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The criminal law and its less restrained alternatives

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1. Introduction

Many societies instinctively and quickly reach for the criminal law as a response to terrorism. The first part of this chapter will explore the many dangers of relying on new and re-enforced criminal laws as the main response to terrorism. In the aftermath of 9/11, UN Security Council Resolution 1373 (2001) encouraged nations to enact new laws against terrorism without offering any guidance about how terrorism should be defined. The result was extremely broad definitions of terrorism that attempt to respond to the many vulnerabilities of modern society, but also blur the boundaries between terrorism and illegal, but non-violent, forms of dissent. These dangers have been aggravated by Security Council Resolution 1624 (2005), which calls on states to prohibit speech that incites terrorism. Terrorism offences that require only acts of material support, financing, membership, participation or association in listed or broadly defined terrorist groups strain traditional criminal law understandings of the need to prove criminal acts and fault beyond a reasonable doubt before applying society's strongest sanction. Terrorist trials, featuring multiple counts and multiple accused, evidence relating to the politics and religion of the accused, frequent applications to close courts and to order non-disclosure of secret intelligence and the use of anonymous witnesses produce a danger of wrongful convictions. In short, there are many risks in using the criminal law to respond to terrorism.

The post-9/11 experience, however, underlines that there are even greater risks in using less restrained alternatives to the criminal law to confine and punish suspected terrorists. The less restrained alternatives include indefinite military or administrative/immigration detention or

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control orders on the basis of secret evidence, and targeted killings of suspected terrorists. These less restrained alternatives to the criminal law are inspired by the idea that we can no longer afford to rely on the costly, slow and public process of establishing guilt beyond a reasonable doubt in order to incapacitate, punish or deter terrorists. The United States led the way with post-9/11 departures from criminal law with its use of indeterminate detention and military commissions at Guantánamo Bay, Cuba, but many other countries followed suit. The many less restrained alternatives to the criminal law underline the many virtues of the criminal law in insisting on proof of guilt beyond a reasonable doubt through the use of reliable evidence in a public forum. One of the greatest dangers of using the criminal law to respond to terrorism is that the innocent will be wrongfully convicted, as occurred in a number of Irish terrorism cases in Britain in the 1970s. Nevertheless, less restrained alternatives to the criminal law are even more dangerous because they accept false positives and collateral damage as a necessary part of the state's anti-terrorism efforts.

The third part of this chapter will outline how a proper use of the criminal law could fit into more comprehensive strategies to combat terrorism. Criminal law should be used to denounce and punish terrorist violence even if it does not deter. The focus of anti-terrorism laws should, following the general definition of terrorism in the 1999 Convention on the Suppression of Terrorism Financing, be on violence against civilians outside of armed conflict. The state should have to prove a high degree of subjective fault especially as the criminal law legitimately expands to include relatively remote acts of preparation for terrorism. States should not be able to rely on administrative lists of terrorist groups in terrorism prosecutions and instead should have to prove the existence of a particular terrorist group beyond a reasonable doubt. The criminal law can justifiably expand to deal with the harms of terrorism, but states should be careful not to allow a pre-emptive and risk-averse intelligence mindset to distort the criminal law by creating status crimes or crimes based solely on a person's associations. Secret evidence should not be allowed in terrorist trials, but the state should have an opportunity to establish to a judge that non-disclosure or selective redaction of unused but sensitive material is justified and can be reconciled with the accused's right to a fair trial. Although one of the virtues of the criminal law is its ability to conduct a fair and public trial that can convince a sceptical public of the reality of a terrorist threat and its commitment to punish only the guilty, the state should also be able to demonstrate the need to

close parts of criminal trials as a proportionate restriction on freedom of expression. The sentence provided for terrorist crimes should not be disproportionate to the accused's actual actions and intent and mandatory sentences may not be appropriate given the breadth of many terrorism offences.

The criminal law can play a unique role in exposing, denouncing and punishing terrorism, but it should only be one element in a comprehensive anti-terrorism strategy. States should also pursue various target-hardening strategies that will feature administrative regulation of sites and substances likely to be used by terrorists. They should also collect intelligence about potential security threats and when necessary engage in intense forms of surveillance, including electronic surveillance. Indeed one key to avoiding the distortion of the criminal law is to understand that some security risks are so ambiguous and remote that they should be subject to surveillance, but not criminalisation. States should also address the causes of extremism and terrorism and also provide for emergency preparedness in order to place terrorism in the context of other threats to human security and to speed recovery from acts of terrorism.

The potential of a public, fair and denunciatory criminal law to de-legitimise terrorism is especially important with respect to home-grown terrorism. That said, there is a danger that the expansion of the criminal law in an attempt to prevent terrorism, as well as innovations in the criminal trial process, may sap the criminal law of its unique and important role in justly stigmatising and punishing those who are intent on committing acts of terrorist violence.

2. The dangers of distorting the criminal law to respond to terrorism

There is a long history of new criminal laws being enacted as a direct response to horrific acts of terrorism.[1] One danger of reactive legislation is that there may often be inadequate time for debate either in the legislature or in civil society about the proposed measures. The dangers to civil liberties and general principles of criminal law and legality are particularly great when new anti-terrorism laws are enacted as a direct and immediate response to terrible acts of terrorism. New criminal laws may serve

[1] Andrew Lynch, Chapter 7 this volume. Philip Thomas, 'Emergency terrorist legislation' (1998) *Journal of Civil Liberties* 240; Philip Thomas, 'September 11 and good governance' (2002) 53 *Northern Ireland Law Quarterly* 366.

what Ackerman has defended as a necessary 'reassurance'[2] function in the wake of traumatic terrorist attacks, but the reassurance may be false if laws are enacted without a full understanding of why the terrorists succeeded and if the laws themselves are politically or legally controversial because they have been developed with inadequate deliberation.

A. Security Council Resolution 1373 and the problematic focus on terrorism financing

On 28 September 2001 and with less than five minutes of public debate, the UN Security Council enacted Resolution 1373 under the mandatory provisions of Chapter VII of the UN Charter relating to the maintenance of international peace and security. In what has aptly been characterised as global legislation,[3] the Security Council required all states to ensure that terrorist acts, including the financing of terrorism, 'are established as serious criminal offences in domestic laws and regulations and that the punishment duly reflects the seriousness of such terrorist acts'.[4] Much of Resolution 1373 contemplated criminalisation and punishment as the primary response to terrorism. This process suggests that the perils of 'governing through crime'[5] and enacting new criminal laws as 'retaliatory measures' designed to 'to respond with immediate effect to public outrage'[6] are not limited to the domestic arena. Although it called on all states to establish 'terrorist acts' as serious criminal offences, Resolution 1373 offered no guidance on the proper definition of terrorism. As will be seen, many states opted for over-broad definitions of terrorism.

The global rush to enact new anti-terrorism laws in response to 9/11 manifests many of the flaws of reactive legislation enacted in response to previous acts of terrorism. Resolution 1373 confirmed the UN's focus on terrorism financing both in the 1999 Convention on Terrorism Financing and the 1267 Committee imposing assets freezes and travel bans on al-Qaeda and the Taliban despite the failure of such measures to prevent 9/11, perhaps the most expensive act of terrorism to date. Terrorism financing laws were

[2] Bruce Ackerman, *Before the Next Attack* (New Haven, CT: Yale University Press, 2005), pp. 44–7.
[3] See C.H. Powell, Chapter 2, this volume.
[4] UN Security Council Resolution 1373. See Kim Lane Scheppele, 'Other people's Patriot Acts' (2004) 50 *Loyola Law Review* 89, 91–3.
[5] Jonathan Simon, *Governing Through Crime* (New York: Oxford University Press, 2007).
[6] David Garland, *The Culture of Control: Crime and Social Order in Contemporary Society* (University of Chicago Press, 2001), pp. 11, 133–4.

often based on a money laundering model even though terrorism, unlike organised crime, could be funded by relatively small amounts of money from legitimate sources. The Security Council did not have full information about the causes of 9/11 when it stressed the need for all countries to enact criminal laws including those prohibiting the financing of terrorism. Three years later, however, the 9/11 Commission revealed that what happened that terrible day was not a failure of the criminal law[7] but rather a failure of intelligence co-ordination and distribution. The Commission also concluded that 'trying to starve the terrorists of money is like trying to catch one fish by draining the ocean'.[8]

The objects of terrorist financing laws are not so much terrorists or even their ideological supporters but third parties such as bankers and landlords.[9] Duties were placed on financial institutions and others to report dealings to the authorities. These new laws represented both an expansion of the traditional scope of anti-terrorism laws and the impact of security strategies that relied less on state imposition of punishment and more on risk management strategies throughout society. New laws against the financing of terrorism combine punitiveness on behalf of the state with newer security strategies that deputise third parties, including the private sector, to fight crime.

A problematic feature of terrorism financing laws is that their enforcement by third parties depends on the circulation of lists of terrorists. The UN Security Council had in 1999 established a committee under Security Council Resolution 1267 that compiled lists of individuals associated with the Taliban and al-Qaeda. This list was expanded after 9/11 often at the request of the United States, but many concerns have been raised about the fairness of an intergovernmental process which involves secret intelligence and no due process for individuals. Reliance on lists of terrorists can have a distorting effect on criminal law. Proscription can act as a bill of attainder that can substitute an executive decision taken on the basis of secret evidence for proof beyond a reasonable doubt in a criminal trial.[10] A person or group listed as a terrorist becomes a virtual

[7] The conviction of the so-called twentieth hijacker, Zaccarias Moussaoui, for conspiracy to commit murder underlines the ability of pre-9/11 criminal law to punish terrorist plots: *United States* v. *Moussaoui* 591 F 3d 263 (4th Cir. 2010).

[8] The National Commission on Terrorist Attacks upon the United States, *The 9/11 Report* (2004), [12.3].

[9] See Kevin E. Davis, Chapter 8, this volume.

[10] David Paciocco, 'Constitutional casualties of September 11' (2002) 16 *Supreme Court Law Review* (2d) 199.

outlaw. The European Court of Justice in *Kadi* v. *Council of the Europe Union and Commission of the European Communities*[11] found that regulations implementing the Security Council financing regime violated fundamental rights and should be annulled. It noted that there was no effective judicial review at the UN level and that the delisting process remained an intergovernmental one which did not provide the affected individual with a judicial remedy. Similar decisions criticising the listing process have been made by the new UK Supreme Court and by the Federal Court of Canada.[12] The United Nations has attempted several times to reform its listing process, but problems persist given that the Security Council is not likely to abandon control over listing and countries are not likely to consent to disclosing the intelligence behind the listing.[13]

Listing will remain legally problematic, but the disruption and diffusion of al-Qaeda makes it less likely that the United Nations or states can rely on the shortcut of proscription. It is not possible for the executive to proscribe random groups of individuals who may be motivated by al-Qaeda ideology, but have no definite connections to that or other listed terrorist groups. Recent prosecutions of 'home grown' terrorism in many parts of the world have not relied on proscribed groups of terrorists, but instead had to establish that those charged in fact functioned as a terrorist group.

B. Domestic criminal law responses to 9/11

Resolution 1373 facilitated a pattern of reactive domestic law reform by calling for countries to report back to the Counter-Terrorism Committee within ninety days on the steps taken to comply with the resolution. Some countries took the ninety-day reporting requirement as a virtual deadline for enacting new anti-terrorism laws. Domestic criminal law reform was shaped and speeded up by the Security Council.

The quickest domestic response to 9/11 not surprisingly came from the United States. The Patriot Act was introduced into Congress on 23 October 2001. It was approved by the House of Representatives by a vote of 357–66

[11] Joined cases C-402/05 P and C-415/05 P, [2009] AC 1225.

[12] *Abdelrazik* v. *Canada* 2009 FC 580; *Treasury* v. *Ahmed* 2010 UKSC 2.

[13] Christopher Michaelson, 'The Security Council AQ and Taliban sanctions regime: "essential tool" or increasing liability in the UN's counterterrorism efforts?' (2010) 33 *Studies in Conflict and Terrorism* 448; Craig Forcese and Kent Roach, 'Limping into the future: the UN 1267 terrorist listing process at the crossroads' (2010) 42 *George Washington International Law Review* 217.

and by the Senate in a 98–1 vote. It was signed into law by President Bush on 26 October 2001.[14] The Patriot Act responded to Resolution 1373 with a new criminal offence that punished with imprisonment of up to 10 years 'whoever harbors or conceals any person who he knows, or has reasonable grounds to believe, has committed or is about to commit' a long list of offences associated with terrorism. By its use of negligence liability, this offence created the possibility of an accidental terrorist, surely a contradiction in terms.

The Patriot Act demonstrated a faith that broadening and toughening the criminal law will help stop terrorism. The crime of providing material support for terrorism, which was first created in 1996 in the wake of the first World Trade Centre and Oklahoma City bombings, was broadened to include the provision of monetary instruments and 'expert advice and assistance' to terrorists groups. The maximum penalty for this offence was increased from ten to fifteen years with the possibility of life imprisonment if death results.[15] The US Supreme Court upheld this provision in 2010 even while accepting that it could apply to those who provided advice about international law to listed terrorist groups. A majority of the Court concluded that it was impossible to separate support for the violent and non-violent activities of terrorist groups.[16] Most anti-terrorism laws assert universal jurisdiction and this, along with executive proscription of groups, means that financial support and even advocacy for groups in foreign lands may often be a domestic crime. Courts have not shown much attraction to 'freedom fighter' arguments even when terrorism is directed against repressive regimes.[17]

The phenomena of enacting new criminal laws as a response to acts of terrorism was not limited to the West.[18] One study of reports to the

[14] John Whitehead and Steven Aden, 'Forfeiting "enduring freedom" for "homeland security"' (2002) 51 *American University Law Review* 1087, 26 ff.

[15] USA PATRIOT Act, ss. 803, 805, 810.

[16] *Holder* v. *Humanitarian Law Project* 561 US_ (2010).

[17] *R* v. *F* [2007] EWCA Crim 243, [31].

[18] Other countries such as Singapore and Malaysia enacted new laws, but relied on the existing Internal Security Act. See Michael Hor, Chapter 11, this volume. Egypt, Syria and Israel all relied on existing laws, but also enacted new terrorism financing and money laundering laws to comply with Resolution 1373. See Lynn Welchman, Chapter 24, this volume; See Daphne Barek-Erez, Chapter 23, this volume. See also Kent Roach *The 9/11 Effect: Comparative Counter-Terrorism* (Cambridge University Press, 2011), Chapter 3 for a discussion of states that relied on old laws to respond to 9/11. Still other states including some African states enacted new laws, but lacked the capacity or the will to enforce the laws. See Chris Oxtoby and C. H. Powell, Chapter 22, this volume. For a discussion of the many different contexts and starting points of various nations in responding to 9/11 and Resolution 1373, see Victor V. Ramraj, Chapter 3, this volume.

Counter-Terrorism Committee concludes that ninety-four states have defined terrorism as a crime since 9/11.[19] A new anti-terrorism law was proposed in Indonesia shortly after 9/11, but met significant resistance in civil society. After the Bali bombings killed over 200 people on 12 October 2002, however, a new anti-terrorism regulation was enacted by presidential decree as an emergency measure on 18 October 2002. Unlike the Patriot Act, the new law was made effective with retroactive force. In July 2004, the Indonesian Constitutional Court held in a 5:4 decision that the law making the new terrorism law retroactive to the Bali bombings violated the prohibition against retroactive punishment in the 1999 Constitution. Indonesia is currently debating new amendments to the law in response to continued terrorism in that country.[20] As was the case with *Moussaoui*,[21] however, the existing criminal law was used to convict the Bali bombers, some of whom were executed. Both Indonesia and the United States turned to instant criminal law reform in the wake of terrible terrorist attacks and relied on broader and tougher criminal law to prevent acts of terrorism.

C. *Over-broad definitions of terrorism and the focus on religious and political motives*

The failure of Security Council Resolution 1373 to provide any guidance about the proper definition of terrorism reflected the absence of an international consensus. Nevertheless, it is regrettable that the Security Council did not call the attention of states to a generic definition of terrorism contained in the 1999 Convention for the Suppression of Terrorism Financing that stressed the essence of terrorism as the intentional killing of those not involved in armed conflict. Some guidance was finally provided in October 2004 in Resolution 1566, but by that time most new anti-terrorism laws had already been enacted with much broader and more controversial definitions of terrorism.[22]

In the absence of international guidance, many countries looked to the broad definition of terrorist acts in s. 1 of the UK Terrorism Act

[19] James Fry, 'The swindle of fragmented criminalization: continuing piecemeal responses to international terrorism and al Qaeda' (2009) 43 *New England Law Review* 424.

[20] See Hikmanto Jurawa, Chapter 12, this volume.

[21] *United States* v. *Moussaoui* 591 F 3d 263 (4th Cir. 2010).

[22] Ben Saul, *Defining Terrorism in International Law* (Oxford University Press, 2006), p. 248.

2000 as the starting point for their own definitions of terrorism.[23] The UK definition was broader than previous definitions in UK law and defined terrorism to include property damage and interferences with electronic systems. This definition, and in particular the inclusion of damage to electronic systems, recognised the many vulnerabilities of modern society. The British reference to the protection of electronic systems was expanded in Canadian legislation to include interference with all essential public or private services and in Australia by listing many examples of electronic systems. Both Australia and Canada, however, departed from the British example by providing protections for at least some forms of advocacy, strikes and protests. One of the broadest definitions of terrorism was ironically enacted in South Africa where anti-terrorism laws had been used against the African National Congress. In response to this particular history, the South African legislation was named the 2004 Protection of Constitutional Democracy Act and included a broad 'freedom fighter' exemption. Nevertheless, the South African law defined terrorist activities very broadly to include politically motivated acts that seriously disrupt essential public or private services, cause major economic harm or create a serious public emergency situation in order to compel governments to act or to intimidate the public with regard to its security, including its economic security.[24] Such broad definitions recognise the many vulnerabilities of modern society, but they extend the ambit of terrorism laws so that they could apply to illegal but non-violent protest. Broad terrorism offences are often verbally convoluted and thus difficult to explain to the juries or police officers that enforce them.

The danger that anti-terrorism laws could target dissenters was also related to the frequent use of religious and political motive as a feature to distinguish terrorism from other crimes. Although religious and political objectives sociologically motivate most acts of terrorism, the criminal law has traditionally not required proof of motive and took the position that no motive could justify or excuse crime. In Australia, failure to prove religious or political motive has led to acquittals for terrorism offences of

[23] Kent Roach, 'The migration of Britain's Terrorism Act, 2000', in Sujit Choudhry (ed.), *The Migration of Constitutional Ideas* (Cambridge University Press, 2006).

[24] Protection of Constitutional Democracy Act No. 33 of 2004, s. 1 (xxv) (South Africa). See Chris Oxtoby and C. H. Powell, Chapter 22, in this volume and Kent Roach 'A comparison of South African and Canadian anti-terrorism legislation' (2005) 18 *South African Journal of Criminal Justice* 127.

those who possessed guns and bombs, but may have been acting for personal as opposed to political reasons.[25]

The requirement for proof of religious or political motive requires police to collect information about a suspect's politics or religion in order to obtain a conviction, even though they might not be adequately trained in distinguishing extremist religious and political views from terrorist intentions. In the case of Maher Arar, the Canadian police wrongly characterised Mr Arar and his wife as 'Islamic extremists' associated with al-Qaeda and then passed on such inflammatory statements to US officials. In its emphasis on the motives of the accused, the accused's past and present associations and training, and remote and non-specific possibilities of harm, much modern anti-terrorism law has incorporated an intelligence mindset.[26] In doing so, there is a danger that terrorism laws will abandon the criminal law's traditional insistence on harm and fault as a basis for just punishment.

Some countries were uneasy with the emphasis on religious and political motives in many new anti-terrorism laws. The Indonesian law enacted after the Bali bombings rejected a previous draft that had defined terrorism as a crime with a political motive and stressed that terrorism should not be considered a political crime and that it should not be applied in a manner that discriminated against any particular religion.[27] Singapore borrowed heavily from the UK definition of terrorism in its post-9/11 terrorism laws, but perhaps in recognition of the religious sensitivities of its significant Muslim minority, it did not duplicate the religious and political motive requirement in new terrorism laws.[28] Perhaps because of concerns about a First Amendment challenge, terrorism was not defined in the Patriot Act by reference to religious or political motive. The US Supreme Court upheld a broad pre-9/11 offence prohibiting material support, but only on

[25] Zeky Mallah was acquitted of doing an act in preparation of a terrorist act in relation to his possession of a rifle and ammunition and video threatening to kill ASIO members and John Amundsen had terrorism charges withdrawn after it was discovered that he planned to use home-made bombs for personal reasons related to an ex-girlfriend: Nicola McGarrity, '"Testing our counter-terrorism laws": the prosecution of individuals for terrorism offences in Australia' (2010) 34 *Criminal Law Journal* 95, 104.

[26] On the different values embraced by intelligence about security risks as opposed to evidence about crimes, see Kent Roach 'The eroding distinction between intelligence and evidence in terrorism investigations', in Nicola McGarrity, Andrew Lynch and George Williams (eds.), *Counter-Terrorism and Beyond* (London: Routledge, 2010).

[27] Indonesian Anti-Terrorism Law, arts. 2, 5.

[28] Terrorism (Suppression of Financing) Act 2003, s. 2; Terrorism (Suppression of Bombing) Act 2007, s. 2.

the basis that it did not criminalise membership in a terrorist group or political advocacy independent of the terrorist group.[29] In Canada, an interpretative clause was added to a new Anti-terrorism Act after concerns were raised that the religious and political motive requirement would assist the police in targeting certain minorities. It provided that the expression of religious or political thought in itself would not constitute a terrorist activity.[30] Nevertheless, the trial judge in Canada's first trial under the new provision struck the reference to religious and political motive down as a disproportionate and unnecessary restriction on freedom of religion and speech, but this decision was overturned on appeal.[31]

D. The expansion of criminal liability: intelligence mindsets and the precautionary principle

The breadth of the definition of terrorism in many post-9/11 laws was enhanced by the broad definition of crimes designed to criminalise even remote acts of preparation for terrorism and broad forms of association with terrorist groups. Laws such as the US offence of material support for terrorism, the Australian offences of possessing things connected with a terrorist act,[32] the UK offence of preparation or training for terrorism[33] and the Canadian offence of participating in a terrorist group or facilitating a terrorist act[34] pushed the boundaries of inchoate and accomplice liability. The potential breadth of the broad Australian offence of associating with a terrorist group is underlined by the need that the drafters felt to exempt interactions with family members, public religious worship and the provision of legal assistance or humanitarian aid.[35] The British offence of withholding information has been applied to convict close family members of terrorists.[36] The breadth of new terrorism offences incorporated both a precautionary principle that sought to criminalise even remote risks before they were actualised and an intelligence mindset that focused on a person's capabilities, motives and associations and did not wait for threats to become imminent.

[29] *Holder* v. *Humanitarian Law Project* 561 US_ (2010).
[30] Criminal Code, s. 83.01 (1.1) (Can).
[31] *R* v. *Khawaja* (2006) 214 C C C (3d) 399 (Ont.Sup.Ct.J.) rev'd 2010 ONCA 862 as discussed in Kent Roach, Chapter 20, this volume.
[32] Criminal Code (Aus), s.101.4. [33] Terrorism Act 2006 (UK), ss. 5–6.
[34] Criminal Code (Can), s.83.18–83.19. [35] Criminal Code (Aus), s.102.8 (4).
[36] Clive Walker, 'Conscripting the public in terrorism policing' [2010] *Criminal Law Review* 445.

Some terrorism offences are defined in such a broad manner that they resemble both status offences and guilt by association. The most frequently used terrorism offence in the UK is possession of 'an article in circumstances which give rise to a reasonable suspicion that his possession is for a purpose connected with the commission, preparation or instigation of an act of terrorism'.[37] Clive Walker has argued the courts have had 'to slam on the judicial brakes'[38] to prevent this serious offence, punishable by up to fifteen years imprisonment, being applied to possession of innocuous items. Tadros has concluded that such 'flexible laws … create a high risk of unjust convictions, as well as unjust police intrusion and unjust prosecution'. Even if they make marginal contributions to the prevention of terrorism, they constitute 'an erosion of security from these forms of injustice, especially the security of young Muslim men'.[39] The expansion of post-9/11 terrorism offences also creates a risk of sentences that the public consider too lenient given the emotive terrorist label, or alternatively, sentences that are not lenient but are disproportionate to the actual severity of what the accused did.

Drafters of post-9/11 anti-terrorism laws employed a precautionary principle that went well beyond criminalising violence and often spelled out that a person could be guilty even if he or she did not know the specifics of any particular terrorist activity. In some cases, the new laws invaded on the traditional domain of the judiciary by deeming certain evidence to be admissible and by trying to preclude any attempt by the courts to adopt anything but a broad reading of the offence. One tactic commonly used was to take actions that could normally be evidence of a conspiracy or an attempt and make those actions independent crimes. Such an expansion of the criminal law runs the risk of distortion, especially if the offence also does not require proof of a high degree of fault or if it places onuses on the accused to provide an innocent explanation for ambiguous conduct. To be sure, the drafting of many post-9/11 anti-terrorism laws reflected the reality of what was known about the cell structure of terrorist groups such as al-Qaeda and the fact that a cell might not know the specifics of an attack or of the existence of co-ordinated attacks. Nevertheless, the end result was to create a mass of overlapping crimes targeting preparation

[37] Terrorism Act 2000, s. 57; Home Office, *Statistics on Terrorism Arrests and Outcomes in Great Britain* (May 2009), p. 3.

[38] Clive Walker, 'Prosecuting terrorism: the Old Bailey versus Belmarsh' (2009) 79 *Amicus Curiae* 23. On the complexity and breadth of the criminal offences, see Clive Walker, *The Anti-Terrorism Legislation* (Oxford University Press, 2009), Chapter 6.

[39] Victor Tadros, 'Crimes and security' (2008) 71 *Modern Law Review* 969.

and association in a way that strained the criminal law's traditional insistence on proof of harm and fault.

E. The difficulties and dangers of the new terrorism trial

There is a danger that new terrorism offences and new police powers of preventive and investigative arrest will be used as a pretext to disrupt suspected terrorist cells with little or no expectation of subsequent prosecution. From 9/11 to 31 March 2010, 1,834 terrorist arrests were made in Great Britain, but only 35 per cent of those arrests resulted in charges, with 279 being charged with terrorism-related crimes and 143 being charged with non-terrorism-related crimes such as forgery and theft. One thousand people were released without charge.[40] These figures suggest that terrorist arrests may have been used for disruption, destabilisation and intelligence gathering, including the collection of intelligence regarding the religious and political motives and beliefs of detainees and their associates. It also suggests that the US is not alone in using a so-called 'Al Capone strategy'[41] where those suspected of involvement in terrorism are prosecuted for non-terrorist crimes. The low rates of prosecutions also underline that reliance cannot be placed on the criminal courts to provide accountability for the state's intensified national security activities.[42]

When terrorist arrests do result in charges, there appears to be high conviction rates. Europol reported an 83 per cent conviction rate in terrorism trials in 2009, including a 92 per cent conviction rate in France and an 81 per cent conviction rate in the United Kingdom.[43] In the United Kingdom, however, the Home Office estimates a lower conviction rate of about 59 per cent from 2001 to 2010. Interestingly, the conviction rate under terrorism legislation is only 49 per cent while it is 77 per cent under non-terrorism legislation which may suggest some resistance by juries to the attempt in new terrorism legislation to criminalise ambiguous

[40] Home Office, *Operation of Police Powers under the Terrorism Act 2000 and Subsequent Legislation* (28 October 2010), [2]–[6] and Table 1.2, p. 15.

[41] On some of the dangers of pretextual 'Al Capone' prosecutions where a person suspected of a serious crime is prosecuted and convicted of a less serious crime, see Daniel Richmond and William Stuntz, 'Al Capone's revenge: an essay on the political economy of pretextual prosecutions' (2005) 105 *Columbia Law Review* 583.

[42] Commission of Inquiry into the Activities of Canadian Officials in Relation to Maher Arar, *A New Review Mechanism for the RCMP's National Security Activities* (Ottawa: Public Works, 2006).

[43] EURPOL, *EU Terrorism Situation and Trend Report* (2010), p. 17 (Figure 6).

conduct that may be very remote from any act of violence.[44] In the United States, an 88 per cent conviction rate has been estimated for 593 completed terrorism prosecutions. As in the United Kingdom, many of these prosecutions were not under terrorism-specific statutes. Unlike in the United Kingdom, however, the average sentence for convictions of non-terrorist offences is much lower: 1.2 years, as opposed to the average sentence of sixteen years for a person convicted of a terrorism offence.[45] This result can perhaps be explained by a greater willingness of US officials to use even minor criminal offences as an Al Capone-type strategy to disrupt suspected terrorists.

The challenges of terrorism prosecutions should not be underestimated. In Canada, a trial in the 1985 Air India bombing case took 217 trial days; involved over 1.5 million pages of disclosure; cost over Can $57 million and resulted in acquittals in 2005 of the two men charged.[46] In Australia, a number of accused have been acquitted of terrorism offences and convicted of less serious offences, in part because of concerns that prosecutors could not establish political or religious motive. In addition, two prosecutions floundered when the judge found statements taken in Australia and in Pakistan were involuntary.[47] In the latter case, the quashing of Jack Thomas's conviction was met less than two weeks later with the issuance of a control order. In this way an administrative measure based on a lower balance of probabilities standard was substituted for the use of the criminal law.[48] Control orders have also been ordered in the United Kingdom against those acquitted of terrorism offences.[49] The

[44] Home Office, *Operation of Police Powers*, [20], [22].

[45] 362 of the 593 resolved prosecutions were for non-terrorism-related offences and these prosecutions were brought under 130 different statutes such as conspiracy, mailing injurious substances, extortion, fraud, false statements, immigration and child pornography: New York University Centre on Law and Security, *Terrorist Trial Report Card* (January 2010), pp. 8–12.

[46] *R* v. *Malik and Bagri* 2005 BCSC 350; *Report of the Air India Commission* Vol. 3 (2010), pp. 267–79. The cost included Can $21 million in defence funding and Can $22 million for prosecution services including Can $1.7 million for victim services.

[47] *R* v. *Ul-Haque* (2007) 177 A Crim R 348; *DPP* v. *Thomas* (2006) 163 A Crim R 567.

[48] Nicola McGarrity, '"Testing our counter-terrorism laws"', 102; Andrew Lynch, 'Australia's "war on terror" reaches the High Court' (2008) 32 *Melbourne University Law Review* 1187–8. In the *Mohammed Haneef* case, his visa was cancelled after he was granted bail. This decision was eventually set aside, but he had already left Australia. The constitutionality of the control order on Thomas was later upheld in a divided High Court decision with the majority stressing that it was within the judicial power to make predictive judgments on the basis of intelligence: *Thomas* v. *Mowbray* (2007) 233 CLR 307.

[49] *Secretary of State* v. *AY* [2009] EWCA 3053 (Admin), [196]

threat of less restrained administrative and immigration measures may hang over criminal proceedings if the criminal proceedings do not produce the result desired by the state.

Terrorism trials place greater emphasis on secrecy than other criminal trials. They often feature publication bans and redactions of judgments. Witnesses in terrorism trials have given evidence anonymously and from remote locations. Defence lawyers who delve into matters affecting broadly defined security interests may find themselves in proceedings from which they are excluded and threatened with punishment if they disclose information that the government claims should be secret.[50] Judges who have presided in terrorism trials have expressed frustration about how the hearing of secrecy claims in the absence of the jury and the accused may adversely affect both the fairness and the efficiency of the criminal trial.[51] Public interest immunity applications where the state seeks non-disclosure to the accused of unused but potentially relevant intelligence are a feature of terrorist trials and in most democracies the trial judge has to weigh the competing interests in disclosure or non-disclosure to the accused.[52] In Australia judges are specifically instructed to 'give greatest weight' to 'the risk of prejudice to national security' over the adverse effect of non-disclosure to the accused's fair trial. The Australian approach represents a conscious decision to increase the risk of wrongful convictions by erring on the side of not disclosing intelligence to the accused that may well assist the accused in their defence.[53] States have always had the choice to prioritise their interest in secrecy over their interest in prosecutions,[54]

[50] Phillip Boulten, 'Preserving national security in the courtroom: the new battleground' in Andrew Lynch, Edwina Macdonald and George Williams (eds.), *Law and Liberty in the War on Terror* (Sydney: Federation Press, 2007), p. 100.

[51] A. G. Whealy, 'Difficulty in obtaining a fair trial in terrorism cases' (2007) 81 *Australian Law Journal* 743.

[52] For an examination of the role of public interest immunity applications in terrorism trials in Canada, the United States, the United Kingdom and Australia, see Kent Roach, *The Unique Challenges of Terrorism Prosecutions* (Ottawa: Public Works, 2010).

[53] *Lodhi* v. *The Queen* (2007) 179 A Crim R 470, upholding s. 31(8) of the National Security Information (Criminal and Civil Proceedings) Act 2004 (Aus). A retired judge of the Australian High Court has written that the Australian legislation 'does not direct the court to make the order the Attorney-General wants. But it goes as close to it as it thinks it can' and 'in a practical sense directs the outcome of the closed hearing'. Hon Michael McHugh, 'Terrorism legislation and the Constitution' (2006) 28 *Australian Bar Review* 117.

[54] The United States did this when it refused to allow intelligence to be disclosed in a German trial where the conviction of a man for being an accessory to the 9/11 murders was eventually overturned. Helen Duffy, *The 'War' on Terror and the Framework of International Law* (Cambridge University Press, 2005), p. 119.

but the non-disclosure of relevant intelligence to the accused can in some cases result in unfair trials and wrongful convictions.

The risk of wrongful convictions may always be present in terrorism cases. In the United Kingdom, a series of wrongful convictions occurred with respect to IRA bombings. Suspects were identified in part because of their nationality and political sympathies. They were mistreated in custody, made false confessions and did not have adequate disclosure that may have helped cast doubt on the faulty forensic evidence used against them and the false confessions they made.[55] Although there is always a risk of wrongful convictions even under the ordinary criminal law, some features of new anti-terrorism laws produce even greater risks. In other words, many of the predisposing circumstances of wrongful convictions – horrific crimes or threats thereof, prejudice against the suspect, non-disclosure of relevant information, intense pressure on police, prosecutors, judges and juries – will be present in most terrorism prosecutions.[56] Dworkin has eloquently warned of the dangers of concluding that 'the requirements of fairness are fully satisfied, in the case of suspected terrorists, by laxer standards of criminal justice which run an increased risk of convicting innocent people'.[57]

It is important that criminal law not lose sight of its foundational principles such as the presumption of innocence and the necessity of proof of individual fault beyond a reasonable doubt. These demanding standards, however, create another risk, namely that states will find the crime model to be too constraining and weak.[58] When the state goes beyond the criminal law, however, the restraining rules become much less clear and demanding. Indeed, at times, there appear to be no rules at all.

3. Less restrained alternatives to the criminal law

Although there are many dangers in using the criminal law to combat terrorism, the focus on individual responsibility and deserved punishment

[55] Kent Roach and Gary Trotter, 'Miscarriages of justice in the war against terror' (2005) 109 *Penn State Law Review* 976–81.

[56] Ibid.

[57] Ronald Dworkin, 'The threat to patriotism', *New York Review of Books*, 28 February 2002.

[58] For arguments that the crime model is not sufficient to deal with terrorism and new rules are required, see Bruce Ackerman, 'The emergency constitution' (2004) 113 *Yale Law Journal* 1029. For arguments against Ackerman's proposed regime, including its use of preventive detention, see David Cole, 'The priority of morality: the emergency constitution's blind spot' (2004) 113 *Yale Law Journal* 1753.

in the criminal law has many virtues, especially when compared to some of the other techniques that have been used against terrorism. Since 9/11, many countries have chosen to use other instruments that, like the criminal law, rely on coercive force and detention, but do so without most of the safeguards and restraints associated with the criminal law. These less restrained alternatives to the criminal law have included wars in Afghanistan and Iraq, targeted killings,[59] extraordinary rendition to countries with poor human rights records, detention and trial by military commission at Guantánamo Bay, administrative detention and the use of executive measures such as control orders. All of these measures starkly reveal the virtues of the criminal law and the dangers of opting out of, or losing confidence in, the crime model.

In his 2004 State of Union address, President George W. Bush made clear that the United States would not rely on the criminal law in its war against terrorism. He stated:

> I know that some people question if America is really in a war at all. They view terrorism more as a crime, a problem to be solved mainly with law enforcement and indictments. After the World Trade Center was first attacked in 1993, some of the guilty were indicted and tried and convicted, and sent to prison. But the matter was not settled. The terrorists were still training and plotting in other nations, and drawing up more ambitious plans. After the chaos and carnage of September the 11th, it is not enough to serve our enemies with legal papers. The terrorists and their supporters declared war on the United States, and war is what they got.[60]

The idea that it is not 'enough to serve our enemies with legal papers' ran throughout much of the Bush Administration's and subsequently Congress's attempts to preclude habeas corpus review of the Guantánamo detentions. This approach is not as popular as it once was, but impatience and a lack of confidence in the criminal law can still be seen in hostile and successful reactions to the Obama Administration's plans to try terrorists in criminal courts and its continued use of both military commissions and indeterminate detention without trial at Guantánamo as well as targeted killing, including the widely celebrated killing of bin Laden.

[59] Plans by both Presidents Clinton and Bush to capture and preferably kill bin Laden before the 9/11 attacks are discussed in *The 9/11 Report*, Chapters 3 and 4. Justice Thomas has expressed concerns in *Hamdi* v. *Rumsfeld* 542 US 507 (2004) that some due process might be required before the US engages in targeted killings abroad (per Thomas J in dissent). But see *Al-Aulaqi* v. *Obama* 2010 US Dist Ct Lexis 129601 dismissing an attempt to judicially review a targeted killing on standing and political questions grounds.

[60] State of the Union Address, 20 January 2004.

A. *Military courts and detention*

The US Supreme Court responded negatively to Bush's attempt to create a law-free zone in Guantánamo, first in its decision holding that detainees at Guantánamo could seek habeas corpus in 2004 and eventually in 2008 by holding that the test for suspending habeas corpus had not been satisfied.[61] The Court also held in 2006 that the rules used to review detentions at Guantánamo did not meet the fairness standards required under the Uniform Code of Military Justice or Common Article 3 of the Geneva Conventions, in part because they allowed the use of secret evidence. Although these decisions rejected the extreme claims made by the Bush Administration and the US government eventually released the majority of those held at Guantánamo, they did not insist on the application of criminal law standards to the Guantánamo detainees. A plurality of the Court even approved of robust departures from criminal law standards, such as a rebuttable onus in favour of the government's evidence and trial before a military tribunal. Only Justices Scalia and Stevens, in an interesting alliance between the conservative and liberal wings of the Court, defended the criminal law for American citizens and criticised their colleagues for approving 'an unheard-of system in which the citizen rather than the Government bears the burden of proof, testimony is by hearsay rather than live witnesses, and the presiding officer may well be a "neutral" military officer rather than a judge and jury'.[62]

Although many expected him to abandon military commissions, President Obama has attempted to legitimise them through 2009 enhancements of the 2006 Military Commission Act. The sustained bipartisan desire of the US executive and Congress to depart from reliance on the criminal law is striking in light of the very high conviction rates for terrorism prosecutions in ordinary courts and the ability of the United States to securely imprison over 2 million people. There is a large element of symbolic rejection of criminal justice norms in successful opposition to the attempts to try Khalid Sheik Mohammed (KSM), the alleged mastermind of 9/11, in the ordinary courts in New York and proposals to deprive terrorist suspects of Miranda rights. Other more substantive objections to the use of the criminal law involve concerns about the disclosure of intelligence, but even here there are strong provisions in

[61] *Rasul* v. *Bush* 542 US 466 (2004); *Boumediene* v. *Bush* 553 US 723 (2008).
[62] *Hamdi* v. *Rumsfeld* 542 US 507 (2004).

US law that allow for non-disclosure and selective redaction of sensitive material. A more pernicious reason for avoiding the criminal law is that some terrorist suspects, such as KSM [63] and Ahmed Ghailani were tortured when interrogated by the CIA in a manner that might make prosecution in the regular courts difficult and embarrassing.[64] The FBI was excluded from extreme interrogation for intelligence purposes and the torture that was used may have irrevocably severed links with the ordinary criminal courts. Even here, Ghailani's subsequent conviction on one of 280 terrorism counts and his life imprisonment sentence underline the power of criminal prosecutions in the ordinary courts.[65]

The US example of departing from the criminal law has not been lost to the rest of the world. In 2007, Egypt amended its Constitution to ensure that its President would have an explicit constitutional power to refer terrorism cases to military courts or special state security courts. This amendment was criticised on the basis that it could make emergency rule and reliance on special courts in Egypt permanent.[66] Israel has expanded its use of administrative detention since 9/11 relying on the notion that such detention is preventive and is necessary because of the dangers of disclosing intelligence.[67] Singapore and Malaysia have also used the post-9/11 environment to claim legitimacy for detention without trial under their Internal Security Acts.[68] One interesting feature of Singapore's approach, however, is that detainees are released once the authorities have been

[63] Jane Mayer, *The Dark Side* (New York: Anchor Books, 2008), pp. 273–9

[64] The judge excluded testimony from a key witness in the *Ghailani* trial because the witness was discovered through harsh interrogation techniques. The jury subsequently acquitted Ghailaini of 280 charges while convicting him of one charge in the 1998 African embassy bombings: 'Terror verdict tests Obama's strategy on trials', *New York Times*, 18 November 2010.

[65] Clyde Haberman 'A verdict replies to terrorists and critics', *New York Times*, 28 January, 2011.

[66] Sideq Reza, 'Endless emergency: the case of Egypt' (2007) 10 *New Law Review* 532. See also Lynn Welchman, Chapter 24, this volume.

[67] See Daphne Barek-Erez, Chapter 23, this volume

[68] See Michael Hor, Chapter 11, this volume. Singapore, in its second report to the Counter-terrorism Committee, justified its use of the Internal Security Act as preventive detention without trial on the basis that 'the character of terrorist activities, in particular the planning and preparation of terrorist acts, makes disclosure of intelligence collected as evidence in open court a threat to the sources of information': Singapore Report (S/2002/690), p. 2. Section 10 of Singapore's recent Hostage Taking Act Act 19 of 2010 also recognises the need to protect informers, but unlike the Internal Security Act contemplates that the identity of informers may have to be disclosed if they have made false statements and to ensure that justice is done.

convinced that they have been rehabilitated through the use of religious counselling and after-care.[69] Preventive detention may have its own instrumental, therapeutic and restorative logic at least as practised in Singapore. In Guantánamo, however, it seems to have been implemented in a punitive and haphazard manner that resulted in both the detention of the innocent and the release of others who subsequently engaged in terrorism.

B. Targeted killings

The Israeli High Court considered targeted killings in a decision rendered in late 2005. The Court rejected the government's arguments that terrorists should be treated as unlawful combatants and affirmed that terrorists were civilians for the purposes of the law of war. At the same time, however, the Court accepted that civilians who directly participated in hostilities could be targeted and defined direct participation broadly to include those who acted as human shields or played an important role in the terrorist organisation.[70] Although criticised,[71] this approach is consistent with the breadth of most criminal laws against terrorism. What is not consistent with any criminal law, however, was the Court's acceptance that collateral damage to innocent civilians would be justified so long as it was proportionate to the military advantage of the killings in protecting civilians and soldiers.[72] The degree of collateral damage is striking with the Court candidly noting that 300 members of terrorist organisations had been killed, but so too had 150 civilians in those attacks.[73] Although the decision attempts to impose legal and institutional restrictions on targeted killings, it is undeniable that it accepts a degree of collateral damage to the innocent that would never be acceptable under the criminal law. The US approach to targeted killing is even more aggressive with the Obama Administration both accelerating the use of targeted killing and successfully resisting attempts to judicially

[69] A recent Rand study has reported that 40 out of 60 terrorist detainees have been released under Singapore's sophisticated rehabilitation programme with only one subsequent arrest. Angel Rabasa, Stacie C. Pettyjohn, Jeremy J. Cihez and Christopher Boucek, *Deradicalizing Islamic Extremists* (Santa Monica, CA: Rand Corporation, 2010), p. 104. See also Michael Hor, Chapter 11, this volume for a partial defence of the use of preventive detention in the unique Singaporean context and in relation to concerns that public trials might create hostility to Singapore's Muslim minority.

[70] *Public Committee Against Torture* v. *Israel* (Israel High Court, 11 December 2005), [36]–[37], available at elyon1.court.gov.il/Files_ENG/02/690/007/a34/02007690.a34.htm.

[71] Note 'On target? The Israeli Supreme Court and the expansion of targeted killings' 116 *Yale Law Journal* 1873 (2007). See also Daphne Barak-Erez, Chapter 23, this volume for a detailed description of the proportionality requirements imposed by the Israeli Court.

[72] *Public Committee Against Torture* v. *Israel*, [45]. [73] Ibid., [3].

review targeted killings. The Obama Administration claims the right to engage in targeted killing of terrorists outside as well in situations of armed conflict and without having to demonstrate that capture and prosecution are not possible as less drastic alternatives.[74]

C. *Administrative and immigration law detention and control orders*

Immigration law, particularly in Western countries, has frequently been used to counter international terrorism since 9/11. It routinely employs what in criminal law would be seen as problematic status-based offences and standards of proof well below the criminal law standard of proof beyond a reasonable doubt. Although it is not a crime to be a member of a terrorist group in either the United States or Canada, it is a ground for apprehension and removal under both countries' immigration laws. Immigration law is also more accepting of preventive, investigative and indefinite detention and the use of secret evidence than the criminal law.

The United Kingdom relied on immigration law as anti-terrorism law in the immediate aftermath of 9/11, but in response to a court decision holding that its approach was both disproportionate and discriminatory, it repealed this provision and enacted control orders. Control orders, like immigration laws, are administrative measures that are imposed on a standard significantly less than proof of guilt beyond a reasonable doubt. They also use secret evidence not disclosed to the detainee even though they may impose strict conditions of house arrest. The courts have forced the state to disclose more information and as of the end of 2010, there were only eight control orders remaining.[75] A 2011 review stressed that control orders, and in particular onerous conditions restricting any use of mobile phones or computers, hindered criminal investigations.[76] Control orders

[74] See William C. Banks, Chapter 18, this volume. For arguments that current US approaches to targeted killing, as well as the apparent continuation of extraordinary renditions, demonstrate American attraction to extra-legal measures, see Roach *The 9/11 Effect*, Chapter 4. Unlike under Gross's proposals, these extra-legal measures are conducted secretly and are not apparently restrained by credible threats of sanctions for the extra-legal conduct. See Oren Gross 'Chaos and Rules' (2003) 112 *Yale Law Journal* 1011. But for arguments that US officials were restrained by worries about prosecutions in connection with the torture memos, see Jack Goldsmith *The Terror Presidency* (New York: Norton, 2007), Chapter 5.

[75] Helen Fenwick and Gavin Phillipson, Chapter 19 this volume.

[76] 'The evidence obtained by the Review has plainly demonstrated that the present control order regime acts as an impediment to prosecution', Lord Macdonald *Review of Counter-Terrorism and Security Powers*, (Cm 8003, January 2011), p. 9 para. 2.

will now be replaced by a less onerous regime with a greater emphasis on surveillance and evidence gathering with the aim of preparing for criminal charges and prosecutions.[77] This can be seen as a healthy correction in favour of the criminal law, if not necessarily liberty. In contrast, the United Kingdom continues to use immigration law as anti-terrorism law by deporting terrorist suspects on the basis of assurances that they will not be tortured when returned.[78] This approach, as opposed to one based on domestic criminal law investigations and prosecutions, runs both the risk of torture and of exporting terrorism.

In the past, terrorism-inspired innovations in the criminal law context such as limits on the right to silence have spread to the rest of the criminal law.[79] This danger still exists, but, in the post-9/11 environment, the more immediate danger seems to be that terrorism-inspired innovations such as secret evidence and special advocates may spread from administrative law to the criminal law. In addition, terrorist innovations in the criminal law may also draw on dramatic expansions of the criminal law in other areas. For example, in Canada much of the basic structure of post-9/11 terrorism offences was taken from previously enacted organised crime offences. In the UK, control orders had precedents both in pre-World War II emergency measures but also in more contemporary measures like Anti-Social Behavioral Orders.[80] The UK's controversial Terrorism Act 2006 not only criminalised indirect encouragement of terrorism through its glorification but also allows police officers to serve notices to require unlawful terrorist related material to be removed from the Internet. The Act thus blurs criminal law and less restrained administrative measures.

D. Summary

The criminal law faces challenges as many continue to argue that terrorism is too dangerous and sensitive a matter to be left to the demands of proving guilt beyond a reasonable doubt on the basis of public evidence.

[77] *Review of Counter-Terrorism and Security Powers & Review Findings and Recommendations*, (Cm 8004, January 2011) pp. 40–3.

[78] See *RB (Algeria)* v. *Secretary of State* [2009] UKHL 10 applying a deferential standard of judicial review to hold that terrorist suspects could be deported to Jordan and Algeria with assurances that they would not be tortured. See Colin Harvey, Chapter 9 this volume.

[79] Oren Gross and Fionnuala Ni Aolian, *Law in Times of Crisis* (Cambridge University Press, 2006), pp. 214–20.

[80] Lucia Zedner, 'Preventive justice or pre-punishment? The case of control orders' (2007) 60 *Current Legal Problems* 174–203.

The persistence of military commissions, administrative detention without trial and targeted killings under the Obama Administration suggests that the challenges to the criminal law are deep and fundamental.

At the same time as it faces external threats, the criminal law will face internal challenges in dealing with terrorism. There is a danger that, in an attempt to preserve its role in combating terrorism, the criminal law may be distorted beyond recognition. Procedural distortions will occur if terrorist trials are frequently closed to the public and the accused is denied access to full disclosure or full confrontation. Substantive distortions will occur if offences are so broadly and vaguely worded that they do not provide meaningful act or fault requirements and are incomprehensible for juries. In addition, the use of membership and association offences combined with an emphasis on religious and political motives create the risk that terrorism crimes will be perceived as political and religious crimes. Such distortions will undermine the rights of the accused and deprive the criminal law of its unique and principled role in preventing and denouncing terrorism.

4. The role of an ideal criminal law in a broader anti-terrorism strategy

Much of this chapter has been pessimistic in warning about the dangers of distorting the criminal law and the even greater dangers of using less restrained alternatives to the criminal law. In this section, I will take a more positive approach by briefly outlining the optimal use of the criminal law in a broader counter-terrorism strategy.

A. An ideal criminal law to combat terrorism

One threshold question is whether countries should enact terrorism laws or rely on existing laws targeting crimes such as murder and bombings. The answer depends in large part on the nature of inchoate offences within the particular country.[81] It may not be necessary to enact laws against the incitement of terrorism as called for in Security Council Resolution 1624 if existing laws against the incitement of violence are adequate. The 2002 terrorism law in Indonesia responded to a very restrictive law of

[81] For a discussion of these issues, see s. 2.1.2 of the Ottawa Principles on Anti-Terrorism and Human Rights in Nicola LaViolette and Craig Forcese (eds.), *The Human Rights of Anti-Terrorism* (Toronto: Irwin Law, 2008), pp. 22–9.

attempts and the absence of general conspiracy offences in that country and could be justified on that basis. The trend in many countries is for terrorism-specific laws that target remote acts of preparation and planning that would not be caught by general offences of attempts, conspiracy or incitement. Terrorism-specific laws may be a better alternative to wholesale expansion of the criminal law, but only if terrorism is defined in a restrained and determinate fashion.

One possible definition of terrorism taken from the 1999 Terrorism Financing Convention would target intentional killing or harming of those not engaged in armed conflict in order to intimidate a population or compel a government or international organisation to act. To be sure, such a definition errs on the side of under-inclusion. It also relegates difficult issues of state terrorism and liberation struggles– issues that have prevented international agreement on a definition of terrorism– to the evolving laws of war. Nevertheless, it is an improvement on many overbroad definitions of terrorism, especially those that require proof of religious and political motive. It should not be forgotten that acts omitted from a definition of terrorism, for example property damage and blockades, may still often be illegal under ordinary criminal laws.

The expansion of criminal law to include remote acts of preparation and planning for terrorism can be justified as a response to the devastating harm of terrorism, but only if the state can establish a high level of subjective fault or intent to commit a terrorist act. In other words, the criminal law should be able to punish a person who is only starting to plan a terrorist act provided that it is clear that the person is intent on committing terrorist violence. Similarly, departures from narrow approaches to conspiracy law can be justified in order to ensure that a person can be convicted even if they have not selected a specific target for their terrorist plot. At the same time, it should be accepted that the broadening of the criminal law may in some cases result in sentences that may at first glance seem too lenient for the terrorist label. It should also be accepted that the remoteness of the preparation for terrorism may in some cases raise a reasonable doubt about whether the accused had the necessary intent.

In general, the state should avoid procedural shortcuts in terrorism law both to minimise the possibility of conviction of the innocent and to demonstrate the state's commitment to fairness. The criminal law's concerns about only punishing the guilty distinguishes it as the moral superior to the willingness of terrorists to punish the innocent. The high standard of proof of guilt beyond a reasonable doubt has been defended in the Canadian *Air India* case as 'the essence of the Rule of Law' and one

that 'cannot be applied any less vigourously in cases of horrific crimes'.[82] The use of reverse onuses should generally be avoided in terrorism laws given the dangers of convicting someone in the face of a reasonable doubt about guilt. The state should also not be able to rely on administrative or international lists of terrorist groups in cases where part of the criminal offence is proof that a terrorist group existed. An administrative listing on the basis of secret evidence should not be substituted for proof beyond a reasonable doubt on the basis of public evidence that the accused can challenge. The accused should be able to make the same due process claims that are allowed in other criminal trials including claims that he or she has been entrapped into committing crimes by state agents. Proactive investigation is acceptable in terrorism investigations but it should not result in discriminatory forms of virtue testing in the absence of individualised suspicion and it should not induce the commission of terrorism crimes.[83]

Criminal trials should never use secret evidence against the accused. At the same time, however, public interest immunity procedures should allow the state to demonstrate that non-disclosure, summarisation or selective redaction of unused material is justified given the dangers of disclosure compared to the use that the accused could make of such material. The trial judge should make non-disclosure decisions and retain the right to re-open them and if necessary stay proceedings should non-disclosure of such material result in an unfair trial.[84] The state should also have an opportunity to justify the use of closed courts and even anonymous witnesses subject to the overriding concern that the accused still have a fair trial. The state may have legitimate reasons relating to witness and source protection, ongoing investigations and future trials to close parts of terrorist trials, but it should also be sensitive to the value of publicity in demonstrating to a sceptical public that terrorist suspects were willing to harm innocent civilians. Fair and public criminal trials can be an important part of a 'heart and minds' approach that exposes and denounces terrorism and may even help convince those with extremist views to stop short of violence. Courts should be careful when admitting evidence about the accused's political

[82] *R* v. *Malik and Bagri* 2005 BCSC 350, [662], [1254].

[83] Kent Roach 'Entrapment and equality in terrorism prosecutions: a comparative examination of North American and European approaches' (2011) 80 *Mississippi Law Journal* 1455.

[84] *R* v. *Ahmed* (2011) SCC 6 stressing importance of stays to prevent unfair trails; Roach, *The Unique Challenges of Terrorism Prosecutions*.

and religious views to ensure that the probative value of such evidence does not exceed its prejudicial effects. Terrorism prosecutions should not become or appear to become political or religious trials.

The issue of sentencing is more difficult than might be imagined. There has been a trend towards heavy sentences that stress the need to denounce, deter and incapacitate terrorists. At the same time, rehabilitation should not be discarded especially in cases where accused have pled guilty and genuinely renounced violence. Some have argued that US terrorism sentences have been 'soft', but Chesney has shown that this critique pays inadequate attention to the specific offences charged including the use of preventive 'Al Capone'-type prosecutions.[85] The UK courts have stressed the need for higher sentences than before 9/11 on the basis that 'IRA terrorists were not prepared to blow themselves up for their cause. It is this fanaticism that makes it appropriate to impose indeterminate sentences on today's terrorists, because it will often be impossible to say when, if ever, such terrorists will cease to pose a danger'.[86] The Canadian courts have also imposed higher sentences on al-Qaeda inspired terrorism including sentences of life, twenty and eighteen years imprisonment in cases where eighteen- to twenty-year-old offenders without prior records pled guilty and expressed remorse for their deadly plots.[87] The Australian courts have also handed out high sentences, but the Victorian Court of Appeal has wisely warned that attention must be paid to the breadth of new crimes of terrorism, differences among terrorist organisations and terrorists plots and the dangers of double punishment for overlapping crimes.[88]

[85] Robert Chesney, 'Federal prosecutions of terrorism-related offences' (2007) 11 *Lewis and Clark Law Review* 851, 885. (The median sentence for material support of designated foreign terrorist group is ten years.)

[86] *R* v. *Barot* [2007] EWCA Crim 1119 (54). See also *R* v. *DaCosta* [2009] EWCA Crim 482 (30) on the need for higher post-9/11 sentences for illegal speech associated with terrorism.

[87] *R* v. *Amara* 2010 ONCA 858 (life imprisonment for twenty-year-old mastermind of truck bomb plot who pled guilty and expressed remorse) *R* v. *Khalid* 2010 ONCA 861 (twenty-year sentence for a nineteen-year-old first offender who was willfully blind but not fully aware of the details of the truck bomb plot and who had renounced violence); *R* v. *Gaya* 2010 ONCA 860 (eighteen-year sentence for an eighteen-year-old first offender who was willfully blind but not fully aware of the details of the truck bomb plot and who was genuinely remorseful). In *R* v. *Khawaja* 2010 ONCA 862, a life imprisonment sentence was justified in part because the offender had not renounced violence. The Court of Appeal also stressed that the trial judge had erred in applying a totality principle to five separate terrorism offences because of a statutory direction that sentences for terrorist offences be served consecutively.

[88] *Benbrika and Ors* v. *The Queen* [2010] VSCA 281 (555) (fifteen-year sentence for a ringleader who had not renounced violence).

Western democracies with traditions of separating religion from state may find the rehabilitation of Islamic (or other religious) terrorists awkward. There is a danger that they will simply abandon any attempt to rehabilitate even though terrorists may be convinced of the errors of religious beliefs that encourage violence. Although Singapore's intense rehabilitation model may not be appropriate for Western democracies,[89] the lack of concern with rehabilitation in the West may also ignore the possibility of prison radicalisation of convicted terrorists who may eventually be released.

Regardless of their approach to rehabilitation, courts should limit terrorism sentences on the basis of the seriousness of the accused's actions and intent. Many new terrorism offences expand the criminal act to remote forms of preparation and support and qualify the fault element to not require that the accused intend a specific terrorist act. These qualifications may be justified to allow earlier prosecution of terrorists, but they also affect the seriousness of the offence for sentencing purposes. The courts should not allow the terrorist label of an offence to be an excuse for sentences that are excessive in relation to what the accused actually did or intended.

B. The place of the criminal law in a comprehensive strategy

Although criminal law reform often figures prominently in public discourse and in country reports concerning compliance with Resolution 1373, most governments are taking a whole of government approach to terrorism which goes well beyond police, prosecutors and courts and includes various security intelligence agencies, immigration and customs officials, aviation and transport security, the regulation of financial institutions, emergency preparedness and foreign policy.

The full development of a comprehensive anti-terrorism policy is obviously beyond the scope of this chapter, but the project can be advanced by selective incorporation of regulatory strategies from outside the field of terrorism or crime. A promising construct for situating the criminal law in broader anti-terrorism policy can be taken from the field of public health.[90] In order to assess a variety of counter-measures that could reduce death and injury from traffic accidents, epidemiologist William

[89] Rabasa *et al*., *Deradicalizing Islamic Extremists*, p. 104.

[90] National Research Council, *Making the Nation Safer: The Role of Science and Technology in Countering Terrorism* (Washington, DC: National Academy Press, 2002).

Haddon constructed a matrix evaluating counter-measures that could be taken to minimise harm before, during and after the accident. Haddon argued that too many resources had been devoted to changing the behaviour of the direct agent and that harm could be reduced by greater regulation of third parties and the environment. I have argued elsewhere that the Haddon Matrix can be modified to apply to terrorism.[91] Following Haddon, we should assume that at least some terrorist activity cannot be deterred and spend more resources on regulating the environment before, during and after acts of terrorism so as to minimise the harms of terrorism. Before the act of terrorism, this means better regulation of sites and substances that are attractive to terrorists. It is particularly important to prevent potential terrorists from obtaining access to lethal substances such as toxins, nuclear material, large amounts of explosive substances and aeroplanes. Much of this type of environmental regulation may be achieved by administrative laws that may present less of a threat to values such as liberty, due process and equality than the criminal law. Some of these preventive measures may also have the advantage of making us safer from accidents involving nuclear material and toxins.

The Haddon Matrix approach should make policymakers think about what can be done to minimise harm during and after an act of terrorism. Although this will be dismissed as defeatist damage control by some, it remains crucial to minimising the harms of terrorism. Without evacuation strategies introduced after the 1993 attacks, the death toll at the World Trade Centre might have been in the tens of thousands.[92] Both Canada and the United Kingdom have stressed preparation for a wide range of emergencies as part of their post-9/11 terrorist strategies, but US strategies changed only after the failure to respond to Hurricane Katrina. It will be interesting to see if the extensive damage and loss of life caused by forest fires in Israel in December 2010 will inspire that country to put a greater emphasis on an all-risk emergency preparedness approach to national security.

[91] William Haddon, 'A logical framework for categorizing highway safety phenomena and activity' (1972) 12 *Journal of Trauma* 193. For an application of the Haddon Matrix for preventing and reducing injury to the field of terrorism, see Kent Roach, *September 11: Consequences for Canada* (Montreal: McGill Queens University Press, 2003), pp. 168–74.

[92] It took four hours to evacuate the World Trade Centre in 1993 whereas all but 2,152 of the 16,400 to 18,800 civilians in the towers were evacuated in less than one hour in 2001: *The 9/11 Report*, [9.4].

Another instrumental concept that could inform a comprehensive anti-terrorism policy is the idea of responsive regulation advocated by Braithwaite. The central idea of responsive regulation is a regulatory pyramid which allows for the escalation of the state's response when regulation fails. Braithwaite stresses that the behaviour of potential wrongdoers can often be best controlled by third parties who have greater influence over the target of regulation than the state. Attempts at persuasion, negotiation, dissuasion from extremism and peaceful problem-solving lie at the base of the pyramid with escalation to deterrent threats of punishment and finally to incapacitation of irrational actors.[93] Some argue that persuasion, problem solving and even deterrence should quickly be ruled out when applied to groups like al-Qaeda that seem bent on death and destruction.[94] Nevertheless, the 9/11 Commission recognised that failed and repressive states, desperation and lack of education are contributing factors to terrorism that should be addressed. For example, Egypt's traditional repression of the Muslim Brotherhood played a role in inspiring some in al-Qaeda.[95] The subsequent development of home-grown terrorism underlines the importance of providing alternative avenues for the expression of grievances and not relying on criminal law to prosecute praise of terrorism. One of the dangers of a focus on criminal law or its less restrained alternatives is that softer strategies that address the causes of terrorism will be ignored.

There is a need to think carefully about the proper relation between the criminal law and the collection of intelligence to warn governments about possible terrorist attacks. The creation of many new terrorist crimes of preparation and association has blurred the distinction between intelligence about security threats and evidence of crime. In many cases, there will be overlapping terrorism investigations by police and intelligence agencies. Intelligence agencies are slowly learning to comply with evidential standards and this is a necessary part of an effective anti-terrorism strategy that will allow the criminal law to be used to punish those who plan terrorist violence. At the same time, however, we must be aware that

[93] John Braithwaite, *Restorative Justice and Responsive Regulation* (Oxford University Press, 2002), pp. 31–2.

[94] Although he recognises the potential for democratic outlets for grievances in Spain, Canada and Northern Ireland, Michael Ignatieff has argued that the 'apocalyptic nihilists' of al-Qaeda 'cannot be engaged politically and must instead be defeated militarily': Michael Ignatieff, *The Lesser Evil Political Ethics in an Age of Terror* (Toronto: Penguin, 2004), p. 99.

[95] *The 9/11 Report*, [12.2]–[12.3]. See also Lawrence Wright, *The Looming Tower* (London: Allen Lane, 2006).

too much merging of intelligence and criminal law paradigms can undermine the moral force of the criminal law and its claim to impose just punishment for clear wrongdoing. The use of the criminal law to respond to remote and speculative risks or to the status of the accused, for example as a person who in the past received terrorist training, can undermine the unique denunciatory force of the criminal law.

A refusal to use the criminal law to respond to particularly remote or ambiguous risks does not mean that society has no defence against such risks. One layer of defence is the use of intelligence to engage in surveillance of potential security threats; another layer of defence is administrative regulation to harden targets and control dangerous substances and likely sites for terrorist activities. Yet another is outreach and co-operation with communities that may be best able to detect potential terrorists in their midst.

There is a need to be aware of the limits of the criminal law in responding to extremist speech. In some cases, it may be better to keep those who engage in extremist speech under surveillance than to prosecute them. Although the criminal law is society's strongest tool of disapproval and denunciation, it is not its only tool. Sometimes exposure and criticism of extremist speech may be enough to stop it from spreading. At the same time, it is possible to defend extremist speech and hate speech prosecutions as an attempt to regulate the ideological environment and prevent radicalisation. Much will depend on the respective values that particular societies place on freedom of expression and social harmony. Care should, however, be taken in transplanting European concepts of militant democracy and abuse of rights to countries without real democratic freedoms or traditions or in using the militant democracy concept within democracies to crush Islamic and other forms of legal pluralism.[96] It should also be recognised that speech, including extreme speech, will often be an important alternative to violence in expressing various grievances at home and abroad that may motivate terrorism.

The core of the criminal law – the idea that intentional violence is not justified regardless of its motives and the grievances that may motivate the violence – should send a powerful message to all those who may contemplate terrorism that violence is out of bounds. To be sure, the denunciation

[96] Kent Roach, 'Anti-terrorism and militant democracy: some Western and Eastern responses', in Andras Sajo (ed.), *Militant Democracy* (Amsterdam: Eleven Publishing, 2004); Patrick Macklem 'Militant democracy. Legal pluralism and the paradox of self-determination' (2006) *International Journal of Constitutional Law* 488.

provided by the core of the criminal law will not eliminate terrorism any more than it has eliminated murder. It will, however, help marginalise and stigmatise terrorism in a way that less restrained alternatives to the criminal law are unable to do because they do not have the same rigorous commitment to public proof of wrongdoing as does the criminal law.

5. Conclusion

To paraphrase Winston Churchill about democracy, the criminal law appears to be the worst way to respond to terrorism – except for all the others that have been tried. The criminal law has been distorted and misused since 9/11 as the Security Council called on all states to enact criminal laws against terrorism and terrorism financing without offering guidance about how terrorism should be defined. The dangers of over-broad definitions of terrorism have only been aggravated by subsequent calls by the Security Council to criminalise incitement of terrorism. Criminal laws against terrorism that are over-broad, duplicative and complex have presented fundamental challenges for terrorism trials, as have attempts to keep intelligence and witnesses secret within those trials.

Although the criminal law has been stretched and strained by the demands of prevention of terrorism, there are signs that democracies are being drawn back to the criminal law as the best way to denounce, incapacitate and punish terrorists. Less restrained alternatives to the criminal law including the use of secret evidence and indeterminate detention without trial have proven to be both legally and politically controversial. The criminal law represents important values of individual responsibility, legally authorised detention, deserved punishment and due process that should not be lightly discarded. Although the terrorist threat can produce distorted and unjust criminal laws and trials, the greater danger since 9/11 is that states will abandon the criminal law in favour of much less restrained and less discriminating anti-terrorist measures including war, targeted killing and the imposition of military or administrative detention on the basis of secret evidence.