
The World after September 11: Has It Really Changed?

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Bannelier, K., O. Corten, T. Christakis and B. Delcourt (eds), *Le droit international face au terrorisme*. Paris: Pédone, 2002. Pp. 356

Czempiel, E.-O., *Weltpolitik im Umbruch: Die Pax Americana, der Terrorismus und die Zukunft der internationalen Beziehungen*. München: Verlag Beck, 2003. Pp. 230

Hirschmann, K., *Terrorismus*. Hamburg: Europäische Verlagsanstalt, 2003. Pp. 96

International Bar Association, *International Terrorism: Legal Challenges and Responses*. Ardsley: Transnational Publishers, 2003. Pp. 186

Koch, H.-J. (ed.), *Terrorismus- Rechtsfragen der äußeren und inneren Sicherheit*. Baden-Baden: Nomos Verlagsgesellschaft, 2002. Pp. 152

Tálas, P. (ed.), *Responses to Terrorism Or: Is There a Route from the 'Huntdown' in Afghanistan to Sustainable Globalization?* Budapest: SVKH, 2002. Pp. 327

Van Krieken, P.J., *Terrorism and the International Legal Order with Special Reference to the UN, the EU and Cross-Border Aspects*. The Hague: TMC Asser Press, 2002. Pp. 482

Abstract

This review essay aims to assess whether international law has actually changed significantly since 9/11, or whether there is just an impression of change conveyed by books and articles published shortly after the events. Most books on terrorism start their discussion by wrestling with the concept of 'terrorism'. In a second step, authors examine the legal tools available to states as well as to the international community to fight terrorism. In particular, reference is made to the roots of terrorism and to anti-terrorism measures adopted by states, the United Nations and the European Union. Many contributions focus on 9/11 as the momentum in favour of a concerted police action against terrorism and enhanced inter-governmental cooperation. Other means employed in the fight against terrorism involve the prosecution of those alleged to have carried out acts of

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'terrorism' and the application of international humanitarian law to situations that may qualify as armed conflicts. Last but not least, much literature deals with the recent trend to combat terrorism by use of military force. In this regard, attention is paid to the characterization of acts of terrorism as 'armed attack', the reaction of the Security Council in the aftermath of 9/11 and the right to self-defence.

This review essay aims to assess whether international law has actually changed significantly since September 11 as much of the literature would suggest, or whether this much vaunted change is essentially a result of the volume of analyses published in the immediate aftermath of a truly traumatic event, and of the outpouring of reactions and overreactions that followed.

1 The Definition of Terrorism: A Never-ending Story

A An Ambiguous Definition

The classical topic dealt with by every book on terrorism is its definition. Authors unanimously concede that there is no commonly agreed upon definition, although there is widespread agreement that the concept carries with it a pejorative and subjective connotation.¹ Indeed, Lutz notes, perhaps sarcastically, that it is easier to list those acts which do not qualify as terrorism.² Frequently, in categorizing 'terrorism', authors distinguish between the aim and the means used.³ Duez sees terrorism through three lenses: the aim, the methods and the expected consequences.⁴ A definition that hinges upon the methods used is rather dangerous, for it means that the definition would depend on the level of technology and the creativity of the perpetrators in using certain methods.⁵ These two elements are well described in Lutz's contribution⁶ and Hirschmann's book.⁷

A number of authors strongly diverge in their opinions on the relevance of the motives of the act, i.e., how the actors characterize the acts. Van Krieken simply asserts that 'the motives or causes driving the actors are irrelevant',⁸ while Sorel dismisses motives as a defining factor on the basis that this enables a common

¹ Sorel, 'Existe-t-il une définition universelle du terrorisme?', in K. Bannelier *et al.* (eds.), *Le droit international face au terrorisme* (2002), at 38; International Bar Association, *International Terrorism: Legal Challenges and Responses* (2003), at 1; P.J. Van Krieken, *Terrorism and the International Legal Order with Special Reference to the UN, the EU and Cross-Border Aspects* (2002), at 14; Lutz, 'Was ist Terrorismus? Definitionen, Wandel, Perspektiven', in H.-J. Koch (ed.), *Terrorismus- Rechtsfragen der äußeren und inneren Sicherheit* (2002), at 9–10; Duez, 'De la définition à la labellisation: le terrorisme comme construction sociale', in Bannelier *et al.* *supra* this note, at 105; P. Tálas (ed.), *Responses to Terrorism Or: Is There a Route from the 'Huntdown' in Afghanistan to Sustainable Globalization?* (2002).

² Lutz, *supra* note 1, at 10.

³ Sorel, *supra* note 1, at 41.

⁴ Duez, *supra* note 1, at 110.

⁵ *Ibid.*, at 111.

⁶ Lutz, *supra* note 1, at 18–27.

⁷ K. Hirschmann, *Terrorismus* (2003), at 25–33.

⁸ Van Krieken, *supra* note 1, at 15.

denominator to be more easily found.⁹ Lutz, on the other hand, defines terrorism as 'the use of force for political or religious motives',¹⁰ an approach also adopted by Hirschmann when analysing terrorism motivated by ideology or social-revolutionary concerns, by ethno-nationalistic considerations and by religion. However, Lutz admits after a few more lines in his contribution that it is difficult, if not impossible, to define terrorism by examining only the motives of the actors.¹¹ It seems that this entire debate on the how to define the authors of such acts is highly politicized so that Sorel's idea of brushing aside this element of motive is probably a sound one.¹²

Moreover, the authors agree that a piecemeal approach towards the condemnation of terrorist attacks has prevailed to date. Indeed, each treaty on so-called 'terrorist' acts has tended to be designed as a reaction to the latest types and forms of terrorism,¹³ making it difficult for anything like a stable definition to emerge. Although 'terrorist acts' are defined in various conventions, and particularly in the Terrorism Finance Convention, the concept of 'terrorism' is left undefined at the international level. In this regard, recent discussions on the definition of terrorism appearing in the reviewed books do not depart from traditional views expressed earlier. Sorel does observe, however, that regional conventions are more audacious in their attempts to define terrorism.

In fact, it is regrettable that authors shun the idea of reaching a neat conclusion. Only Sorel and Van Krieken grasp the nettle. While Sorel draws up a definition of terrorism after reviewing the different sources of international law,¹⁴ Van Krieken adopts the 1996 General Assembly definition after analysing the best-known definitions which, in his opinion, are either too specific or too general.¹⁵

Despite the September 11 events, it seems that not much has changed in the legal debate surrounding the definition of 'terrorism'. However, as Oeter notes, two thorns remain in the side of the fragile agreement on the core elements of a definition of 'terrorism': the qualification of national liberation movements and the concept of 'state terrorism',¹⁶ a position espoused by Hirschmann on the issue of national liberation movements¹⁷ and by Van Krieken on the issue of state terrorism.¹⁸

B 'Freedom Fighters v. Terrorists': A Hackneyed Debate

Given that one would have thought that the debate on the exclusion of national liberation movements from the definition of terrorism came to a close some years ago,

⁹ Sorel, *supra* note 1, at 58.

¹⁰ 'Terrorismus ist Anwendung von Gewalt zu politischen oder religiösen Zwecken': Lutz, *supra* note 1, at 11.

¹¹ *Ibid.*, at 13.

¹² Sorel, *supra* note 1, at 67.

¹³ *Ibid.*, at 45; International Bar Association, *supra* note 1, at 4; Oeter, 'Terrorismus- ein völkerrechtliches Verbrechen?', in Koch (ed.), *supra* note 1, at 35.

¹⁴ Sorel, *supra* note 1, at 68.

¹⁵ Van Krieken, *supra* note 1, at 19.

¹⁶ Oeter, *supra* note 13, at 43.

¹⁷ Hirschmann, *supra* note 7, at 10.

¹⁸ Van Krieken, *supra* note 1, at 15.

it is surprising to see that many authors are still discussing this issue. Most authors concede that, on the basis of an analysis of relevant General Assembly resolutions and various regional conventions, states do not consider acts perpetrated by liberation movements as being of a terrorist nature.¹⁹ The main feature distinguishing liberation movements from terrorist groups seems to be the aim of their activities. Benchikh, for example, argues that ‘terrorist organizations do not represent people aspiring to liberation, even though, in some cases, they are fed by revolt instincts against misery and injustice’.²⁰

Still, as several authors point out, the distinction between terrorists and national liberation movements is hardly clear, especially since some groups use both guerrilla and terrorist tactics.²¹ In fact, as though to underscore the complexity of the issue, Benchikh for example thinks it is necessary to distinguish between liberation and secession movements, with only the latter being excluded from the definition of terrorism.²² Hirschmann suggests that while ‘guerrilla-fighters’ are fighting for the occupation of a territory, terrorists are fighting for the occupation of minds.²³ In his view, terrorism is primarily a communication strategy. Indeed, what is perhaps necessary is to move away from a concept of terrorism as being linked to territory altogether. The idea that terrorism has lost any relationship to territory emerges in many German books that speak of ‘*Entterritorialisierung*’.

At the end of the day, however, as Hirschmann correctly observes, ‘to classify a group as a terrorist organization or freedom fighters using partly terrorist methods, is a political decision’.²⁴ Perhaps, however, the overall difficulty of defining terrorism is demonstrated by the fact that the authors of the reviewed books are reluctant to apply their theoretical knowledge to real cases. Apart from discussing Al Qaeda and clearly identifying it as a terrorist group, authors are silent on the denomination of other entities such as the PKK, the Chechens or Hamas. This can have the effect of making their writings somewhat theoretical at times.

C *Does State Terrorism Exist?*

The reviewed books also add grist to the mill in the debate as to whether terrorist acts can be perpetrated by states. The IBA’s assertion that ‘it [is] vital to acknowledge that the use of violence to instil terror among civilians is not exclusively the preserve of the non-State actor’²⁵ finds support in Oeter’s comment that ‘after all [the definition]

¹⁹ *Ibid.*, at 74–76 and Hirschmann, *supra* note 7, at 10.

²⁰ ‘Les organisations terroristes ne représentent pas des peuples qui cherchent leur libération, même si, dans certains cas, elles s’inspirent des réactions de révolte contre la misère ou l’injustice’: Benchikh. ‘Le terrorisme, les mouvements de libération nationale et de sécession et le droit international’, in Bannelier *et al.*, *supra* note 1, at 73.

²¹ Oeter, *supra* note 13, at 41 and Hirschmann, *supra* note 7, at 12.

²² Benchikh, *supra* note 20, at 69.

²³ Hirschmann, *supra* note 7, at 11.

²⁴ ‘Letztlich ist es eine politische Entscheidung, ob eine Gruppe als Terrororganisation oder als Freiheitskämpfer mit terroristischem Handlungsanteil eingestuft wird’: *ibid.*, at 12.

²⁵ International Bar Association, *supra* note 1, at 3.

should not depend on whether such acts are committed by private persons or State agents; what is most relevant are the concrete modalities and the (terrorist) aim of the use of force'.²⁶

It is true that the term 'state terrorism' is not recognized in international law.²⁷ Despite the lack of a legal definition, however, Kohen suggests that state terrorism be divided into four groups: terrorist acts committed during armed conflicts; terrorist acts perpetrated usually on foreign soil by state agents outside the framework of an armed conflict; acts involving the state in the activities of terrorist groups; and internal state terrorism. This categorization is all the more puzzling as traditional analyses have focused on the nature and distance of the link between the state and terrorist groups (ranging from a very close relationship to no relationship at all and the state committing terrorist acts without the intermediation of terrorist groups), without taking into consideration the existence of an armed conflict. A more political categorization is provided by Hirschmann, who distinguishes between terrorism supported by a state ('*staatlich gefördert*') and terrorism tolerated by a state ('*staatlich geduldet*').²⁸ In his opinion, while the first category, better known as 'state-sponsored terrorism', is disappearing, the second is growing at a frightening pace.²⁹ The main question relating to state-sponsored terrorism is undoubtedly state responsibility. The merit of the books published as a result of the French- and the German-speaking conferences is the rare and excellent examination of state responsibility for terrorist acts made by Dubuisson as well as Bruha's thoughts on state obligation to eschew any tolerance and support of terrorism and to adopt measures aimed at preventing and suppressing terrorism.³⁰ Of particular relevance is the discussion on the concept of due diligence, a topic that, so far, only American scholars seem to have struggled with.

Indeed, most authors stress that the acts covered by the lax terminology of 'state terrorism' are prohibited either by international humanitarian law, human rights, international criminal law or general international law and that some of these rules are addressed to states.³¹ There is, therefore, a subtle contradiction running through their efforts to come to grips with the issue. On the one hand, they point to the

²⁶ 'Letztlich kann es nicht darauf ankommen, ob derartige Akte von Private oder von Trägern staatlicher Gewalt begangen werden; entscheidend sind die konkreten Modalitäten und das (terroristische) Ziel der Gewaltanwendung': Oeter, *supra* note 13, at 46.

²⁷ International Bar Association, *supra* note 1, at 3; Kardos, 'Cooperation or the Protection of the Right of Sovereign Decision-Making? Some Dilemmas of International Law and the Actions against Terrorism' in P. Tálás (ed.), *Responses to Terrorism Or: Is There a Route from the 'Huntdown' in Afghanistan to Sustainable Globalization?* (2002), at 125.

²⁸ Hirschmann, *supra* note 7, at 51.

²⁹ *Ibid.*, at 51–55.

³⁰ Dubuisson, 'Vers un renforcement des obligations de diligence en matière de lutte contre le terrorisme?' in Bannelier *et al.*, *supra* note 1, at 141–157; Bruha, 'Neuer Internationaler Terrorismus: Völkerrecht im Wandel?', in Koch, *supra* note 1, at 67–71.

³¹ International Bar Association, *supra* note 1, at 4; Oeter, *supra* note 13, at 41 and 47; Kohen, 'Les controverses sur la question du "terrorisme d'Etat"', in Bannelier *et al.*, *supra* note 1, at 85; Kardos, *supra* note 27, at 125.

necessity of agreeing on a definition of state terrorism and, on the other, they assert that all acts that could be considered as state terrorism are proscribed anyhow. Since the IBA believes that the great majority of acts falling under the heading of 'state terrorism' are covered by a comprehensive and prohibitive legal regime, it prefers to focus its discussion on the activities of international terrorists that are subject to less prohibitive norms.³² Lutz also refrains from discussing the concept of state terrorism, because he believes that non-state terrorism is presently the biggest threat.³³ To some extent, the most recent literature tends to prove that although the heated debate on 'state terrorism' is still far from over, it is now less the focus of attention than it was.

Astutely, Kohen raises the issue of the use of terrorism by states in order to fight terrorism effectively. While he admits that lawyers may be loath to discuss such a question, it nonetheless remains of importance in the light of the current and past practice of several states. Kohen nonetheless insists that 'it is not possible to really fight terrorism if one betrays the fundamental values of justice and rule of law'.³⁴

2 Legal Tools to Fight Terrorism

Koufa notes that although terrorism is essentially a political and social phenomenon, the United Nations opted chiefly for a legal approach to combat its impact.³⁵ Some correctly argue that, in the fight against terrorism, international law always took a defensive and reactive stance.³⁶ This explains why some authors militate in favour of a preventive approach, i.e., of fighting the root causes of terrorism.

A *Fighting the Root Causes of Terrorism*

Vincze argues that, especially in the European Union, September 11 'generated a wave of reflections on the roots of terrorism (and a general anti-Western sentiment in the developing world)'.³⁷ Sadly, most of the books reviewed are silent on this topic, probably because international lawyers are often reluctant to engage in any even slightly politicized debate.

According to Bruha, a first means of reducing the wide support of terrorist groups in the Islamic world is to find a solution to the Palestinian conflict.³⁸ A similar comment is made by Czempiel when examining the reaction of Islamic states after September 11.³⁹ It is rather refreshing to realize that international lawyers like Bruha

³² International Bar Association, *supra* note 1, at 4.

³³ Lutz, *supra* note 1, at 9–27.

³⁴ 'On ne saurait ainsi combattre véritablement le terrorisme en trahissant les valeurs essentielles de justice et de primauté du droit': Kohen, *supra* note 31, at 91.

³⁵ Koufa, 'Le terrorisme et les droits de l'homme', in Bannelier *et al.*, *supra* note 1, at 191.

³⁶ Szerek, 'Le jugement des auteurs d'actes de terrorisme: Quels tribunaux après le 11 septembre?' in Bannelier *et al.*, *supra* note 1, at 297.

³⁷ Vincze, 'The European Union's Response to the September 11 Events', in Tálás, *supra* note 27, at 214.

³⁸ Bruha, *supra* note 30, at 61.

³⁹ Czempiel, *supra* note 2, at 50–51.

understand the political background without which, oftentimes, any analysis in international law is left without practical application.

On behalf of all the authors of 'Responses to Terrorism', Tálas asserts that there is a means of preventing individuals from joining international terrorist groups: the financial investment of the richest countries of the world in the health and education systems of the developing states.⁴⁰ A similar proposal is also made by Bruha who declares that 'without a solution to the problem of poverty in the world, there will be no solution to the problem of terrorism'.⁴¹ Czempiel regroups this under the heading of 'unequal distribution' of wealth in the world.⁴²

Further, Czempiel points out that the existence of failed states gives terrorist networks a possibility of finding safe places from which they can organize and launch their attacks.⁴³ Czempiel and Kiss go further inasmuch as they argue that the international community should engage in nation-building operations to ensure that failing or failed states have the means to hinder the emergence of terrorist groups on their soil.⁴⁴

Despite the enunciation of all these possible causes of and responses to the emergence of international terrorism, the international legal measures adopted by international society post-September 11 have largely focused on a more immediate sort of reaction.

B Counter-terrorism Measures

1 National Measures to Fight Terrorism

The last few years have generated an important debate on state means to fight terrorism. *Terrorismus- Rechtsfragen der äußeren und inneren Sicherheit* offers a particularly interesting perspective on this topic, most likely because German international lawyers must bear in mind the importance of the Fundamental Law of Germany and its emphasis on fundamental rights and freedoms. In this context, Denninger explains that the logic promoted by a liberal law-abiding state that aims to protect individual freedom and autonomy differs fundamentally from the one adopted by a 'preventive state' (*Präventionsstaat*) that is predicated on concepts such as security and efficiency.⁴⁵ The IBA adds, moreover, that any national legislation pertaining to terrorism should be in accordance with the principles of legality and certainty.⁴⁶

The events of September 11 have stimulated many states to reconsider the effectiveness of their existing anti-terrorist legislation and policies. As the IBA remarks, states have modified (or not) their legislative attitude towards terrorism in

⁴⁰ Tálas, 'Fighting Terrorism as a New Type of Warfare', in Tálas, *supra* note 1, at 66.

⁴¹ Bruha, *supra* note 30, at 62.

⁴² E.-O. Czempiel, *Weltpolitik im Umbruch: Die Pax Americana, der Terrorismus und die Zukunft der internationalen Beziehungen* (2003), at 51.

⁴³ *Ibid.*, at 58–59.

⁴⁴ *Ibid.*, at 61; Kiss, "'New Terrorism' or the Metamorphosis of Security and War", in Tálas, *supra* note 1, at 50.

⁴⁵ Denninger, 'Freiheit durch Sicherheit', in Koch, *supra* note 1, at 86.

⁴⁶ International Bar Association, *supra* note 1, at 58.

three different ways: by asserting that the existing legal framework is sufficient to deal effectively with terrorism; by introducing comprehensive or specific and targeted anti-terrorist acts; and by the use of repressive actions.⁴⁷ The IBA then examines changes in several countries to prove its point.

According to Denninger, although Germany adopted new laws pertaining to counter-terrorism, it opted for the same policy and stance as in the 1970s when it was swept by a wave of terrorist attacks.⁴⁸ In particular, the German authorities renewed the '*Rasterfahndung*', a very peculiar procedural method that enables the authorities to identify 'sleepers' (not by examining criminal records, but by seeking to identify persons who have always obeyed the law and in the face of it appear to be behaving like good citizens). Prior to September 11 this method was commonly used by the secret services, but it is now applied by the German police forces.⁴⁹ In this sense (and to the extent that the German case is representative), it would seem that September 11 has not brought significant change in states' methods of dealing with terrorism. Yet, Hirschman correctly explains that the main break with the past is that nowadays states are compelled to consider internal as well as external political factors and to adopt a multidisciplinary approach, mixing reactive as well as preventive measures in their fight against terrorism.⁵⁰

2 Counter-terrorism and the Protection of Human Rights

The generally held view is that the fight against terrorism should not lead to restricting human rights and civil liberties,⁵¹ although many authors note the by now well-evidenced fact that many states have used terrorist crimes as an excuse to contravene international human rights standards,⁵² raising fears that the repression of terrorism may even lead to more terrorism.

To reassure the general public and quickly improve the sense of security, states tightened existing regulations, without first receiving much criticism from the public.⁵³ This policy is well reflected in Van Krieken's triangle of 'interdependency of freedom, security and justice'.⁵⁴ Looking at how this balance needs to be struck, the IBA identifies several controversial issues: the broad definition of terrorism, the methods of information gathering and sharing used, law enforcement, detention and finally the way trials are conducted.⁵⁵ It is evident that the IBA mostly focuses its attention on the right to a fair trial, sometimes in too much detail. Yet, perhaps the interesting point is that the critique of states' arbitrage between security and personal freedom addressed by the IBA or Hirschmann, for example, is not as virulent as one

⁴⁷ *Ibid.*, at 38–39.

⁴⁸ Denninger, *supra* note 45, at 83.

⁴⁹ Gusy, 'Geheimdienstliche Aufklärung und Verfassungsschutz', in Koch (ed.), *supra* note 1, at 94.

⁵⁰ Hirschmann, *supra* note 7, at 76.

⁵¹ International Bar Association, *supra* note 1, at 53; Koufa, *supra* note 35, at 195.

⁵² *Ibid.*, at 195; Bruha, *supra* note 30, at 79.

⁵³ Szabó, 'In the Wake of September 11: Challenges and Trends of Response in Domestic and International Institutions' in Tólas, *supra* note 27, at 29.

⁵⁴ Van Krieken, *supra* note 1, at 4.

⁵⁵ International Bar Association, *supra* note 1, at 58–89.

would have thought.⁵⁶ This is in stark contrast with the comments generally heard about international humanitarian law and, more specifically, about the detention of prisoners in Guantanamo Bay.

Another issue raised by the legal literature is the possible violation of human rights standards by organs of the United Nations in the fight against terrorism. One must regret that such comments only recently emerged and have, so far, not led to any proper discussion. For example, Angelet briefly indicates that Resolution 1373, which contains wide-ranging anti-terrorism measures, does not refer in any manner to general human rights standards.⁵⁷ The IBA also quickly points out that, unfortunately, none of the resolutions relating to terrorism mention human rights standards or, for example, provide means for alleged terrorists to obtain the removal of their name from the list drawn up under Resolution 1373.⁵⁸ There is no doubt that this interesting question needs further development.

3 State Cooperation

As Delcourt judiciously remarks, 'recent events have not radically changed the various approaches towards the fight against terrorism; the State remains, in fact, the central institution endowed with responsibility for the fight against terrorism'.⁵⁹ Indeed, contrary to popular belief, the hand of many states seems to have been reinforced by the September 11 attacks, rather than the contrary. This, however, does not mean that state cooperation has increased.

(a) State Cooperation in the Framework of the United Nations

It seems that divergent, if not opposing, tendencies towards the fight against terrorism can be detected in the framework of the United Nations. It is revealing of the current state of international affairs that it was the Security Council that led the qualitative jump in the fight against terrorism. Although the Security Council had, on numerous occasions prior to the September 11 attacks, condemned terrorist attacks and international terrorism more specifically, it had never invoked its Chapter VII powers to oblige states to abide by the terms of these resolutions.⁶⁰ This remarkable step was accomplished by the adoption of Resolution 1373 (2001). As Corten underlines, this 'showed the will of the Security Council to reinforce its normative

⁵⁶ *Ibid.*, at 58–89; Hirschmann, *supra* note 7, at 88–90.

⁵⁷ Angelet, 'Vers un renforcement de la prévention et la répression du terrorisme par des moyens financiers et économiques?' in Bannelier *et al.*, *supra* note 1, at 227.

⁵⁸ International Bar Association, *supra* note 1, at 32 and at 125–127.

⁵⁹ 'Les événements récents n'ont pas modifié de manière radicale les approches relatives [*sic*] la réglementation de la lutte contre le terrorisme; l'Etat demeure effectivement l'institution centrale chargée de lutter contre le terrorisme': Delcourt, 'De quelques paradoxes liés à l'invocation de l'Etat et du droit', in Bannelier *et al.*, *supra* note 1, at 204.

⁶⁰ Corten analyses in depth most of the resolutions on terrorism: Corten, 'Vers un renforcement des pouvoirs du Conseil de Sécurité dans la lutte contre le terrorisme?', in Bannelier *et al.*, *supra* note 1, at 270–276.

power' in matters of terrorism,⁶¹ a novelty that neither van Krieken, Angelet nor Valki fail to mention in their analysis of the Security Council resolutions.⁶²

As a consequence of Resolution 1373, the Counter-Terrorism Committee (CTC) was established to monitor states in their obligations to abide by the resolution. So far, the work of this Committee has received very little criticism. It is therefore unusual to read the sort of criticism that one finds in the book *International Terrorism: Legal Challenges and Responses*. The main arguments expounded by the IBA are that states are obliged to introduce anti-terrorist measures without defining the term; that the CTC does not have the power to monitor these measures in terms of their conformity with human rights standards; and, on top of that, that the Security Council remained silent as to how states not complying with Resolution 1373 would be compelled to abide by its provisions.⁶³ Obviously, September 11 radically modified the Security Council's attitude towards international terrorism, but real enforcement mechanisms are still lacking.

This creative and new approach, as d'Argent remarks, almost nullifies the need for ratification of certain conventions such as the Terrorism Finance Convention.⁶⁴ However, in contrast to many and in a rather thought-provoking manner, Angelet draws the conclusion that Resolution 1373 adopted under Chapter VII has binding force and is thus immediately applicable to all states, but that it cannot replace the Convention. In particular, Angelet points out that Resolution 1373 only contains some of the norms established in the Convention and that it hardly mentions international cooperation in penal matters, brushing aside the principle '*aut dedere aut judicare*' and thereby leaving the door open for a case-by-case system.⁶⁵ He also observes that there is no reference to how the efficiency of the measures adopted by the state is to be controlled.⁶⁶ The IBA is more understanding of Resolution 1373, although it also highlights the minimal role played by the CTC in the implementation of the norms enounced in Resolution 1373.⁶⁷

It is true that the United Nations has adopted several instruments aimed at cutting the sources of finances of international terrorism. Yet, one must bear in mind that this method of fighting international terrorism predates the September 11 events. Already in 1999, after the terrorist bomb attacks in Nairobi, Kenya and Dar-es-Salaam, the Security Council had requested the establishment of a Committee, the task of which would be to draw up a list of individuals and groups whose assets should be frozen. According to Van Krieken, therefore, '1373 should therefore be seen as an elaboration of 1269'.⁶⁸

⁶¹ *Ibid.*, at 275.

⁶² Van Krieken, *supra* note 1, at 144; Angelet, *supra* note 57, at 219; Valki, 'The 11 September Terrorist Attacks and the Rules of International Law', in Tólas, *supra* note 27, at 110.

⁶³ International Bar Association, *supra* note 1, at 30–31.

⁶⁴ D'Argent, 'Examen du projet de convention générale sur le terrorisme international', in Bannelier *et al.*, *supra* note 1, at 122.

⁶⁵ Angelet, *supra* note 57, at 227–228.

⁶⁶ *Ibid.*, at 228–235.

⁶⁷ International Bar Association, *supra* note 1, at 124–125.

⁶⁸ Van Krieken, *supra* note 1, at 144.

That the Security Council made use of its substantial powers accorded it by Chapter VII of the United Nations Charter is criticized by Angelet and Bruha, who believe that the Security Council is not endowed with the power to enact such strong legislation.⁶⁹ Moreover, drawing from the example of the *Lockerbie* case, Kardos stresses that, in some cases, the Security Council hinders the good implementation of treaties relating to terrorism,⁷⁰ an idea that is discussed only in this contribution and deserves to be developed. Notwithstanding, it is probably hard to argue that the Security Council was acting *ultra vires* when it adopted Resolution 1373, and it is probably better that the Security Council should have been involved rather than allow more state unilateralism.

In addition to the actions taken by the Security Council, there are several conventions currently under discussion in the General Assembly of the United Nations. The global Convention on international terrorism drafted by India has obtained only the lukewarm blessing of most legal commentators. Sorel and d'Argent, for example, contend that it lacks clear guidelines as to its relationship with the other anti-terrorist conventions.⁷¹ Only Koufa expresses her deep regret that the events of September 11 have not resulted in the international community giving the utmost priority to the adoption of the anti-terrorist convention:⁷² 'in brief, one must admit that nothing has happened in this field'.⁷³

(b) State Cooperation: A Look at the Practice

State cooperation in the field of terrorist repression is primarily embodied in various conventions adopted at the UN level. The IBA lists eight modalities of cooperation, adding that none of the international treaties relating to international terrorism has recourse to all of them.⁷⁴ Cooperation is especially weak in penal matters.⁷⁵ More generally, as Szurek remarks, the implementation of anti-terrorist conventions is largely conditioned by the good will of states.⁷⁶

For example, while some states often work on a multi- or bilateral level, others prefer to have recourse to unilateral measures. Christakis illustrates this division in the international community well by using the example of cooperation regarding biological and chemical weapons. He does contend, however, that this is not necessarily for the worse because the existing system at the international level is rather insufficient, if not seriously flawed, and thus unilateral remedies can sometimes be beneficial.⁷⁷ From the French-speaking contributions, it emerges that this mixture of

⁶⁹ Angelet, *supra* note 57, at 227; Bruha, *supra* note 30, at 63–64.

⁷⁰ Kardos, *supra* note 27, at 124.

⁷¹ Sorel, *supra* note 1, at 62; D'Argent, *supra* note 64, at 136–139.

⁷² Koufa, *supra* note 35, at 198–199.

⁷³ 'En somme, force est de constater que dans ce domaine rien ne s'est passé' : *ibid.*, at 201.

⁷⁴ International Bar Association, *supra* note 1, at 129 and 131–132.

⁷⁵ *Ibid.*, at 6.

⁷⁶ Szurek, *supra* note 36, at 306 and 310.

⁷⁷ Christakis, 'Unilatéralisme et multilatéralisme dans la lutte contre la terreur: L'exemple du terrorisme biologique et chimique', in Bannelier *et al.*, *supra* note 1, at 166.

multilateralist and unilateralist measures is probably the best solution, a stance that the German contributors reject, arguing instead for an all-multilateralist approach.

Since no new convention or implementation machinery has been adopted since the September 11 events, it may be argued that international cooperation has, in fact, not significantly increased. Besides deploring the weaknesses of international conventions, several authors underline the current need to improve other methods of cooperation such as information sharing,⁷⁸ notably as regards investigations and interrogation of suspects and exchange of information.⁷⁹ Yet, authors forget to mention that this cooperation is often undertaken outside the framework of international conventions on terrorism and, hence, hinges even more on the good will of the states involved.

(c) State Cooperation in the Framework of Regional Organizations

By contrast, September 11 has had a positive impact on the cooperation among regional organizations. In this regard, the IBA examines the work undertaken by the African Union, the OSCE, the Commonwealth of Nations, and the South Asian Association for Regional Cooperation.⁸⁰

It is interesting that the IBA publication also focuses its attention on the European context, shedding an interesting transatlantic perspective on a region where cooperation has significantly increased, especially in the framework of the third pillar.⁸¹ In fact, perhaps one of the more interesting elements to emerge from the books is that the EU used September 11 as an opportunity to strengthen its own integration.⁸² As Weyembergh points out, 'it is the fight against terrorism that motivated and constituted the primary subject of efforts aimed to develop the police cooperation between the member States of the Communities.'⁸³ Yet, she fails to mention the major critiques developed by various NGOs in relation to the European penal cooperation and arrest warrant.

Yet, again, one needs to conclude that the measures taken or suggested by the European Union were, in fact, not new.⁸⁴ September 11 only forced European states to acknowledge terrorism as a serious threat and, as a result, become involved in further discussions of two already existing propositions of the European Commission. As the IBA comments, one of them, by enumerating acts considered as terrorist, did have the effect of encouraging many states to adopt legislation in the field of terrorism.⁸⁵

⁷⁸ International Bar Association, *supra* note 1, at 129.

⁷⁹ Van Krieken, *supra* note 1, at 79.

⁸⁰ International Bar Association, *supra* note 1, at 32–33.

⁸¹ Vincze, *supra* note 37, at 193.

⁸² *Ibid.*, at 196.

⁸³ '[C]'est la lutte anti-terroriste qui a motivé et constitué l'objet premier des efforts visant à développer la coopération policière entre Etats membres des Communautés': Weyembergh, 'La coopération pénale européenne face au terrorisme: rupture ou continuité?', in Bannelier *et al.*, *supra* note 1, at 281.

⁸⁴ Vincze, *supra* note 37, at 198–207; Weyembergh, *supra* note 83, at 289.

⁸⁵ International Bar Association, *supra* note 1, at 34–35.

C The Prosecution of Acts of Terrorism

Among legal scholars, there is no doubt that acts of terrorism violate national and international law. In investigating which fora might be appropriate for trials of suspected terrorists, the IBA identifies domestic courts, special military tribunals, coalition treaty-based tribunals, *ad hoc* international tribunals and finally the International Criminal Court.⁸⁶ However, in practice, the initiative to mount criminal prosecutions of such acts remains in the realm of national law, notably because the international community did not secure a definition of terrorism to be included in the Statute of the International Criminal Court.⁸⁷ Jurovics and Szurek attribute this absence of a definition to the abundance of international conventions. In fact, these conventions are based on the following three pillars: the principle of '*aut judicare aut dedere*',⁸⁸ state obligation to include in their legislation the crimes mentioned in the conventions, and state obligation to establish their legal basis to prosecute these crimes.⁸⁹ This can nonetheless lead to contentious assumptions and modalities of jurisdiction. Szurek is particularly critical of the military courts set up by the American Government since, in her opinion, they derogate from both American legislation and international law.⁹⁰ The IBA characteristically refuses to take such a stance, preferring to weigh the pros and cons of such courts as part of a typically 'policy-oriented' evaluation.⁹¹

Regardless of whether national initiatives comply with international law, systematic resort to national fora is a fact that is deplored by many authors who claim that the International Criminal Court (ICC) would have been an appropriate and viable venue for trying suspected terrorists.⁹² For Jurovics, there is no shortage of offences under which acts of terrorism can be prosecuted: war crimes or crimes against humanity,⁹³ or even, according to the IBA, the crime of genocide.⁹⁴ In order to demonstrate that terrorist acts may fall under the definition of the crimes enumerated in the ICC, the IBA interestingly takes the events of September 11 as an example.⁹⁵ It is worth nothing, however, that not all acts of terrorism, as van Krieken notes, 'fall within the ambit of the Rome Statute.'⁹⁶ Most importantly, the books reviewed fail to mention the high selectivity of future trials before the ICC: not every alleged terrorist criminal

⁸⁶ *Ibid.*, at 142–146.

⁸⁷ 'Whatever the definition of the act, it is of paramount importance that the offender be apprehended and be brought to justice': Van Krieken, *supra* note 1, at 33.

⁸⁸ *Ibid.*, at 33–109.

⁸⁹ Jurovics, 'Les controverses sur la question de la qualification du terrorisme: Crime de droit commun, crime de guerre ou crime contre l'humanité', in Bannelier *et al.*, *supra* note 1, at 97; Szurek, *supra* note 36, at 306.

⁹⁰ *Ibid.*, at 303.

⁹¹ International Bar Association, *supra* note 1, at 143–144.

⁹² Oeter, *supra* note 13, at 50; Jurovics, *supra* note 89, at 102; International Bar Association, *supra* note 1, at 141–142.

⁹³ Jurovics, *supra* note 89, at 98–101.

⁹⁴ International Bar Association, *supra* note 1, at 157–158.

⁹⁵ *Ibid.*, at 149–158.

⁹⁶ Van Krieken, *supra* note 1, at 108.

would be hauled into court, only those having committed massive violations, so that the problem of forum choice would remain largely intact.

D *International Humanitarian Law*

There is no doubt that international humanitarian law has suffered much from the consequences of September 11. The fact that the IBA feels obliged to stress that ‘international humanitarian law remains as applicable and important today as it was prior to September 11’⁹⁷ is a good illustration of how even the obvious needs to be reaffirmed. In the opinion of Szurek,

the US interpret the rules of international humanitarian law in the light of terrorism with the consequence that they believe that they are allowed to withdraw persons arrested during an armed conflict created by and/or required in the fight against terrorism from the protection of the rules of international law in order to submit them to *ad hoc* criminal law.⁹⁸

In particular, the situation of the so-called ‘Guantánamo Bay’ prisoners and particularly their ‘enemy combatant’ denomination, which is not defined in international law but only in national American jurisprudence predating the Geneva Conventions (see *ex parte* Quirin), has rightly spurred a wave of complaints in the literature. The IBA chiefly argues that the *ratione personae* scope of application of this term is unclear and violates the rule of law and that the consequences of being characterized as an ‘enemy combatant’ lead to serious violations of general human rights law.⁹⁹

More significantly, academics have detected on numerous occasions differences in interpretation by the US and European states of the application of international humanitarian law. For example, Szurek complains that the American authorities have adopted the inverse proposition to that enshrined in international humanitarian law, and have assimilated the Talibans to Al Qaeda members. Instead of denying en masse POW status, the US should have individually assessed the status of each prisoner. Furthermore, as the IBA asserts, the blanket refusal to grant POW status to any captured individual in Afghanistan undermines the international humanitarian law regime.¹⁰⁰ There is no doubt that the legal vacuum in which these prisoners are found is absolutely intolerable.¹⁰¹ Their future trial by military courts is also severely criticized by the IBA as possibly leading to violations of the fair-trial guarantees as spelled out in many international conventions and as interpreted by human rights implementation mechanisms.¹⁰²

⁹⁷ International Bar Association, *supra* note 1, at 93.

⁹⁸ ‘Les Etats-Unis relisent donc les règles du droit international humanitaire à la lumière du terrorisme, avec cette conséquence qu’ils s’estiment autorisés à soustraire les personnes appréhendées dans le cadre d’un conflit armé engendré et/ou nécessité par la lutte contre le terrorisme aux règles du droit international applicable, pour les soumettre à un droit pénal *ad hoc*’: Szurek, *supra* note 36, at 304.

⁹⁹ International Bar Association, *supra* note 1, at 112–113.

¹⁰⁰ *Ibid.*, at 97.

¹⁰¹ *Ibid.*, at 97; David, ‘Le statut des personnes détenues par les Etats-Unis à la suite du conflit afghan (2001–2002)’, in Bannelier *et al.*, *supra* note 1, at 327.

¹⁰² International Bar Association, *supra* note 1, at 105–112.

3 The Military Reaction to Terrorism

A *The Concept of 'Armed Attack' and Terrorism*

The September 11 events pressed authors into debating whether private actors could launch an 'armed attack' in the sense of Article 51 of the Charter of the United Nations.

As the IBA notes, September 11 and the subsequent use of force 'sits uneasily within [the] framework [of international law]'.¹⁰³ Relatedly, Bruha argues that international law needs to adapt to the new situation, i.e., to the emergence of private actors capable of using force.¹⁰⁴ Bruha is excellent in showing how international law can be bent so as to allow challenging events to fit into the legal framework. He suggests that Resolution 1368 (2001) implies, through its recognition of the right to self-defence, that the destruction of the Twin Towers and the Pentagon was an armed attack.¹⁰⁵ In his opinion, Article 51 does not restrict 'armed attack' to states, a reading confirmed by Eisemann and Valki.¹⁰⁶ Valki, however, observes that at the time the decision was taken to use military force against the Taliban, there was little information proving the link between the Taliban and Al Qaeda.¹⁰⁷

B *The Role of the Security Council*

Bruha points out that whereas prior to September 11 the Security Council had condemned terrorism as a threat to international peace and security in general terms and only rarely referred to particular events, it started, after these events, to pass resolutions on specific terrorist acts.¹⁰⁸

Of considerable importance in the reviewed literature is the issue of whether the US was allowed to override the Security Council after it had passed a resolution on the subject. While Bruha and Eisemann strongly argue that the US intervention could only have been blessed by the Security Council,¹⁰⁹ Valki explains that the US's action was perfectly lawful since the Security Council had not adopted a resolution to the contrary and the US was allowed to have recourse to self-defence without any authorization.¹¹⁰ This again launches the debate on the interpretation of the word 'inherent' encapsulated in Article 51 of the UN Charter. To allow states the right to self-defence while the Security Council has already expressed an opinion conveys the impression that the Security Council is not able to play its role as the 'policeman' of the international order and can easily be overridden by individual states.

¹⁰³ *Ibid.*, at 15.

¹⁰⁴ Bruha, *supra* note 30, at 59.

¹⁰⁵ *Ibid.*, at 64.

¹⁰⁶ Eisemann, 'Attaques du 11 septembre et exercice d'un droit naturel de légitime défense', in Bannelier *et al.*, *supra* note 1, at 241; Valki, *supra* note 62, at 105.

¹⁰⁷ *Ibid.*

¹⁰⁸ Bruha, *supra* note 30, at 62–63.

¹⁰⁹ *Ibid.*, at 72–73; Eisemann, *supra* note 106, at 239.

¹¹⁰ Valki, *supra* note 62, at 113.

Reading the various resolutions focusing on the situation in Afghanistan in connection with the September 11 events, Corten and Bruha draw the conclusion that the Security Council preferred to abstain from judging the legality of the British and American intervention.¹¹¹ The lack of any reference to international affairs and notably to the role and veto power of the US and the UK in the Security Council renders their analysis a bit bland. In contrast, Tálas and Czempiel, speaking from a more political perspective, contend that it would have been more appropriate for the United States to start a military action in Afghanistan with the express and full support of the Security Council.¹¹²

C The Right to Self-Defence

Bruha asserts that the US was entitled to defend itself. Therefore, operation ‘Enduring Freedom’ was perfectly legal under international law.¹¹³ Yet, the question of whom the US was entitled to direct their ‘right to self-defence’ against is troublesome. As Kiss contends ‘[a]nti-terrorism warfare is a war against a state collaborating with the terrorists and using them’.¹¹⁴ Methodically analysing the different tests used to attribute acts of private agents to a state, Bruha concludes that other criteria than those spelled out in the *Nicaragua* case need to be adopted.¹¹⁵ Christakis also mentions that, even if the right to anticipatory self-defence did exist, it could not be applied against terrorist groups if the state, acting in so-called self-defence, cannot prove that these groups are linked to the state against which they are carrying out their activities.¹¹⁶ The IBA and Eisemann make a slight distinction. For them, the self-defence response of the US was based not on the attribution of Al Qaeda’s acts to the Taliban, but on the collusion between these two entities.¹¹⁷

The IBA clearly points out that ‘[m]ilitary action in self-defence cannot, in international law, be taken unless it meets the requirements of necessity and proportionality, now recognised as principles of customary international law’.¹¹⁸ Taking into account the principle of proportionality, Bruha vehemently criticizes the US for going further than necessary in its campaign against the Taliban. Bruha also makes clear that the removal of the Taliban regime is not covered by the norms of international law relating to self-defence.¹¹⁹ In contrast, the IBA, despite its general remark on the principle of proportionality, does not apply it to the given case.¹²⁰ It seems that many authors consider that without the removal of the Taliban regimes the US would not have been able to defend itself against Al Qaeda.

¹¹¹ Corten, *supra* note 60, at 266 and Bruha, *supra* note 30, at 72.

¹¹² Tálas, *supra* note 27, at 64; Czempiel, *supra* note 42, at 124–125.

¹¹³ Bruha, *supra* note 30, at 66–67.

¹¹⁴ Kiss, *supra* note 44, at 47.

¹¹⁵ Bruha, *supra* note 30, at 67–71.

¹¹⁶ *Ibid.*, at 171–172.

¹¹⁷ International Bar Association, *supra* note 1, at 24; Eisemann, *supra* note 106, at 243–244.

¹¹⁸ International Bar Association, *supra* note 1, at 17.

¹¹⁹ Bruha, *supra* note 30, at 71.

¹²⁰ International Bar Association, *supra* note 1, at 15–27.

In the heated debate about preventive self-defence, the IBA indicates that one must distinguish between 'anticipatory self-defence' and 'pre-emptive self-defence'.¹²¹ Here, the IBA echoes the distinction that has been made by the Bush administration, yet it affirms that whereas the first is allowed in international law, the second appears to be, as of now, in contravention of the current norms.¹²² In contrast, Christakis, echoing the classic European view, argues that both forms of self-defence are in contravention of contemporary international law.¹²³

Further, Christakis develops the idea that if a state believes itself to be threatened by a biological or chemical attack coming from a particular state, it can act against this state, not on the basis of its right to self-defence but on the basis of necessity, i.e. on the basis of secondary rules.¹²⁴ The idea of embedding a state's preventive actions in the right to act out of necessity is particularly attractive for those who wish to distance themselves from the classical debate on the interpretation of the right to self-defence. Yet, it may raise similar problems, notably regarding the concept of 'threat' and the principle of proportionality.

Conclusion

The perhaps perplexing conclusion that emerges from this review of the literature is that surprisingly little has changed, either in law or in practice, despite the common perception that 9/11 was a watershed in terms of international law. Much has taken place in terms of international cooperation in the fight against terrorism, but most of it has been of marginal significance. It has moreover generated all too little momentum in favour of a concerted police action against terrorism and enhanced inter-governmental cooperation. The principal consequence seems to be the greatly enhanced respectability of the use of military force in response to terrorism, and the sometimes rather promiscuous invocation of the 'war against terrorism', even when the terrorist dimensions are minimal at best. The extent to which some version of 'just war' doctrine has been relied upon to justify such an approach provides little comfort. As Delcourt has noted, this development seems primarily to signal 'the degeneration of international law and devitalisation of the system of collective security', mainly caused by the emergence of a 'hegemon'.¹²⁵

¹²¹ *Ibid.*, at 18.

¹²² *Ibid.*, at 20–21.

¹²³ Christakis, *supra* note 77, at 171.

¹²⁴ He mostly bases his arguments on the discussion of the International Law Commission: *ibid.*, at 172–175. See also Bruha, *supra* note 30, at 75.

¹²⁵ Delcourt, *supra* note 59, at 214–215.