong with sending out a clear signal that terrorism will not be tolerated? Is it not a good thing to stigmatize terrorists and reassure the public through the adoption of special counter-measures? And why would the phenomenon of international terrorism and the myriad legal responses it has provoked not deserve to be treated as an academic branch in its own right? Why, in short, does all of the above matter?

163. SAUL, *supra* note 13, at 39 (emphasis in original).

164. See Pierre Klein, *Les problèmes soulevés par la référence à la “communauté internationale” comme facteur de légitimité*, in DROIT, LÉGITIMATION ET POLITIQUE EXTERIEURE: L’EUROPE ET LA GUERRE DU KOSOVO 261, 263 (Olivier Corten & Barbara Delcourt eds., 2000) (discussing the situation in Kosovo, and providing examples of States, organizations, and other entities that advanced the idea of an “international community” in order to legitimize their own interests); Martti Koskeniemi, *International Law and Hegemony: A Reconfiguration*, 17 CAMBRIDGE REV. INT’L AFF. 197, 198 (2004) (discussing international law as a hegemonic technique).

165. For the example of Spain, see O’Donnell, *supra* note 146, at 955 (“Official acknowledgement of Spain’s imperilment imbued Spanish domestic counter-terrorism measures, both existing and potential, with international legitimacy.”).

It matters, first, because the crisis management and special treatment approach, which is mainly advanced through Security Council action, concentrates the attention of international law on a phenomenon that is primarily of concern to a number of powerful states, while at the same time marginalizing issues of structural justice that affect the everyday lives of the vast majority of the world's population.¹⁶⁶ A thorough exploration of this fundamental and complex issue is beyond the scope of this article. Instead, I will focus on the second, more limited, implication: namely, that the emergence of a special body of law on terrorism has led to a radical change in the legal discourse on terrorism—a change that has been reinforced by the academic treatment of the subject as a distinct branch of international law.

The traditional approach of international lawyers to terrorism, epitomized by the quotations at the beginning this article, was to treat it as one contemporary social phenomenon among many and to investigate how international law applied to this particular phenomenon. Today, this approach has been reversed. Treating terrorism as an autonomous subject involves a focus on what is distinct about terrorism as compared to other political or social phenomena. Under the special treatment model, the starting point of any legal analysis of terrorism is that what is offered by general international law is inadequate to deal with this exceptional phenomenon, and so special rules, bodies, and mechanisms—a fresh legal approach—are required.¹⁶⁷ The result is a self-perpetuating circle of assertions of the exceptional nature of contemporary international terrorism and the need for a resolute legal response in the form of unprecedented special measures. Despite its claim to “freshness,” this kind of discourse is in fact impoverished. Constantly devised and revised in response to particular terrorist attacks, it focuses on swift legal amendments without thorough consideration of the practical need for them or their effectiveness, and obscures the possibility of applying general principles and rules of international law. The crisis model of international law, as Hilary Charlesworth perceptively observed, “leads us to rediscover an issue constantly and to analyse it without building on past scholarship.”¹⁶⁸

How this new approach to terrorism tends to obscure the possibility of applying the *lex generalis* is illustrated, for example, by the Council of Europe Guidelines on Human Rights and the Fight against Terrorism, adopted in 2002.¹⁶⁹ The guidelines have been widely, and rightly, lauded for making it clear that the fight against terrorism must conform to basic standards of human rights law.¹⁷⁰ But at the same time it is striking that they merely restate what, prior to the emergence of the special treatment model, was obvious and did not need stating. For example, the guidelines stress that terrorist suspects should be brought promptly before a judge upon arrest,

166. See Charlesworth, *supra* note 144, at 391–92 (discussing the day-to-day effects of “poverty, discrimination and violence” on the majority of the world’s population).

167. See Spencer J. Crona & Neal A. Richardson, *Justice for War Criminals of Invisible Armies: A New Legal and Military Approach to Terrorism*, 21 OKLA. CITY U. L. REV. 349, 349–350 (1996) (expounding on the steps necessary for developing a new approach to terrorism); Jan. 2002 Gonzales Memorandum, *supra* note 52.

168. Charlesworth, *supra* note 144, at 384 (citing remarks of Philip Alston, ANZSIL/ASIL joint meeting, Canberra (June 29, 2000)).

169. DIRECTORATE GEN. OF HUMAN RIGHTS, COUNCIL OF EUR., GUIDELINES ON HUMAN RIGHTS AND THE FIGHT AGAINST TERRORISM, ADOPTED BY THE COMMITTEE OF MINISTERS ON 11 JULY 2002, at 44 (2002) available at [http://www.coe.int/T/E/Human_rights/h-inf\(2002\)8eng.pdf](http://www.coe.int/T/E/Human_rights/h-inf(2002)8eng.pdf) [hereinafter GUIDELINES ON HUMAN RIGHTS].

170. See, e.g., C. A. Gearty, *Terrorism and Human Rights*, 1 EUR. HUMAN RTS. L. REV. 1, 1 (2005).

that they have the right to a fair trial before an independent and impartial tribunal, that they must be treated with due respect for human dignity, and that they should not be tortured.¹⁷¹ Only in the light of the general trend towards special treatment of terrorism is it understandable why the Council of Europe ends up pointing out the obvious. Like all other special norms pertaining to terrorism, the guidelines seem to be based on the assumption that counter-terrorism is a distinctly separate field of criminal justice. As a consequence, it becomes necessary to state that the general rules in the form of basic human rights standards are still applicable. If it is, in the words of Pierre-Marie Dupuy, “la cohérence, et donc l’unité de l’ordre juridique international qui donnent leur signification aux normes et aux institutions,”¹⁷² the special treatment model, by narrowing thinking to what is “within the box,” contributes to confusion over the meaning and the applicability of norms.

The coherence and unity of international law is not an end in and of itself. Its significance has been described by the ILC Study Group as follows: “[c]oherence is valued positively owing to the connection it has with predictability and legal security. Moreover, only a coherent legal system treats legal subjects equally.”¹⁷³ It is, in my view, the second aspect—only mentioned as a side-note in the ILC report—which is the crucial function of the coherence of international law. Already Kant understood that only a legal system based on formal, general, universally applicable norms can guarantee equality.¹⁷⁴ This insight is also central to the theories of modern liberal thinkers, such as Ronald Dworkin, whose principle of equal concern implies the “political virtue of integrity,” requiring the state to act on a single, coherent set of principles of justice and fairness.¹⁷⁵ Critical scholars, such as the Frankfurt-school jurist Franz Neumann, have equally highlighted the link between the coherence and generality of the law on the one hand and the universalistic idea of legal equality on the other; situation-specific state action is antithetical to this idea.¹⁷⁶ More recently, Martti Koskenniemi has pointed out with regard to international law, “the form of law . . . [affirms] . . . the principle that the conditions applying to the treatment of any one member of the community must apply to every other member as well.”¹⁷⁷

From this perspective, the creation of a kind of shadow legal system for terrorism, accompanied by the emergence of a respective academic branch, not only threatens the coherence and unity of international law but also implicitly attacks the principle that every legal subject deserves to be treated with equal respect and concern. Since the main purposes of the special treatment model—whose principal

171. GUIDELINES ON HUMAN RIGHTS, *supra* note 169, §§ IV, VII, IX, XI.

172. Dupuy, *supra* note 5, at 13.

173. *Report on Fragmentation*, *supra* note 9, para. 491.

174. See IMMANUEL KANT, *GROUNDWORK OF THE METAPHYSICS OF MORALS* 13–14 (James W. Ellington trans., Hackett Publ’g 1981) (1785).

175. RONALD DWORKIN, *LAW’S EMPIRE* 164–67, 176–224 (1986).

176. FRANZ NEUMANN, *THE RULE OF LAW: POLITICAL THEORY AND THE LEGAL SYSTEM IN MODERN SOCIETY* 256–57 (1986); FRANZ NEUMANN, *THE DEMOCRATIC AND THE AUTHORITARIAN STATE: ESSAYS IN POLITICAL AND LEGAL THEORY* 42 (Herbert Marcuse ed., 1957). See also WILLIAM E. SCHEUERMAN, *BETWEEN THE NORM AND THE EXCEPTION: THE FRANKFURT SCHOOL AND THE RULE OF LAW* 104 (1994) (“When the state abandons cogent general law in favor of situation-specific action, capitalism gains the upper hand over the fragile, constantly threatened aspirations of the liberal political tradition.”).

177. Martti Koskenniemi, *What Is International Law For?*, in *INTERNATIONAL LAW* 57, 70 (Malcolm D. Evans ed., 2006).

driving force is the Security Council with its web of anti-terrorism norms and bodies—are condemnation, stigmatization, and reassurance, those subject to the anti-terrorism regime are inevitably singled out for particularly harsh treatment. Not only are separate legal categories of conduct created but also different levels of protection: the category of people that falls under the special regime is seen as undeserving of the same level of protection of the law as everyone else. This premise underlies virtually all norms and mechanisms that make up the contemporary special anti-terrorism regime, turning the (suspected) terrorist into what the pirate was in previous times: the “enemy of mankind,” the pariah of the international community.¹⁷⁸

The terrorist sanctions regime imposed by the Security Council, for instance, provides far less protection to those affected by the sanctions than is generally available under national and international law, in particular depriving them of the rights to a fair hearing and a judicial remedy.¹⁷⁹ This inferior level of due process protection has been justified on the basis that the Security Council’s sanctions resolutions, by virtue of Article 103 of the U.N. Charter, prevail over every other obligation of states under domestic or international law, including obligations under human rights treaties.¹⁸⁰ The same reduced protection is evident in the 1373 regime. Resolution 1373 obliges states to adopt numerous, very far-reaching measures against terrorism, but lacks any reference to their obligations under international law to respect the basic human rights of individuals affected by these measures.¹⁸¹ This omission is compounded by the fact that the mandate of the CTC does not include reviewing anti-terrorism measures for their compliance with international human rights standard; accordingly, its first years of activity have been marked by an almost complete disregard for human rights issues.¹⁸² Similarly, Security Council Resolution

178. See GERRY SIMPSON, LAW, WAR AND CRIME: WAR CRIMES TRIALS AND THE REINVENTION OF INTERNATIONAL LAW 159–77 (2007); Malvina Halberstam, *Terrorism on the High Seas: The Achille Lauro, Piracy and the IMO Convention on Maritime Safety*, 82 AM. J. INT’L L. 269 (1988).

179. Erika de Wet & André Nollkaemper, *Review of Security Council Decisions by National Courts*, 45 GERMAN YBK INT’L L. 166, 166 (2002). See Council of Europe, *The European Convention on Human Rights, Due Process and United Nations Security Council Counter-Terrorism Sanctions* (Feb. 6, 2006) (prepared by Iain Cameron), http://www.coe.int/t/e/legal_affairs/legal_cooperation/public_international_law/Texts_&_Documents/2006/I.%20Cameron%20Report%2006.pdf; U.N. Office of Legal Affairs, Office of the Legal Counsel, *Targeted Sanctions and Due Process* (Mar. 20, 2006) (prepared by Bardo Fassbender), available at www.un.org/law/counsel/Fassbender_study.pdf; Bianchi, *supra* note 37, at 903–10; Elin Miller, *The Use of Targeted Sanctions in the Fight against Terrorism – What about Human Rights?*, 97 AM. SOC’Y INT’L L. PROC. 46, 48 (2003).

180. See Case T-306/01, Yusuf and Al Barakaat Int’l Found. v. Council of the E.U. and the Comm’n of the Eur. Cmties., 2005 E.C.R. II-3533 (“According to Article 103 of the Charter of the United Nations, ‘[i]n the event of a conflict between the obligations of the Members of the United Nations under the present Charter and their obligations under any other international agreement, their obligations under the present Charter shall prevail.’”); Case T-315/01, Kadi v. Council of the E.U. and the Comm’n of the Eur. Cmties., 2005 E.C.R. II-3649. These decisions were later overturned by the European Court of Justice. Joined Cases C-402/05 P and C-415/05 P, *Yassin Abdullah Kadi and Al Barakaat International Foundation v Council of the E.U. and Comm’n of the Eur. Cmties* (ECJ Judgment), Sept. 3, 2008, available at <http://curia.europa.eu/en/content/juris/index.htm> (last visited Feb. 12, 2009).

181. Only in January 2003, in a resolution *not* adopted under Chapter VII of the UN Charter, did the Security Council make clear that “[s]tates must ensure that any measure taken to combat terrorism comply with all their obligations under international law.” S.C. Res. 1456, para. 6, UN Doc. S/RES/1456 (Jan. 20, 2003).

182. See U.N. Econ. & Soc. Council [ECOSOC], Comm’n on Human Rights, *Report of the Special Rapporteur on the Promotion and Protection of Human Rights and Fundamental Freedoms While Countering Terrorism*, paras. 51–63, UN Doc. E/CN.4/2006/98, (Dec. 28, 2005); E.J. Flynn, *The Security*

1624, by calling on states to “[p]rohibit by law *incitement* to commit a *terrorist act*” without defining either term,¹⁸³ may help to legitimate exceptionally vague and far-reaching restrictions on the freedom of political expression.¹⁸⁴ As a final example, the claim that the Geneva Conventions are outdated and new legal categories, such as that of the “enemy combatant,” are needed,¹⁸⁵ aims to deny suspected terrorists the guarantees that are normally available to those captured during armed conflict under the general rules of international humanitarian law as well as the protections enjoyed by those who are charged with a criminal offense.¹⁸⁶ Thus, while the special treatment model may not place the terrorist beyond the law,¹⁸⁷ it does turn him or her into a stigmatized figure without the full protection of the law.

Of course, this is not the only instance where international law serves the purpose of stigmatization. For example, certain forms of crime, including crimes against humanity and genocide, are treated as international crimes to which a special stigma is attached, as they “particularly shock the collective conscience.”¹⁸⁸ However, what makes these crimes particularly shocking and deserving of stigmatization is the nature of the act: the fact that they are committed as part of a widespread or systematic violation of basic human rights.¹⁸⁹ In contrast, in the case of terrorism, the reason for the special treatment is the nature of the actor: the fact that he or she pursues political or ideological goals. This is made explicit, for example, in the European Commission’s proposal for the Framework Decision to Combat Terrorism: “Most terrorist acts are basically ordinary offences which become terrorist offences because of the motivations of the offender. If the motivation is to alter seriously or to destroy the fundamental principles and pillars of the state, intimidating people, there is a terrorist offence.”¹⁹⁰ What is stigmatized is not the crime itself but the perpetrator’s motivation.

Inherent in this focus on the actor and their motivation is a tendency to direct the stigmatizing effect of the special anti-terrorism regime against a certain category of people: those who, because of their nationality, ethnicity, national origin, religion, or other personal characteristics, are seen as potentially sympathetic to the respective political or ideological cause. In other words, the creation of an

Council’s Counter-Terrorism Committee and Human Rights, 7 HUMAN RIGHTS L. REV. 371, 377 (2007); HUMAN RIGHTS WATCH, HEAR NO EVIL, SEE NO EVIL: THE UN SECURITY COUNCIL’S APPROACH TO HUMAN RIGHTS VIOLATIONS IN THE GLOBAL COUNTER-TERRORISM EFFORT 6–7 (2004), available at <http://www.hrw.org/backgrounder/un/2004/un0804/un0804.pdf>.

183. S.C. Res. 1624, para. 1(a), UN Doc. S/RES/1624 (Sept. 14, 2005) (emphases added).

184. Roach, *supra* note 151, at 247–49.

185. Hamdi v. Rumsfeld, 542 U.S. 507, 516 (2004); Jan. 2002 Gonzales Memorandum, *supra* note 52. See Jordan Paust, *War and Enemy Status after 9/11: Attacks on the Laws of War*, 28 YALE J. INT’L L. 325, 325–26 (2003).

186. Daniel Moeckli, *The US Supreme Court’s ‘Enemy Combatant’ Decisions: A ‘Major Victory for the Rule of Law’?*, 10 J. CONFLICT & SEC. L. 75, 77–79 (2005).

187. See Fleur Johns, *Guantánamo Bay and the Annihilation of the Exception*, 16 EUR. J. INT’L L. 613, 617 (2005).

188. Prosecutor v. Kambanda, Case No. ICTR 97-23-S, Judgment and Sentence, para. 14 (Sept. 4, 1998).

189. Rome Statute of the International Criminal Court, art. 7.1, July 17, 1998, 2187 U.N.T.S. 3 (“For the purpose of this Statute, ‘crime against humanity’ means any of the following acts when committed as part of a widespread or systematic attack”).

190. *Commission Proposal for a Council Framework Decision on Combating Terrorism*, at 6, COM (2001) 521 final (Sept. 19, 2001).

alternative legal system for terrorism inevitably carries with it the danger of discrimination.¹⁹¹ The treatment of terrorism as a separate category of international law should therefore not only be resisted by those who are concerned about the coherence and unity of the international legal system—those who believe that this unity can be an end in itself—it should also be opposed by those who are concerned about the fundamental principle that all human beings deserve equal protection of the law. It is this bedrock of the international human rights system¹⁹² that is ultimately at stake in the debate about the proper place of terrorism in international law.

CONCLUSION

Various authors have considered the positive and negative impacts that the fragmentation of international law may have on the international legal system. On the positive side, specialized and tailored regulation may better accommodate the special needs of the particular subject matter, which, in turn, may lead states to better comply with international law.¹⁹³ Similarly, institutional fragmentation, i.e., the proliferation of implementation organs, may improve the efficiency of the international legal system by “generating a more refined and precise system of interpretation of norms.”¹⁹⁴ On the negative side, whereas the coherence of the international legal system contributes to its intelligibility and efficiency,¹⁹⁵ fragmentation increases the opportunities for frictions and contradictions between different special regimes, thus undermining predictability and legal certainty.¹⁹⁶ In addition, fragmentation is dangerous from a “political” perspective: since any special regime can be rejected by states, fragmentation may lead to an *à la carte* approach to international law that could ultimately threaten its very existence.¹⁹⁷

Yet the fragmentation of international law is not a unitary phenomenon whose overall benefits could be balanced against its drawbacks. Instead, there are different forms of fragmentation. Different reasons lead to the emergence of different special regimes and respective academic branches, and these developments accordingly raise different concerns. This is evidenced by the creation of the international anti-terrorism regime and the emergence of an academic branch of terrorism law. The *raison d'être* of this category of international law is very different from that of other international legal categories, as it primarily relates to a perceived need for stigmatization and reassurance through the creation of an international anti-terrorism regime that mirrors special regimes established at the domestic level. The

191. DANIEL MOECKLI, HUMAN RIGHTS AND NON-DISCRIMINATION IN THE “WAR ON TERROR” 56 (2008).

192. See, e.g., International Covenant on Civil and Political Rights, art. 26, Dec. 16, 1966, 999 U.N.T.S. 171; Universal Declaration of Human Rights, G.A. Res. 217A, art. 7, U.N. GAOR, 3d Sess., 1st plen. mtg., U.N. Doc. A/810 (Dec. 12, 1948).

193. Gerhard Hafner, *Pros and Cons Ensuing from Fragmentation of International Law*, 25 MICH. J. INT'L L. 849, 859 (2004).

194. Pierre-Marie Dupuy, *The Danger of Fragmentation or Unification of the International Legal System and the International Court of Justice*, 31 NYU J. INT'L L. & POL. 791, 796 (1999); see also Georges Abi-Saab, *Fragmentation or Unification: Some Concluding Remarks*, 31 NYU J. INT'L L. & POL. 919, 925–26 (1999).

195. Dupuy, *supra* note 5, at 13–14.

196. Hafner, *supra* note 193, at 856–58.

197. Dupuy, *supra* note 5, at 14–15.

problem with this development is not, as with other types of fragmentation, that special regimes may be rejected by states. Since the international anti-terrorism regime is built around binding Security Council resolutions and backed up by the political pressure of powerful (Western) states, there is no opt-out possibility. Nor is it merely a technical problem, threatening legal security and efficiency. The real concern raised by the emergence of terrorism as a distinct category of international law is that it undermines the principle that every legal subject deserves to be treated with equal respect and dignity.

In one respect, however, the emergence of terrorism law is characteristic of the general trend towards the fragmentation and compartmentalization of international law. Martti Koskenniemi and Päivi Leino have convincingly argued that these developments “arise as effects of politics and not as technical mistakes or unfortunate side-effects of some global logic.”¹⁹⁸ When Koskenniemi and Leino refer to “politics,” they have the hegemonic struggle between different international implementation organs in mind.¹⁹⁹ The emergence of the international anti-terrorism regime is equally the consequence of political pressures, albeit of a different sort: it is the result of a hegemonic attempt by certain states to impose a global approach to countering terrorism that mirrors their own domestic anti-terrorism policies.

198. Martti Koskenniemi & Päivi Leino, *Fragmentation of International Law? Postmodern Anxieties*, 15 LEIDEN J. INT'L L. 553, 561 (2002).

199. *Id.* at 562.