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Legislating anti-terrorism: observations on form and process

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1. Introduction

The likely conduct of the three arms of government in responding to threats to national security – and the strengths and weaknesses possessed by each in doing so – has been the subject of a considerable amount of academic debate in the years since the terrorist attacks on the United States in 2001. Although the question of how democracies can defeat an enemy while still maintaining essential checks and balances on government is far from a new one, it has certainly received sustained attention, frequently enriched through use of comparative perspectives and experiences, in the first decade of this century.

In the immediate aftermath of World War II, Rossiter concluded that 'it is always the executive branch in the government which possesses and wields the extraordinary powers of self-preservation of any democratic, constitutional state' and that the other arms of government should facilitate, rather than obstruct it from doing so.[1] Drawing parallels between the use of strictly limited dictatorships by the Roman Republic and the behaviour of the US and UK governments during the then recently concluded hostilities, Rossiter's advocacy of virtually unchecked executive power in times of crisis – a 'constitutional dictatorship' – was underpinned by his appreciation of the capacity of the other arms of government to reclaim their status and functions once the danger had passed.[2] The ability of the

I gratefully acknowledge the excellent research assistance of Keiran Hardy in preparation of this chapter and the comments and suggestions of participants at the 2010 Anti-Terrorism Law Symposium and Dr Dominique Dalla-Pozza on an earlier version of this work. I thank the editors for their invitation to contribute to the symposium and this collection. Any errors are, of course, mine alone.

[1] Clinton L. Rossiter, *Constitutional Dictatorship* (Princeton University Press, 1948), p. 12.

[2] Ibid., pp. 8–25. The use of dictators by the Roman Republic is something of an ubiquitous entry point to modern discussion of emergency constitutionalism: see particularly John

polity to revert swiftly to its more familiar constitutional contours must surely depend on the strength of its democratic culture and institutions.[3] But such a reversion is also greatly assisted by the clear identification of a point when victory or safety has been secured. The subsequent experience of decades of Cold War and, of course, the contemporary realisation that however else we might seek to describe the present security environment, a 'war on terror' it simply is not, has exposed the limitations of Rossiter's study. The embrace of executive unilateralism by the White House Administration of President George W. Bush after 9/11 has, in turn, served to amply demonstrate the dangers of such an approach outside the parameters of total war.[4]

Other than those few voices whose support of essentially unchecked presidential war powers was relied on by the Bush White House to furnish it with legal justification for the many extraordinary methods it employed against foreign nationals and its own citizens in the name of national security,[5] the bulk of recent literature overwhelmingly favours the retention of some limits upon executive power, even in times of emergency or danger to the polity. But across this broad consensus there is an internal divide as to whether the judiciary or legislature is best equipped to effectively counter or control the likely excesses of the executive. Although the arguments are numerous and set out at length

E. Finn, *Constitutions in Crisis: Political Violence and the Rule of Law* (Oxford University Press, 1991), pp. 15–16; Oren Gross, 'The concept of "crisis": what can we learn from the two dictatorships of L. Quinctius Cincinnatus' (Paper presented at the Centro Nazionale di Prevenzione e Difesa Sociale XVII International Conference, 'Civil and economic rights in times of crisis', Stresa, Italy, 13–14 May 2005); Oren Gross and Fionnuala Ní Aoláin, *Law in Times of Crisis: Emergency Powers in Theory and Practice* (Cambridge University Press, 2006), pp. 17–26.

[3] Samuel Issacharoff, 'Political safeguards in times of war' (2009) 29 *Oxford Journal of Legal Studies* 189, 206. See also Finn, *Constitutions in Crisis*, p. 149; and Rossiter, *Constitutional Dictatorship*, p. 71.

[4] See Jack Goldsmith, *The Terror Presidency* (New York: W.W. Norton, 2007); Kim Lane Scheppele, 'Law in a time of emergency: states of exception and the temptations of 9/11' (2004) 6 *University of Pennsylvania Journal of Constitutional Law* 1001.

[5] See Karen J. Greenberg and Joshua L. Dratel (eds), *The Torture Papers: The Road to Abu Ghraib* (New York: Cambridge University Press, 2005); Eric Posner and Adrian Vermeule, *Terror in the Balance: Security, Liberty and the Courts* (New York: Oxford University Press, 2008); John Yoo, 'Executive power, civil liberties, and security: constitutional trade-offs in fighting global terrorism' in Stuart Gottlieb (ed.), *Debating Terrorism and Counterterrorism: Conflicting Perspectives on Causes, Contexts, and Responses* (Washington, DC: CQ Press, 2010), pp. 339–52 (cf. Goldsmith, *The Terror Presidency*); Stephen Holmes, *The Matador's Cape: America's Reckless Response to Terror* (New York: Cambridge University Press, 2007), pp. 286–302.

by many elsewhere,[6] basically the perceived strength of the judiciary as a safeguard hinges on its independence when contrasted with the constraining effects of populism and party discipline on the legislature. Conversely, judges rarely have the access to information or experience to make determinations on the reasonableness of security measures.[7] The judicial arm of government is also the most reactive, with its power of intervention dependent upon individuals to seek legal redress. Considerable time may elapse before the hearing of specific claims results in the courts placing a clear curb on political power, if at all.[8] The judiciary's historical record of affording individuals meaningful protection in times of national emergency is far from stellar. While some might point to key cases in the last few years in both the United States and the United Kingdom[9] as proof that the judiciary has overcome its traditional deference so as to take a stand against rights abuses by their respective governments in responding to terrorism (particularly in the United Kingdom by virtue of the courts' use of the Human Rights Act 1998),[10] others strongly argue that this favourable assessment of judicial performance is contestable when one examines the actual impact the decisions made have had both on the rights of the individuals in question, and more broadly.[11]

My own position on this debate is that it starts from an artificial premise. While separate evaluation of the capacity and performance of the legislature and judiciary is worthwhile in promoting a better

[6] Though for an especially succinct and balanced presentation of both points of view, see Fiona de Londras and Fergal Davis, 'Controlling the executive in times of terrorism: competing perspectives on effective oversight mechanisms' (2010) 30 *Oxford Journal of Legal Studies* 19.

[7] Mark Tushnet, 'Controlling executive power in the war on terrorism' (2005) 118 *Harvard Law Review* 2673, 2679.

[8] Consider the cumulative effect of the decisions of the United States Supreme Court in *Rasul* v. *Bush*, 542 US 466 (2004); *Hamdi* v. *Rumsfeld*, 542 US 507 (2004); *Hamdan* v. *Rumsfeld*, 548 US 557 (2006); *Boumediene* v. *Bush*, 553 US 723 (2008).

[9] Namely *Boumediene* v. *Bush*, 553 US 723 (2008) and *A* v. *Secretary of State for the Home Department* [2005] 2 AC 68 (*Belmarsh* case).

[10] See David Bonner, *Executive Measures, Terrorism and National Security: Have the Rules of the Game Changed?* (Aldershot: Ashgate, 2007); de Londras in de Londras and Davis, 'Controlling the executive in times of terrorism', 41–3; Colm O'Cinneide, 'Strapped to the mast: the siren song of dreadful necessity, the United Kingdom Human Rights Act and the terrorist threat' in Miriam Gani and Penelope Mathew (eds.), *Fresh Perspectives on the 'War on Terror'* (Canberra: ANU E Press, 2008), p. 327.

[11] Davis in de Londras and Davis, 'Controlling the executive in times of terrorism', 28–9; Keith Ewing and Joo-Cheong Tham, 'The continuing futility of the Human Rights Act' [2008] *Public Law* 668.

understanding of how each may act as a safeguard against an overreaching executive in times of existential crisis, to the question, 'which of them is best placed to check the power of the executive?' I would simply answer 'both'.[12] Apart from the fact that this shared responsibility accords with constitutional arrangements generally in many countries (making the championing of one arm of government over the other in times of emergency, most usually as an expression of judicial review scepticism,[13] a fairly curious exercise), there is much to be said for the view that the legislature and judiciary together contribute to ensuring the accountability of the executive. Although they obviously act in distinctive ways and at different stages, they may often complement each other's efforts. The weight of contemporary experience since 9/11 increasingly supports this stance. De Londras and Davis, after offering a dialectic examination of the most effective means of checking executive power in responding to terrorism, and while maintaining their individual emphasis on judicial and political controls respectively, ultimately conclude that 'it seems likely that … the most effective form of oversight will be through a legislative–judicial dialogue focused on achieving a sustainable, proportionate balance between the exigencies of a security crisis and the fundamentality of rights'.[14] 'Dialogue' might best describe the optimal interaction between the non-executive arms of government in such circumstances, but there seems little cogent reason why the judiciary should not act simply as 'a back-up' for when political controls fail.[15] Tushnet's argument that the danger of this is that the political branches of government will discharge their own responsibilities with less care than they ought to exercise,[16] is difficult to verify. The judiciary in the United Kingdom enjoyed a far less significant role in the review of legislation prior to the arrival of the Human Rights Act and yet this did not appear to influence parliamentary scrutiny for the better – consider, for example, the manifestly draconian laws hurriedly enacted in response to the declaration of war in

[12] Andrew Lynch, 'Exceptionalism, politics and liberty: a response to Professor Tushnet from the antipodes' (2008) 3 *International Journal of Law in Context* 305.

[13] Mark Tushnet, 'The political constitution of emergency powers: some lessons from Hamdan' (2007) 91 *Minnesota Law Review* 1451. Ewing and Tham are further motivated by scepticism over the effectiveness of the UK statutory Human Rights Act in protecting individual freedoms: Ewing and Tham, 'The continuing futility of the Human Rights Act'.

[14] de Londras and Davis, 'Controlling the executive in times of terrorism', 46.

[15] Issacaharoff, 'Political safeguards in times of war'.

[16] Tushnet, 'Controlling executive power in the war on terrorism', 2680; shared by Davis in de Londras and Davis, 'Controlling the executive in times of terrorism, 32, 45.

1939 and the threat of Irish terrorist activity.[17] In any case, while I am sympathetic to the view that legislators are frequently not as mindful of the constitutionality of the bills they enact as they should be and instead appear to be content to await judicial decision on such questions,[18] the prospect of the latter can hardly be used to let parliamentarians off the hook. Apart from anything else, the judiciary may be expected to defer to elected representatives when questions of national security arise. Far better to appreciate the value of judicial scrutiny, while at the same time seeking to enhance that of law-makers, than to dispense with the former and risk no improvement in the latter.

The performance of legislatures, then, has clearly been central to consideration as to how best to restrain executive excess in responding to terrorism – but too often this has been in the service of debates over its effectiveness relative to that of the judiciary. If we abandon attempts to place the legislature and judiciary on opposing sides of the ledger whereby the weakness of one strengthens the appeal of the other, then the focus becomes less on competition than on the quality of each in its own right. The purpose of this chapter is to explore some of the recurrent themes in the enactment of anti-terrorism laws by national legislatures since 9/11. This provides essential context for the substantive analysis of many of these laws in the other chapters of this book.[19] A study of the law-making process in this area necessarily involves making generalised observations, given the range of different jurisdictions which are included in the discussion and also the significant number of enactments made by some of those. But it is important to state at the outset that the arguments made here about the general adequacy of pre-enactment scrutiny and deliberation of anti-terrorism laws in legislative chambers are not consciously presented as part of a case for judicial review. As stated above, I am of the view that, quite independently of the performance of the legislative arm, the courts should play a meaningful role, within their traditional capacities, in the restraint of executive abuse of power in times of emergency. The legislature should be

[17] Respectively the Emergency Powers (Defence) Act 1939, the Prevention of Violence Act (Temporary Provisions) 1939 and the Prevention of Terrorism (Temporary Powers) Act 1974.

[18] Andrew Lynch and Tessa Meyrick, 'The Constitution and legislative responsibility' (2007) 18 *Public Law Review* 158.

[19] See especially George Williams, Chapter 21, this volume (Australia and New Zealand); Kent Roach, Chapter 20, this volume (Canada); William C. Banks, Chapter 18, this volume (United States); Helen Fenwick and Gavin Phillipson, Chapter 19, this volume (United Kingdom).

appraised on its own terms and where strengthening is required, then that should be through its own practices and culture – and not by simply passing the ball to judges.

2. Anti-terrorism laws: form and process

For the purposes of discussion, this Section first examines some common trends in the form of the bills which have been brought by governments to their legislatures for enactment, before then considering the process by which the latter has typically occurred. Admittedly this is somewhat artificial since of course the members of legislative bodies cannot readily isolate form and process from each other. Nor should those observing the pattern of legislative enactment since all too frequently the two operate in tandem to give rise to objections. The dense complexity of draft anti-terrorism legislation is itself not necessarily a legitimate ground for complaint, especially given the gravity of the harm it is seeking to forestall, until one also considers the timeframe within which the government has pushed parliamentarians to act. Essentially, a holistic examination of legislating anti-terrorism laws is required in order to appreciate how the discrete features of that experience have worked in combination to affect the strength of the legislature's oversight of counter-terrorism initiatives of the executive.

Before commencing to look for themes in the way in which jurisdictions have responded legislatively to the terrorist threat in the wake of 9/11, it is perhaps worth indicating that this discussion focuses mainly upon Australia, Canada, New Zealand, the United Kingdom and United States as nations offering particularly fruitful avenues of comparison. That said, even amongst these common law countries there are significant distinctions which should be kept in mind at all stages. Government in the United States does not, of course, adhere to the Westminster doctrine of responsible government by which the executive governs through rather than separately from parliament. The dominance of the executive in the lower house of the parliaments of the four other nations (and, in Australia, occasional control of the upper house as well) clearly impacts upon the capacity of those institutions to resist government legislative demands and act as a truly independent check at all times. Another clear distinction is the level of formal human rights protection against which legislation is made. The United States alone enjoys constitutionally entrenched strong judicial review, while Canada, the United Kingdom and New Zealand all possess less conclusive forms of judicial involvement in the protection of

rights.[20] In Canada the Charter of Rights and Freedoms 1982 is a constitutional document but the Parliament may enact laws notwithstanding its protections – either in the first instance or by way of re-enactment following invalidation by the Supreme Court of the initial Act as in breach of the Charter. In the United Kingdom, the courts do not possess the power to strike out laws and can merely issue a declaration when they find one to be incompatible with the freedoms recognised by the Human Rights Act 1998. The Parliament need not repeal or amend the law in response. Initially, the New Zealand Bill of Rights Act 1990 conferred upon the courts an interpretative power only so that laws were to be read consistently with its protections, but a power to issue declarations of incompatibility was claimed by the judiciary in 2000.[21] As in the United Kingdom, a declaration of incompatibility does not invalidate the relevant legislation. Lastly, Australia has no formal instrument of rights protection whatsoever at the national level, though a handful of constitutional provisions limit the powers of either or both the Commonwealth and States to impair some specific rights of individuals.

However, the main point of difference between these five jurisdictions must, in the context of this volume, be their distinctive security challenges and the level of the terrorist threat. Including the atrocities of 9/11, of the five, only the United States and the United Kingdom have suffered a major terrorist attack in the last decade. Australian and Canadian authorities have each foiled plans for a major strike involving a sizeable number of individuals apparently motivated by Islamic fundamentalism, many of whom have since been convicted of terrorist offences.[22] In 2007, New Zealand's terrorism laws were used by police to arrest seventeen indigenous and environmentalist activists, but the Solicitor-General declined to prosecute for these offences. Lastly, Australia and the United Kingdom were participants in the US-led 'coalition of the willing' which invaded Iraq in 2003, while Canada and New Zealand were not. All five countries have participated to some extent in the military operations in Afghanistan since October 2001.

It is noteworthy that, despite these differences between the countries regarding governance and their likely priority as a terrorist target, clear

[20] Stephen Gardbaum, 'The new Commonwealth model of constitutionalism' (2001) 49 *American Journal of Comparative Law* 707, 719–39.

[21] *Moonen* v. *Film and Literature Board of Review* [2000] 2 NZLR 9.

[22] For a comprehensive account of Australian terrorism trials, see Nicola McGarrity, '"Testing" our counter-terrorism laws: the prosecution of individuals for terrorism offences in Australia' (2010) 34 *Criminal Law Journal* 92.

trends in the creation of anti-terrorism laws both as to form and process are discernible. With direct reliance on the records of parliamentary and congressional debates themselves, it is to a consideration of these that we now turn.

A. Form

The most striking similarity between the laws enacted in the first flush of legislative activity in the aftermath of 9/11 was their sheer scale. The current British Prime Minister, then sitting on the opposition benches, listed size as the first of his objections to the Blair government's Anti-Terrorism, Crime and Security Bill 2001 (ATCSB), adding pithily that 'we do not have to read it, as we can simply weigh it'.[23] Given that the Westminster Parliament had enacted what aspired to be comprehensive and permanent anti-terrorism law in just the preceding year, David Cameron's incredulity at the density of the ATCSB was understandable. The ATCSB not only amended existing provisions of the Terrorism Act 2000 but provided for, amongst other things, the freezing of terrorist assets, the disclosure of information for law enforcement purposes and the indefinite detention of terrorist suspects (later held by the House of Lords to be incompatible with the UK Human Rights Act).[24] In other jurisdictions, hefty legislation was perhaps to be expected. Australia, for instance, had no national laws generally criminalising terrorist activity or providing special powers to the authorities to investigate and prevent it. And while others had at least some legislative experience in anti-terrorism, they had certainly not revisited the area as recently as the British.[25]

Size alone was clearly not the problem, but merely reflected the deeper difficulty that these were 'omnibus bills' – a single enactment of diverse and discrete parts amending a range of existing laws and creating new ones.[26] Although the various components might be grouped as complementary paths to the overall goal of enhanced security, the bills were

[23] *Hansard*, HC, vol. 375, col. 101, 19 November 2001 (David Cameron).

[24] *A* v. *Secretary of State for the Home Department* [2005] 2 AC 68.

[25] Roach has highlighted how this had the effect of many nations seizing on the Terrorism Act 2000 (UK) as a template – particularly as regards the definition of terrorist acts: Kent Roach, 'The post-9/11 migration of Britain's Terrorism Act 2000' in Sujit Choudhry (ed.), *The Migration of Constitutional Ideas* (New York: Cambridge University Press, 2006), pp. 374–402.

[26] This is not a new phenomenon in respect of such laws: Laura K. Donohue, *The Cost of Counterterrorism: Power, Politics, and Liberty* (New York: Cambridge University Press, 2008), p. 12 (discussing the Civil Authorities (Special Powers) Act 1922 (UK)).

unquestionably difficult to debate and put to a simple vote. In this, the US Patriot Act set the tone admirably. Director Michael Moore, in his 2004 film *Fahrenheit 9/11*, famously lampooned the fact that apparently very few legislators (by the admission of some) had even read the whole Bill before enacting it. Writing the year after, Vervaele conjectured that as the 'Patriot Act document numbers approximately 350 pages and in ten titles amends over 15 existing federal laws…the complexity of the Act is doubtless the reason why not a single book has yet been published in the US analysing it in-depth and in its entirety'.[27] Although it enjoyed enormous congressional support in the wake of the 9/11 attacks, Senator Russ Feingold, the only Senator to vote against the Bill (and one of those who apparently *did* read it), lamented that its breadth required him to oppose enactment despite finding that 'many of its provisions are entirely reasonable, and I hope they will help law enforcement more effectively counter the threat of terrorism'.[28]

The Canadian Parliament confronted a similar problem with Bill C-36, enacted as the Anti-Terrorism Act 2001. Making substantial amendments to the Canadian Criminal Code, the Official Secrets Act the Canada Evidence Act, and the Proceeds of Crime (Money Laundering) Act and lesser changes to many other laws, the Bill provoked this reaction from one legislator:

> Let us talk about Bill C-36. It is 175 pages. I am not a lawyer, thankfully. However there are a number of lawyers in the House and elsewhere who will help us wade through the legislation. It is 175 pages and it affects 28 acts. I have never seen such an omnibus bill. In my experience … I have not seen a bill of this nature come before the House. We must tread carefully and softly with it.[29]

This quote is indicative of others made by non-lawyer members occasionally expressing the view that they were out of their depth.[30] Commentators

[27] John A. E. Vervaele, 'The anti-terrorist legislation in the US: *inter arma silent leges*?' (2005) 13(2) *European Journal of Crime, Criminal Law and Criminal Justice* 207, 213.

[28] United States of America, *Congressional Record*, Senate, 107th Congress, 25 October 2001, S11021 (Russ Feingold).

[29] Canada, *Parliamentary Debates*, House of Commons, 18 October 2001, 1100 (Rick Borotsik). Stuart described Bill C-36 as 'a complex melange of tortuous legalistic sections and exceptions which can only serve to encourage expensive litigation': Don Stuart, 'The anti-terrorism bill C-36: an unnecessary law and order quick fix that permanently stains the Canadian criminal justice system' (2002) 14 *National Journal of Constitutional Law* 153, 163.

[30] Ibid.; Canada, *Parliamentary Debates*, House of Commons, 16 October 2001, 1530 (Reg Alcock).

have highlighted that too much of the deliberation over the Bill became concentrated on the question of whether it was 'Charter-proof', that is, able to withstand successful legal challenge under Canada's Charter of Rights and Freedoms. That had two negative effects. First, it risked rendering the debate a highly exclusive one in which participants required a level of legal expertise that many parliamentarians and, more broadly, the public did not possess.[31] Second, in narrowing discussion of the Bill in this way, the broader issues about the necessity, effectiveness and possible application in practice by police and other agencies of various components of the Bill were arguably neglected.[32] In the United Kingdom's case, Fenwick similarly has argued that the government, after entering a derogation under the European Convention on Human Rights, proceeded to use the purported compatibility with the Convention rights 'to cast a legitimising cloak over legislation which was clearly rights-abridging'.[33]

The size and complexity of many of the first wave of anti-terrorism bills was directly due to the frequent inclusion of material that, while perhaps justifiable as elements in a broad and comprehensive strategy of combating terrorism,[34] could hardly be said to be immediately and urgently necessary. At the same time, governments also used the bills as vehicles for making changes to the general regulation of police powers and community behaviour in areas that were clearly beyond the terrorist threat itself. For example, the United Kingdom's ATSCB was objected to on the basis that:

> Part 5 deals with incitement to religious hatred, which is a very important issue, but it has nothing to do with terrorism; part 10 on police powers, ditto; part 1 on retention of communications data, ditto; part 12 on bribery and corruption, ditto; part 13 on implementation of the European Union third pillar, ditto. All those matters are important, but they are certainly not about terrorism, and yet we are subjecting them to a very tight timetable.[35]

[31] Roach notes the democratic objections to government defence of its Bill as Charter-proof, but concluded that, commendably, many 'were not overawed by the idea that the legislation was "Charter-proof"': Kent Roach, 'Did September 11 change everything? Struggling to preserve Canadian values in the face of terrorism' (2001–2) 47 *McGill Law Journal* 893, 943.

[32] Ibid.; Wesley Pue, 'The war on terror: constitutional governance in a state of permanent warfare' (2003) 41 *Osgoode Hall Law Journal* 267, 287.

[33] Helen Fenwick, 'The Anti-Terrorism, Crime and Security Act 2001: a proportionate response to 11 September?' (2002) 65(5) *Modern Law Review* 727–8.

[34] *Hansard*, HC, vol. 374, col. 989, 15 November 2001 (Robin Cook).

[35] *Hansard*, HC, vol. 375, col. 94, 19 November 2001 (Douglas Hogg).

The frustration of UK legislators that the Bill dealt 'not only with national and international terrorism but with many other matters', was one echoed in other jurisdictions.[36] In the United States, one congressman claimed that the Patriot Act 'could have been passed 3 or 4 weeks ago without much discussion', had it been limited to terrorism and not a 'general search warrant and wiretap law'.[37] As a New Zealand legislator succinctly exposed the strategy in play, many amendments 'have been sneaked into the bill because the Government knows that if a counter-terrorism label is put on amendments, members will be more reluctant to oppose them'.[38] The extended scope of the contents of 'emergency legislation' is reflective of such laws as an opportunity for government to secure changes to the law which it has previously been unable to pull off. The Patriot Act, for instance, contained several controversial provisions affecting criminal law and procedure that Congress had previously rejected.[39] In the United Kingdom, there was strong suspicion that 'the Home Office's back lobby … has a lot of stuff that it wants to put before Parliament, and it has attached it to this Bill'.[40] The New Zealand government's Terrorism (Bombings and Financing) Bill had been endorsed by the Parliament's Foreign Affairs, Defence and Trade Committee just prior to 9/11, but it was substantially revised and broadened and then presented for swift enactment as the rebadged Terrorism Suppression Bill.[41] In his analysis of Canada's C-36, Whitaker wrote:

> The opportunity offered by 9/11 was alertly seized by the Canadian security and intelligence community, which has ended up with much more than it would likely have achieved had 9/11 not happened. But most of these ideas were already in the pipeline in Ottawa, sometimes for years,

[36] Ibid., col. 56 (Simon Hughes).

[37] United States of America, *Congressional Record*, House of Representatives, 107th Congress, 23 October 2001, 7200 (Scott).

[38] New Zealand, *Parliamentary Debates*, House of Representatives, 1 April 2003, 4629–30 (Keith Locke). See Alex Conte, 'Crime and terror: New Zealand's criminal law reform since 9/11' (2005) *New Zealand Universities Law Review* 635, 636.

[39] Regina Germain, 'Rushing to judgment: the unintended consequences of the USA PATRIOT Act for *bona fide* refugees' (2001–2) 16 *Georgetown Immigration Law Journal* 505; Michael P. O'Connor and Celia M. Rumann, 'Into the fire: how to avoid getting burned by the same mistakes made fighting terrorism in Northern Ireland' (2003) 24 *Cardozo Law Review* 1657, 1707.

[40] *Hansard*, HC, vol. 375, col. 94, 19 November 2001 (Douglas Hogg); see also *Hansard*, HC, vol. 375, col. 56, 19 November 2001 (Simon Hughes); *Hansard*, HL, vol. 629, col. 212, 27 November 2001 (Lord Beaumont).

[41] New Zealand, *Parliamentary Debates*, House of Representatives, 8 October 2002 (Keith Locke).

> awaiting the political push that would bring them to the front of the policy agenda.[42]

It is not simply that the legislation's status as anti-terrorism law provides cover for the passage of these measures – though, as is discussed in the next section, this is indeed significant when the government of the day is willing to portray any who express concern about the Bill as terrorist sympathisers. But additionally, the sheer size and diversity of the Bill's contents will mean there is a good chance that all but the most objectionably draconian elements will, even allowing for committee scrutiny, escape parliamentary attention due to a shortage of time and limited access to information and expertise. It is also highly conceivable, though of course difficult to verify, that the executive loads its Bill up with material some of which it is quite prepared to give ground on in order that its main goals are met. In other words, 'concessions are built into the legislative process'.[43]

The speed with which governments have been able to draft large, complex bills in the aftermath of a terrorist attack (whether at home or abroad) further suggests that much of this legislation is prepared in advance. Indeed, there appears to be a tradition of this – the Home Secretary of the United Kingdom having admitted that his government's anti-terrorism legislation of 1974 was drafted 'long before' it was rushed before Parliament in response to the Birmingham bombings of that year.[44] Thomas has described the basic process, and its consequences, as follows:

> Emergency legislation passed as a consequence of national catastrophe associated with terrorism has a predictable pattern. It involves an unseemly scramble between the Executive and legislature so that they are seen by the public and the media to be doing 'something'. A previously prepared emergency Bill is dusted down and hastily pushed through the legislature. Policy and law are thereby tightened, with scant recourse to reasoned chamber debate or recognition of standard procedures, in order to respond to the media and public outcry. Thus, the politicians' anxiety to be viewed as resolving the crisis overrides both established process and rational action.[45]

[42] Reg Whitaker, 'Keeping up with the neighbours? Canadian responses to 9/11 in historical and comparative context' (2003) 41 *Osgoode Hall Law Journal* 263.

[43] Mark Shepherd, 'Parliamentary scrutiny and oversight of the British "war on terror": from accretion of executive power and evasion of scrutiny to embarrassment and concessions' (2009) 15 *Journal of Legislative Studies* 191, 211.

[44] Owen G. Lomas, 'The executive and the anti-terrorist legislation of 1939' [1980] *Public Law* 16, 18.

[45] Philip A. Thomas, 'Emergency and anti-terrorist powers: 9/11 – USA and UK' (2002–3) 26 *Fordham International Law Journal* 1193, 1196.

Under these circumstances, what was previously unpassable can quickly ripen for enactment. The Indian experience is instructive in this respect. The national government in that country failed to gain support for its Prevention of Terrorism Bill 2000, five years after the Terrorist and Disruptive Activities (Prevention) Act 1987 had been allowed to expire. Just over a year later, after not only the events of 9/11 but also an attack on the Indian Parliament itself on 13 December 2001 which resulted in the death of fourteen innocents, the Bill was passed in essentially its initial form.[46] Even then, in order to ensure passage of the Bill the government controversially arranged for a joint sitting of both houses of Parliament to deliver a simple majority in its favour.[47] Following a change of government in 2004, the Prevention of Terrorism Act 2002 (POTA 2002) was prospectively repealed – however, several key provisions were simply re-enacted as amendments to the Unlawful Activities (Prevention) Act 1967 (UAPA).[48] India was rocked by a major terrorist strike on Mumbai on 11 July 2006, but the government did not reintroduce the POTA 2002 legislation; it instead sought to upgrade the investigative and intelligence capacities of its agencies. Although observers at the time saw in this an apparent recognition that 'special antiterrorism laws have not proven particularly effective in combating terrorism',[49] this ignored the strength of the provisions added to UAPA when POTA 2002 was repealed. After 'India's 9/11' – three days of bombings and shootings in key locations around Mumbai in November 2008 – further amendments (including 180 days pre-charge detention) were made to the UAPA 'that further harmonized it with previously retracted anti-terror legislation'.[50]

[46] Manas Mohapatra, 'Learning lessons from India: the recent history of antiterrorist legislation on the subcontinent' (2004) 95 *Journal of Criminal Law and Criminology* 315, 332–3. In the intervening weeks, a major attack had also been made by suicide bombers on the Kashmir state assembly: ibid., 323.

[47] Jayanth K Krishnan, 'India's "Patriot Act": POTA and the impact on civil liberties in the world's largest democracy' (2004) 22 *Law and Inequality* 265, 272.

[48] Ted Svennson, 'Fixing the elusive: India and the foreignness of terror' in Asaf Siniver (ed.), *International Terrorism Post-9/11: Comparative Dynamics and Responses* (Oxford: Routledge, 2010), pp. 168, 170. For a more positive assessment of the differences between the POTA and UAPA provisions, see Oliver Mendelsohn, 'Law, terror and the Indian legal order' in Christoph Antons and Volkmar Gessner (eds.), *Globalisation and Resistance: Law Reform in Asia since the Crisis* (Oxford: Hart, 2007), pp. 174–5. See also Ujjwal Kumar Singh, Chapter 17, this volume.

[49] Anil Kalhan, Gerald P. Conray, Mamta Kaushal, Sam Scott Miller and Jed S. Rakoff 'Colonial continuities: human rights, terrorism, and security laws in India' (2006–7) 20(1) *Columbia Journal of Asian Law* 96, 100.

[50] Svensson, 'Fixing the elusive', pp. 170–1.

The strongly reactive nature of anti-terrorism law-making[51] has also been evident in those jurisdictions that, while avoiding any successful terrorist strike over the relevant period, have nevertheless not been immune from 'a global convergence of policy prescriptions and widespread calls for greater harmonization of legislative responses'.[52] Indeed, in Australia, where over forty separate pieces of anti-terrorism law have been enacted since 9/11, a peculiarly heightened and vicarious reactivity has been the dominant driver in the construction of the new national security legislative framework, with the government regularly responding in domestic law to many of the attacks occurring overseas.[53] To cite a particularly prominent example, in the wake of the bombing of the London transport system in July 2005, the Howard government in Australia unveiled one of its more sweeping and ambitious bills, enacted not long after as the Anti-Terrorism Act (No 2) 2005 (Cth), providing for control orders, preventative detention orders, fresh sedition offences, the power to proscribe terrorist organisations on the basis of 'advocacy' and expanded police powers to issue notices to produce. The sheer range of the topics piled into the Bill was suggestive both of government opportunism and also extensive forethought.

Government responses to acts of political violence which occur elsewhere in the world are not necessarily confined to those countries bound by historical and cultural ties and joined in an explicit alliance against terrorist organisations such as al-Qaeda. The overarching globalisation of the terrorist threat in recent years has seen attacks on Western nations used by both the Russian and Chinese governments to relabel and re-energise existing campaigns, including through the introduction of harsh legislative measures, against separatist groups or ethnic minorities within their borders.[54] Russia's President Putin has used international

[51] Donohue, *The Cost of Counterterrorism*, p. 11; see also Ben Golder and George Williams, 'Balancing national security and human rights: assessing the legal response of common law nations to the threat of terrorism' (2006) 8 *Journal of Comparative Policy Analysis* 43, 45.

[52] Andrew Goldsmith, 'The governance of terror: precautionary logic and counterterrorist law reform after September 11' (2008) 30 *Law & Policy* 141, 144.

[53] Anthony Reilly, 'The processes and consequences of counter-terrorism law reform in Australia 2001–2005' (2007) 10 *Flinders Journal of Law Reform* 81, 84–90.

[54] Regarding the Russian Federation, see Svante E. Cornell, 'The war against terrorism and the conflict in Chechnya: a case for distinction' (2003) 27(2) *Fletcher Forum of World Affairs* 167. Of course, the Chechnyan conflict has inflicted significant domestic attacks on civilians upon the Russian population over the last fifteen years, which have also provided the basis for ever-stronger anti-terrorism measures quite independently of

terrorism generally so as to acquire remarkable powers for security agencies to 'eliminate' terrorist threats located outside the Federation[55] and also to further facilitate a broader legislative agenda of centralised executive power 'aimed at strengthening the unity of the country' (for example, by replacing the election of regional governors with a system of presidential appointment).[56]

Lastly on form, some mention should be made of the planned duration of the laws in question. As is discussed in the next section, governments have frequently introduced many of these laws to legislatures with an invocation of the labels of 'emergency' or 'exception', yet they have done so without any temporal limit on their operation.[57] However, legislators have generally displayed a keen awareness of the capacity of emergency measures to become permanent features of the legal landscape.[58] One of the easiest things for them to insist upon as a safeguard when being pressured to enact laws quickly is the inclusion of a sunset clause stipulating a date on which the law will expire and require re-enactment. In turn, agreeing to limit the duration of controversial laws or hold a later review has been something which governments have been far more willing to do than back down on the scope of new terrorism offences or the process by which novel powers are regulated.[59] With this in mind, Canada's Senator Fraser opined that 'sunset clauses have the serious potential to be

developments in the West: see Cerwyn Moore and David Barnard-Wills, 'Russia and counter-terrorism' in Asaf Siniver (ed.), *International Terrorism Post-9/11*, pp. 144–67. For that reason, an arguably more pronounced use of 9/11 to justify aggressive new laws and other acts of oppression was that which accompanied the Chinese government's crackdown on the Muslim Uighur population in the west of that country: see Amnesty International, *People's Republic of China: China's Anti-Terrorism Legislation and Repression in the Xinjiang Uighur Autonomous Region* (2002), available at www.amnesty.org/en/library/info/ASA17/010/2002/en.

[55] Seth T. Bridge, 'Russia's new counteracting terrorism law: the legal implications of pursuing terrorists beyond the borders of the Russian Federation' (2009) 3 *Columbia Journal of East European Law* 1.

[56] Thomas F. Remington, 'Putin, parliament, and presidential exploitation of the terrorist threat' (2009) 15 *Journal of Legislative Studies* 219, 231.

[57] Maureen Webb, 'Essential liberty or a little temporary safety? The review of the Canadian Anti-terrorism Act' (2005–6) 51 *Criminal Law Quarterly* 53, 54.

[58] This was a particularly dominant feature of United Kingdom and Indian anti-terrorism laws in the twentieth century: see Donohue, *The Cost of Counterterrorism*, pp. 14–15; and Kahlan *et al*., 'Colonial continuities, 125–55.

[59] Consider the nature of all three of the 'important concessions' which Ewing identifies as secured by the UK Parliament during enactment of the ATCSB 2001: Keith Ewing, 'The political constitution of emergency powers: a comment' (2008) 3 *International Journal of Law in Context* 313, 314–15.

pernicious in their effect' – as a concession legislators may secure in order to ease their misgivings over the contents of a bill.[60]

The extent to which sunset clauses elicit a fresh appraisal of the necessity or wisdom of the legislation upon expiration is open to question. Various key components, if not the entirety, of the terrorism laws in many of the jurisdictions discussed in this chapter were made subject to sunset clauses as a result of parliamentary deliberation – but the vast majority of them have been renewed over generally far less objection than the original enactment, despite the passage of time since the precipitating terrorist event. An exception has been the failure of the Canadian government to renew controversial provisions in the Anti-Terrorism Act 2001 allowing for special investigative hearings and recognisance with conditions, despite several attempts both just before and in each year since their expiry in 2007. The minority government's insistence that Parliament should, at the eleventh hour, simply renew the original provisions rather than deliberate possible enhancements, including those flagged by a Commons Committee Review,[61] led the opposition parties to block the move. While on one hand this did demonstrate that security measures will not simply be extended as a matter of course, Roach's detailed account of the episode makes it clear that the result owed far more to 'partisan maneuvering in a minority Parliament than with issues of principle'.[62] Not only was the renewal debate brought on so late as to be a race against the clock for expiration, but it was deeply 'partisan and largely uninformed'.[63] Ultimately, the non-renewal of these sunsetted components of the 2001 Canadian Act does not amount to much of an endorsement of the mechanism since it was not the result of 'a sustained debate about either the merits or the dangers of those provisions'.[64]

B. Process

Given the typical characteristics of much anti-terrorism law enacted in recent years, there should be little wonder that so many have expressed concern over the process by which it has regularly been enacted. The bills have all too often been presented by governments to legislatures

[60] Canada, *Parliamentary Debates*, Senate, 13 December 2001, 1620 (Joan Fraser).
[61] See House of Commons Standing Committee on Public Safety and National Security, *Review of the Anti-Terrorism Act Investigative Hearings and Recognizance with Conditions – Interim Report* (2006) 2.
[62] Kent Roach, 'The role and capacities of courts and legislatures in reviewing Canada's anti-terrorism law' (2008) 24 *Windsor Review of Legal and Social Issues* 20, 54.
[63] Ibid., 25. [64] Ibid., 28.

accompanied by assertions of urgency and with the expectation that accordingly they will be enacted in a very quick timeframe. There can be no better example of this than the call by US Attorney-General John Ashcroft on Congress, six days after the 9/11 attacks, to pass the Bush Administration's (as yet unseen and incomplete) Patriot Act proposal 'this week'.[65] Both Houses of Congress passed legislation barely three weeks after the White House unveiled its Bill and just six weeks after the attacks themselves.[66]

The sense of urgency that pervaded the legislative process of the Patriot Act in the United States was hardly surprising. But the same theme dominated legislative responses in many other nations. In the United Kingdom, to which several of the 9/11 hijackers had links, the ATCSB 2001 was introduced to the House of Commons on 12 November 2001 and given its second reading one week later on 19 November. The Committee consideration occurred between 21 and 26 November, with this stage concluding at 11:57 pm on the last of those days and being immediately followed by the third reading of the Bill before midnight. By Thomas's calculations, the Bill's passage through the House of Commons took sixteen hours and debate over whether the Act should be permitted to derogate from Article 5 of the ECHR took a total of ninety minutes.[67] The House of Lords took rather more time and insisted on making several amendments, but the Act received Royal Assent on 14 December. The statement by one member of the Commons that 'with every day that goes by, we are risking our safety' was perhaps symptomatic of the parliamentary mood.[68]

Interestingly, similar invocations of the need for urgent action to preserve community safety were heard in parliaments that could not have been further removed from the immediate events of 9/11. In introducing the Security Legislation Amendment (Terrorism) Bill 2002 and the other four Bills which comprised the so-called 'SLAT package' to the House of Representatives on 12 March 2002, the Australian Attorney-General, Daryl Williams, said:

> Since September 11 there has been a profound shift in the international security environment. This has meant that Australia's profile as a terrorist target has risen and our interests abroad face a higher level of threat … We must

[65] Beryl A. Howell, 'Seven weeks: the making of the USA PATRIOT Act' (2003–4) 72 *George Washington Law Review* 1145, 1152.

[66] The process involved competing versions of the Bill which were eventually reconciled into one legislative enactment passed by the House on 24 October and by the Senate the next day.

[67] Thomas, 'Emergency and anti-terrorist powers', 1216–18.

[68] *Hansard*, HC, vol. 375, col. 93, 19 November 2001 (Caroline Flint).

> direct all available resources … at protecting our community and ensuring that those responsible for threatening our security are brought to justice. And we must do so as swiftly as possible … We cannot afford to become complacent. And we should never forget the devastation of September 11.[69]

All five bills in the package were passed by the lower chamber just twenty-four hours later.

Quite aside from domestic political pressures on governments to 'do something' in response to the world-wide shock at the events of 9/11,[70] UN Security Council Resolution 1373 issued on 28 September 2001 required governments to report back within just ninety days on their progress in taking the various counter-terrorism measures stipulated. Roach says that 'this short reporting deadline was taken as a virtual deadline for the enactment of new anti-terrorism laws' in a number of countries,[71] and the effect of Security Council Resolution 1373 more generally has been viewed as promoting the rapid globalisation of security law at the direct expense of human rights law.[72] The novelty of the Security Council effectively 'legislating' to compel responses to 9/11 from all member nations has been identified as an unprecedented development in international law.[73] It unquestionably added a substantial layer of justification to the insistence by governments that action was required and quickly, particularly in nations where the threat level might have been seen as not necessitating a response of that order. Additional motivating factors in the decision to legislate were undoubtedly the extent to which certain jurisdictions were allied with the United States in the prosecution of the 'war on terror' more broadly,[74] and also the significance of trading relationships.[75]

[69] Commonwealth, *Parliamentary Debates*, House of Representatives, 12 March 2002, 1040–3 (Daryl Williams).

[70] 'Circumstances and public opinion demanded urgent and appropriate action after the 11 September attacks': *Hansard*, HC, vol. 375, col. 22, 19 November 2001 (David Blunkett).

[71] Kent Roach, 'Sources and trends in post-9/11 anti-terrorism laws' in Benjamin Goold and Liora Lazarus (eds.), *Security and Human Rights* (Oxford: Hart, 2007), pp. 227, 231.

[72] Kim Lane Scheppele, 'The migration of anti-constitutional ideas', in Choudhry, *The Migration of Constitutional Ideas*, 347, 350.

[73] Ibid.; Craig Forcese, 'Hegemonic federalism: the democratic implications of the UN Security Council's "legislative" phase' (2007) 38 *Victoria University of Wellington Law Review* 175–98. See also C. H. Powell, Chapter 2, this volume.

[74] John E. Owens and Riccardo Pelizzo, 'The impact of the "war on terror" on executive–legislative relations: a global perspective' (2008) 15 *Journal of Legislative Studies* 119, 135.

[75] This was very direct in respect of implications for the movement of people and goods across the shared border between Canada and the United States, exemplified by the statement during debate on Bill C-36 that: 'Our economy, our trade, our way of life, depends

The presence of urgency as a contextual factor in augmentations to the initial raft of laws is even more interesting given the lack of such a direct international impetus on those later occasions. Despite the lapse of time, governments continued to employ the events of 9/11 as the justification, not merely for more laws, but their urgent necessity. This sense pervaded US Congressional debates on the Homeland Security Bill which was deliberated over an approximately five-month period before being enacted in November 2002.[76] The Bill's main function was to establish a Department of Homeland Security, headed by a Secretary of Homeland Security appointed by the President. In so doing, it amounted to the 'largest re-structuring of the US federal government since the passage of the National Security Act 1947'.[77] In this sense the Bill's contents were arguably much more complex than those of the earlier Patriot Act. Although the enactment process took months rather than weeks, there were complaints from some legislators as to being rushed in their consideration of a vast bill containing many significant amendments only tangentially linked to the topic of 'homeland security'.[78] North of the border, the Canadian government's tactics in scheduling time for the parliamentary debate of its second major legislative response, the Public Safety Act 2002, was another illustration of the continued and selective invocation of urgency at some remove from the events of 9/11.[79]

on ready access to the US, and Canada must give assurance to the US that future terrorists will not be spawned inside Canada.': Canada, *Parliamentary Debates*, Senate, 13 December 2001, 1610 (Douglas Roche). See further, Kent Roach, *September 11: Consequences for Canada* (Montreal: McGill-Queen's University Press, 2003), pp. 134–6. Interestingly, trading implications have also been raised in parliamentary debate over New Zealand's anti-terrorism laws: New Zealand, *Parliamentary Debates*, House of Representatives, 8 October 2002 (Ken Shirley) and New Zealand, *Parliamentary Debates*, 29 March 2007, 8514–5 (Shane Jones).

[76] See, e.g., United States of America, *Congressional Record*, House of Representatives, 107th Congress, 25 July 2002, H5634 (Mr Richard Armey); United States of America, *Congressional Record*, Senate, 107th Congress, 4 September 2002, S8156 (Senator Lieberman). See generally Rena Steinzor, '"Democracies die behind closed doors": The Homeland Security Act and corporate accountability' (2002/3) 12 *Kansas Journal of Law and Public Policy* 642.

[77] Kym Thorne and Alexander Kouzmin, 'The USA PATRIOT Acts (et al): collective amnesia, paranoia and convergent, oligarchic legislation in the "politics of fear"' (2007/8) 10 *Flinders Journal of Law Reform* 554, 554.

[78] United States of America, *Congressional Record*, Senate, 107th Congress, 19 September 2002, S8881 (Senator Thompson); United States of America, *Congressional Record*, Senate, 107th Congress, 19 November 2002, S11358 (Senator Byrd).

[79] Canada, *Parliamentary Debates*, House of Commons, 7 October 2003, 1150 (John Herron); 1350 (Bev Desjarlais).

Two particularly pronounced, and indeed linked, examples of this phenomenon occurred in respect of the control orders legislation passed by both the United Kingdom and Australia in 2005.[80] After the December 2004 decision of the House of Lords in the *Belmarsh* case, the UK's Blair government set upon the creation of a control order regime for terrorism suspects to replace the indefinite detention of foreign suspects under Part 4 of the Anti-Terrorism, Crime and Security Act. The latter scheme had been declared incompatible with the ECHR by their Lordships and was due to lapse on 14 March 2005. Having committed to not renewing the scheme, the government used this date as a deadline for the enactment of its replacement, eventually the Prevention of Terrorism Act (POTA), which it introduced to Parliament in late February. Although commentators have praised the quality of parliamentary scrutiny – namely that offered by the Joint Committee on Human Rights in its report on the bill and the concessions won by the House of Lords[81] – the spectacle of the Bill being 'ping-ponged' between the latter and the House of Commons in a single parliamentary sitting day of record-breaking length (thirty hours) before being finally passed on 10 March was testament to the constraints imposed upon deliberation by a manipulated sense of urgency.

As already mentioned, following the London bombings in July 2005, the Australian Commonwealth government under Prime Minister John Howard released an extensive list of counter-terrorism proposals a fortnight in advance of its meeting with State and Territory leaders at the Council of Australian Governments in late September of that year. Agreement to those far-reaching measures was secured at that meeting after less than two hours' discussion, even though draft legislation was not made available to the participants until 7 October.[82] The draft

[80] A detailed comparative study of the passage of the enactments in question is available at Joo-Cheong Tham, 'Parliamentary deliberation and the national security executive: the case of control orders' [2010] *Public Law* 79. The substance of the control order schemes in both countries and their judicial consideration are discussed by Helen Fenwick and Gavin Phillipson, Chapter 19, this volume (UK) and George Williams, Chapter 21, this volume (Australia).

[81] Tham, 'Parliamentary deliberation and the national security executive' 92; Janet L. Hiebert, 'Parliamentary Review of Terrorism Measures' [2005] *Modern Law Review* 676.

[82] The necessity for the Commonwealth to seek co-operation from the other Australian governments and a detailed critique of this process is discussed in Greg Carne, 'Prevent, detain, control and order?: Legislative process and executive outcomes in enacting the Anti-Terrorism Act (No 2) 2005 (Cth)' (2007) 10 *Flinders Journal of Law Reform* 17, 26–32. See more generally on COAG's role in national security matters: Phil Larkin and John Uhr, 'Bipartisanship and bicameralism in Australia's "war on terror": forcing limits on the extension of executive power' (2009) 15 *Journal of Legislative Studies* 239, 242–4.

Bill was subsequently leaked via the Internet by the Chief Minister of the Australian Capital Territory which enabled rather more public examination and debate of the government's law than it had planned. Initially, the Commonwealth proposed bringing the Bill forward on Tuesday 1 November, the day of the Melbourne Cup horse-race, an event of national distraction, and allowing only that day for debate in the House of Representatives followed by a Senate Committee inquiry also of just one day's duration.[83] It is important to appreciate that from July of that year, the government had gained control of the Senate as well as the House of Representatives – a very rare turn of events in the Australian political system.[84] This strongly increased the capacity of the Howard government to evade serious parliamentary scrutiny of its Bill.[85]

However, as it transpired, Melbourne Cup week saw a fairly minor, but arguably very significant, amendment contained in the Bill broken off and rushed with breakneck speed through the national parliament (including a recalled Senate) as a standalone enactment in order to equip law enforcement agencies with the capacity to thwart a 'potential terrorist threat' on which the government publicly stated it had received a specific intelligence briefing.[86] By 3 November, and against the backdrop of these dramatic developments, the remaining bulk of the initial draft bill, reflecting the government's suite of controversial new measures was introduced to the Parliament as Anti-Terrorism Bill (No 2). It was immediately referred to a Senate Committee inquiry which was to report on 28 November. Although Tham, contrasting this result favourably against the government's original plan, says that the inquiry took place 'over 25 days',[87] Carne highlights the strictness of even this extended timeframe by pointing out that only six days separated the call for submissions on this complex bill and the closing date for their receipt, as well as the need for the Committee to expend massive effort in order to finalise its report in time.[88] This month-long legislative process was punctuated by major arrests by Commonwealth and State police on 8 November of groups of

[83] Tham, 'Parliamentary deliberation and the national security executive', 91.

[84] John Halligan, Robin Miller and John Power, *Parliament in the Twenty-First Century: Institutional Reform and Emerging Roles* (Melbourne University Press, 2007), p. 255.

[85] Larkin and Uhr, 'Bipartisanship and bicameralism in Australia's "war on terror"', 250–1.

[86] This episode is analysed in Andrew Lynch, 'Legislating with urgency: the enactment of the Anti-Terrorism Act [No 1] 2005' (2006) 30 *Melbourne University Law Review* 747.

[87] Tham, 'Parliamentary deliberation and the national security executive', 92.

[88] Greg Carne, 'Hasten slowly: urgency, discretion and review – a counter-terrorism legislative agenda and legacy' (2008) 13 *Deakin Law Review* 49, 66–7.

men in Sydney and Melbourne charged respectively with doing acts in preparation of a terrorist act and membership of a terrorist organisation.[89] The government maintained throughout that it was necessary for the entire Bill to be passed before the Christmas holidays – echoing its insistence three years earlier that the opposition should support controversial new questioning and detention powers for the Australian Security Intelligence Organisation (ASIO) because of the necessity to 'clothe our intelligence agencies with this additional authority over the summer months'.[90]

On that earlier occasion, the government did not have control of both legislative chambers and the passage of its Australian Security Intelligence Organisation Legislation Amendment (Terrorism) Bill 2002 (ASIO Bill) was greatly protracted. That episode, involving no fewer than three committee inquiries into the Bill, is often viewed as an example of thorough scrutiny and deliberation over many months resulting in some important changes to the law – namely clearer procedures by which ASIO's new powers were to be used and the scrapping of the initial plan to make them applicable to children over the age of ten. But ultimately, it demonstrated the ability of government to simply wear down its parliamentary opposition.[91] The Bill's most controversial feature – its conferral upon an intelligence agency of the power to detain non-suspects for up to seven days for questioning – remained in the final enactment. While the dynamics of the Australian political landscape at the time meant that the legislation was certainly not rushed, assertions of urgent necessity clearly still have an impact beyond mere speed. They have a damaging effect on the quality of the debate itself and the capacity of political parties in opposition, reluctant to be tagged as 'soft on terror', to offer sustained resistance.[92] In this regard, it is instructive that the performance of the unelected House of Lords in the United Kingdom has been favourably contrasted with that of the popularly elected opposition in the Commons[93] – though, as we saw

[89] See McGarrity, '"Testing" our counter-terrorism laws'.

[90] Prime Minister John Howard on 13 December 2002, quoted in Jenny Hocking, *Terror Laws: ASIO, Counter-Terrorism and the Threat to Democracy* (Sydney: University of New South Wales Press, 2004), p. 198.

[91] For a thorough analysis see Dominique Dalla-Pozza, 'The Australian approach to enacting counter-terrorism laws', PhD Thesis, University of New South Wales (2010), pp. 271–362.

[92] Larkin and Uhr, 'Bipartisanship and bicameralism in Australia's "war on terror"', 252; Hocking, *Terror Laws*, pp. 218–20.

[93] Shepherd, 'Parliamentary scrutiny and oversight of the British "war on terror"', 194–5.

in respect of the POTA, even their Lordships are not immune from the pressure of urgency.

Consideration of these experiences inevitably prompts reflection on the role played by parliamentary committees in the enactment of anti-terrorism laws. Have committees generally served to enhance that process? To this the answer must certainly be positive. Apart from anything else, the referral of a bill to a committee for scrutiny, even when the inquiry is set to a brief timetable, interposes an additional step before enactment that creates space for political and community debate that might not otherwise be afforded. A parliamentary committee inquiry also obviously creates a focused setting in which civil society, as well as non-government parties and even occasionally government back-benchers who are perturbed by the contents of a bill, can voice their objections and propose alterations.[94] The receiving of submissions and oral evidence in public hearings undoubtedly assists legislators in their ability to scrutinise and challenge aspects of a bill. Debate on the floor of a parliamentary chamber is a markedly inefficient way to deliberate the merits and deficiencies of modern legislation and develop specific amendments to complex omnibus bills, and the constructive capacity of committees in the creation of law is well noted.[95]

Of course, the ability of committees to fill this role is far from assured. There appears to be a recognition on behalf of government that anti-terrorism laws are of such importance that providing opportunity for public input via a committee inquiry cannot be bypassed: the Australian experience of the Anti-Terrorism Act (No 2) 2005 illustrates that even when a government controls both legislative chambers it will be reluctant to be so heavy-handed as to flout any committee scrutiny.[96] But that said, all too frequently governments have done their best to inhibit the opportunity of committees to give detailed consideration to these bills.

[94] Roach, *September 11: Consequences for Canada*, pp. 67–8. For an empirical study of this in respect of parliamentary committee inquiries examining Australian anti-terrorism bills, see Dominique Dalla-Pozza, 'Promoting deliberative debate? The submissions and oral evidence provided to Australian parliamentary committees in the creation of counter-terrorism laws' (2008) *Australasian Parliamentary Review* 39.

[95] Lawrence D. Longley and Roger H. Davidson, 'Parliamentary committees: changing perspectives on changing institutions' in Lawrence D. Longley and Roger H. Davidson (eds.), *The New Roles of Parliamentary Committees* (London: Frank Cass & Co., 1998) pp. 1, 5.

[96] 'As for legislative appraisal, the referral of bills has become standard in the Senate, and it is unimaginable that this would be substantially curtailed': Halligan, Miller and Power, *Parliament in the Twenty-First Century*, p. 258.

If they cannot do so by mere force of numbers, then the familiar assertions of urgent necessity and accusations that the delay caused by political opponents endangers the community will still prove powerful. The Blair government's enactment of the POTA is an excellent example of the latter technique.

The railroading of pre-enactment scrutiny by committees often results in expressions of frustration from those bodies or their individual members. These should not be lost sight of when reporting positively on the role played by committees in parliamentary deliberation. For example, the United Kingdom's parliamentary Joint Committee on Human Rights was explicit in its criticism of the legislative timetable for the POTA and also in underscoring the effect of this upon its own contribution:

> We regret that the rapid progress of the Bill through Parliament has made it impossible for us to scrutinise the bill comprehensively for human rights compatibility in time to inform debate in Parliament.[97]

Nor was the Committee impressed when, in the following year, the Home Secretary exercised his power to renew the control order legislation in such a way as to curtail any meaningful deliberation of the merits of the scheme on that occasion also:

> In view of the very considerable human rights implications of the control orders regime and the very limited opportunity for proper scrutiny during passage of the 2005 Act, we regret this …. We also regret the limited time which has been made available for us and any other interested committees to report to Parliament. Laying the renewal order … on 2 February and scheduling the renewal debate in both Houses for 15 February severely restricts the possibility for committees such as ours to discharge our responsibility to scrutinise and report in a fully considered way to both Houses.[98]

Any ultimate evaluation of a committee's contribution must depend substantially upon what changes, if any, it was able to promote to the final form of the legislation enacted by the parliament. Given the various conditions under which anti-terrorism bills are typically brought forward by the government of the day, not least simply their size, it is appropriate to be realistic about just how many alterations a committee is going to be able

[97] Joint Committee on Human Rights, Parliament of United Kingdom, *Prevention of Terrorism Bill: Tenth Report of Session 2004–5* (2005), p. 3.

[98] Joint Committee on Human Rights, Parliament of United Kingdom, *Counter-Terrorism Policy and Human Rights: Draft Prevention of Terrorism Act 2005 (Continuance in Force of Sections 1 to 9) Order 2006* (2006), p. 9.

to recommend and how likely it is that a percentage of these will translate into amendments agreed to by the government. It seems reasonable to expect that limited, rather than substantial, amendments will be made – if only because the government, having made such a big deal about the need for the law to be passed quickly, will be reluctant to tarry. As Carne pointed out in the case of Australia's Anti-Terrorism Act (No 2) 2005, 'the deliberate assertion of executive authority to enact the law according to a pre-determined timetable' signalled an unwillingness to consider making major amendments including even those which might actually strengthen the law.[99] For this reason, the insertion of sunset clauses or provisions for formal review of the law's operation tend, as observed earlier, to be prominent among those demands to which the government is more prepared to accede than others.

Assessing the impact of committee recommendations is nevertheless far from straightforward. To consider the extent to which the Australian Senate Legal and Constitutional Legislation Committee's inquiry resulted in changes to the Anti-Terrorism Act (No 2) 2005 as an example, it is true that the government amended the Bill to reflect the Committee's recommendations that confirmation of interim control orders should be by an *inter partes* hearing and that hearsay evidence should be inadmissible on that occasion.[100] But the most significant change to the government's Bill, indeed a precondition for those successfully moved by the Committee, occurred between the draft version which was publicly leaked and that which was eventually put before Parliament. Specifically, the government surrendered the power to issue the orders to the federal judiciary. It is impossible to know whether the government would have gone ahead with executive-issued control orders in the Bill it took to Parliament had it not had to weather three weeks of unanticipated political and public opposition on this matter. That portion of the debate over the proposed law, while highly effective in some respects, was hardly to be expected and was essentially a bonus brought about by the most unlikely of political manoeuvres. If the Bill presented to Parliament had been essentially the same as the draft which had been circulated to State and Territory leaders, we can only speculate whether the Committee itself would have been successful in recommending a move to court-issued control orders.

[99] Carne, 'Hasten slowly: urgency, discretion and review', 69. See further John Uhr, 'Terra infirma? Parliament's uncertain role in the "war on terror"' (2004) 27 *University of New South Wales Law Journal* 339, 341.

[100] Tham, 'Parliamentary deliberation and the national security executive', 94–5.

In contrast to any impact one might credit the Senate Committee with having on the control order scheme of Anti-Terrorism Act (No 2) 2005 was the failure of any of its recommendations concerning the sedition offences in Schedule 7 of the Bill to be picked up by the government. This aspect of the Bill excited more widespread distrust in the community than any other and was targeted by influential backbenchers in the government as something which should be dispensed with, at least for the present. The bipartisan Committee was unanimous on this point and recommended that Schedule 7 be scrapped and the matter of reform of seditious offences referred to the Australian Law Reform Commission (ALRC). Failing that, the Committee made specific recommendations to improve the Schedule if the government persisted with it.[101] The government did not accept either course and instead took the quite extraordinary step of retaining the Schedule in the Bill and, once enacted, immediately referring the relevant provisions to the independent ALRC for review. As Carne identifies in his recounting of these events, the Attorney-General's position was explicitly justified by the urgent necessity of having the new laws in place – regardless of what the ALRC's review might later find in respect of them.[102] The ALRC delivered a substantial and constructive report, largely echoing the views of the Senate Committee, to the government in July 2006.[103] The government made no move to implement its recommendations and amend the relevant legislation. The Labor government which won office in 2007 did substantially incorporate aspects of the ALRC report into amendments contained in the National Security Legislation Amendment Bill 2010, but the Parliament was dissolved for a general election before that Bill was passed (ironically demonstrating the dangers of legislating with an insufficient sense of urgency).[104]

In conclusion, the value of pre-enactment scrutiny of anti-terrorism laws by parliamentary committee must always be better than not having such a step in the legislative process. It clearly provides opportunities for independent experts and civil society lobby groups to engage with legislators and promotes greater and more constructive deliberation about the measures in question amongst parliamentarians. But the role of

[101] Carne, 'Hasten slowly: urgency, discretion and review', 70. [102] Ibid., 71.

[103] Australian Law Reform Commission, *Fighting Words – A Review of Sedition Laws in Australia* (ALRC Report 104, 2006).

[104] The Bill was subsequently reintroduced to the Commonwealth Parliament by the Labor government, which now holds office as a minority government since the election produced a hung parliament. It was enacted in December 2010.

committees should not be overstated. In the context of 'emergency' omnibus bills in the politically sensitive area of national security, about which government has the distinct advantage of access to secret intelligence,[105] committees cannot be expected to mitigate, let alone overcome, the pressures upon the quality of parliamentary deliberation more generally.[106]

3. Consequences

The consequences of the sort of legislative processes that have just been examined are far better appreciated through the detailed analysis of the anti-terrorism laws of specific jurisdictions provided by the many other chapters of this volume. It is, however, possible to make some general observations in this regard.

It should not be surprising that laws made against a constant background noise of assertions that they are urgently necessary in order to prevent heightened risk of a terrorist attack being made upon the community tend to be imprudently drafted. United Kingdom legislators, with their long experience of anti-terrorism measures devised in response to political violence over the Northern Ireland situation, expressed a particular awareness of the fact that 'a Bill rushed through with such speed will before long be found to be deficient in some way'.[107] If this seems like something of an ambit claim, consider the widespread dissatisfaction with many of the domestic definitions of 'terrorism' itself. Many studies of domestic anti-terrorism legislation grapple with the breadth and vagueness of the way in which this central concept has been defined. While finding a perfect definition of this activity, upon which a nation's entire anti-terrorism legal edifice is built and against which it is designed to guard, is destined to be highly challenging, it is striking how many subtle variations exist between definitions in like jurisdictions, even those which drew upon that provided by the UK's Terrorism Act 2000.[108] Often worse than the definition are the offences that flow from it, which are

[105] See Goldsmith, 'The governance of terror', 153.

[106] Tham identifies the 'tyranny of the national security executive' and its aggressive pursuit of secrecy, its own pre-eminence and the principle of pre-emption as crucial impediments to better parliamentary debate: see Tham, 'Parliamentary deliberation and the national security executive', 102–8.

[107] *Hansard*, HC, vol. 375, col. 73, 19 November 2001 (Andrew Hunter). See also col. 24 (Mark Fisher); col. 56 (Simon Hughes); *Hansard*, HL, vol. 629, col. 212, 27 November 2001 (Lord Beaumont).

[108] See generally Ben Golder and George Williams, 'What is "terrorism"? Problems of legal definition' (2004) 27 *University of New South Wales Law Journal* 270.

frequently cast in terms of such ambiguous width as to create a worryingly broad scope for the operation of executive discretion in respect of their application. This inevitably leads to operational failures where the lack of guidance provided by the law means it fails to restrain authorities from pursuing misguided investigations at the expense of individuals' privacy and even occasionally their freedom.[109]

These same features are also prevalent amongst the more novel and insidious legal tools designed to restrict the liberty of individuals with the aim of protecting the public: control orders, proscription of organisations and limitations on speech, such as the UK's offence of indirectly encouraging terrorism through statements that glorify such acts 'whether in the past, in the future or generally'.[110] As O'Cinneide explains, 'the criminal law as developed over time attempts to provide clarity, certainty and proportionate responses: counter-terrorism laws frequently cut through this careful organic growth, and establish parallel systems of control and repression that can contradict the values of the "mainstream" legal code'.[111] However, the overarching preventative justification of counter-terrorism laws does more than shape such measures themselves in 'contradiction' of the orthodox principles of criminal justice. Instead, as we know from history and as more recent experience has begun to show, so-called 'exceptional' legal powers and prohibitions have a strong tendency to seep into what O'Cinneide calls 'the "mainstream" legal code'.[112] In short, the reactive enactment of anti-terrorism laws as a matter of urgency regularly produces bad laws – both the security measures as immediately passed and then by extension as those laws influence others outside the anti-terrorism paradigm over time. As discussed earlier, attempts to contain these 'exceptional' measures through the use of sunset clauses or the provision of post-enactment review mechanisms are rarely successful.

Not unrelated to the problem of legislative quality and consistency is the deleterious phenomenon of legislative inflation. In a specific sense, this is rather more observable in some jurisdictions over others – particularly the United Kingdom and Australia, as the anti-terrorism legislation burgeons

[109] The arrest, detention and deportation of Dr Mohamed Haneef by the Australian Federal Police is an excellent case in point: see The Hon. John Clarke QC, *Report of the Clarke Inquiry into the Case of Dr Mohamed Haneef* (November, 2008).

[110] Terrorism Act 2006 (UK), s. 1.

[111] O'Cinneide, 'Strapped to the mast', p. 349.

[112] See generally, Nicola McGarrity, Andrew Lynch and George Williams, *Counter-Terrorism and Beyond: The Culture of Law and Justice After 9/11* (Oxford: Routledge, 2010).

unabated due to ever-renewed executive demands. The Australian legislative cycle in the area of national security may, without any exaggeration, be described as having been in constant motion for roughly the first five years after 9/11. The UK Parliament enacted fewer laws numerically but they were each fairly substantial and had an ever-increasing impact on the powers of the state at the expense of individuals' liberty. In both cases, the legislative process was not seen as finite or limited to the creation of any one particular law. Instead, each bill was just the latest round in an ongoing tussle between the executive and a brow-beaten legislature. Dalla-Pozza points out that just months after the exhausting and protracted parliamentary process by which the Australian government's 2002 ASIO Bill was enacted, government began agitating for changes to be made to the national intelligence agency's newly conferred questioning and detention powers, with the Attorney-General describing the legislation passed just five months earlier as 'possibly … third or fourth best'.[113] A similar mindset appeared to grip the Blair/Brown government in the UK as it repeatedly sought parliamentary approval of ever increased extensions to the length of pre-charge detention of terrorism suspects.[114] The unwillingness of executives to accept the outcome of the legislative process as a final determination, even for just the short to intermediate term, has meant that anti-terrorism laws have accreted with inexorable predictability.

But even in jurisdictions which have managed to avoid this wearying cycle, such as Canada, New Zealand and the United States, it is wrong to think that there is no legislative inflation whatsoever as a by-product of recent anti-terrorism law-making. For one thing, the magnitude of the bills means that just a few enactments add significantly to the statutory powers of government agencies and the regulation of the community. It is not as if many of these laws are filling a vacuum, despite what the political rhetoric might say. They are placed alongside existing powers, criminal offences and other forms of regulation which might be just as applicable in any given situation of planned or executed political violence. This is not to revisit the claims heard from some quarters when the first wave of anti-terrorism laws was created after 9/11 that they were wholly unnecessary because the existing criminal law provided everything needed to address

[113] Dalla-Pozza, 'The Australian approach to enacting counter-terrorism laws', p. 364.

[114] Shepherd, 'Parliamentary scrutiny and oversight of the British "war on terror"', 211. Although the House of Commons endorsed an extension to forty-two days, due to the resistance of the House of Lords pre-charge detention remains capped at twenty-eight days.

the threat. But it is to acknowledge that there is indeed a substantial corpus of law already in place to which these new laws are a sizeable addition, creating quite a stockpile of emergency laws.[115]

The fact that substantial portions of these acts are then not actually used in combating terrorism not only belies the fact that they were 'urgently necessary' but is also worrying since they simply lie around for possible application in other situations. The experience in New Zealand, a country which has been comparatively restrained in the quantity of anti-terrorism bills enacted since 9/11, provides a perfect example of this aspect of the dangers of legislative inflation. The New Zealand Parliament passed the Terrorism Suppression Act in 2002 but no part of it had been used when the Foreign Affairs, Defence and Trade Committee reviewed it three years later.[116] The only occasion in which its provisions have been brought to bear was by police in making a number of arrests in 2007 of indigenous and environmental activists. While those charges did not proceed to trial, the inappropriate use of the law as a factor in police actions is itself deeply embarrassing and highlights the potential latent in measures that depend so heavily upon executive discretion. Even when laws are not used at all they may exert an influence. The existence of laws regulating speech, such as sedition offences or censorship of materials 'advocating' or 'praising' terrorism, may well have a dampening effect on public discourse,[117] while the presence in the statute books of exceptional measures such as Australia's preventative detention orders may act as a template for similar devices in other contexts where they may be used.[118]

4. Conclusion – an end to reactive anti-terrorism laws?

Despite the manifest deficiencies of legislating with urgency as a response to terrorist activity, it is hard to imagine that this will not continue to occur in future. Although the reaction of the Spanish government to both 9/11 and then the Madrid train bombings of 2004, which killed 191 of its own citizens and injured over 2,000 more, involved no legislative dimension, this is clearly quite exceptional. Spain already had a number of strict laws directed towards terrorism, of which it has had considerable

[115] Webb, 'Essential liberty or a little temporary safety?', 98.

[116] Foreign Affairs, Defence and Trade Committee, Parliament of New Zealand, *Review of the Terrorism Suppression Act 2002* (2005), pp. 4–5.

[117] David Hume and George Williams, 'Australian censorship policy and the advocacy of terrorism' (2009) 31 *Sydney Law Review* 381.

[118] Criminal Code Act 1995 (Cth), div. 105.

experience at the hands of the Basque separatist organisation ETA, and it was content not to supplement or replace these laws with new ones. Instead, the country's defining response to the 2004 bombings was the withdrawal by its newly elected government of all troops from the conflict in Iraq. At the time, one commentator criticised Spain's failure to 'provide the law enforcement community with special powers' as not 'consistent with a developing global response to Islamic terrorism'.[119] Even setting aside the three countries against which this unfavourable comparison was made – the United States, Russia and Israel, all of which have employed a 'proactive and aggressive'[120] legislative response to international terrorism – the criticism itself seems an odd one. It appears to assume that anti-terrorism laws need to be specifically tailored to different sources of political violence, though it is hard to imagine what this would look like in practice and how even greater attempts at the specification of terrorist motivation in determining the application of anti-terrorism laws would assist in protecting the community. It also assumes that legislative responses are more significant in preventing terrorism than, say, a repositioning of national foreign policy – despite the high likelihood that the converse is true.[121]

It may be that as we move beyond the first decade after the events of 9/11, the propensity for knee-jerk legislative responses in many countries will diminish. But history gives little cause for optimism on this score. Governments seem all too vulnerable to the pressure to react to terrorist violence with legislation and they will ensure that the legislature is given as little opportunity as possible to impede the swiftness of that response. The fact that legislators are at a distinct disadvantage in this scenario from the outset due to their very limited access to current security intelligence assessments means that deliberation over a government's measures hardly occurs on an even playing field. Parliamentary committees provide a forum in which an array of views and perspectives may be gleaned so as to inform and deepen debate of the bills, but even when these bodies

[119] Amos N. Guiora, 'Legislative and policy responses to terrorism: a global perspective' (2005) 7 *San Diego International Law Journal* 154, 165.

[120] Ibid.

[121] In addition to the Spanish experience, the recent testimony to the UK's Iraq Inquiry of Dame Eliza Manningham-Buller, the former director of M15, supports the view that while the Blair government was busy drafting legislation designed to prevent terrorism, its decision to go to war in Iraq served to dramatically increase the likelihood of domestic terrorist attack: Richard Norton-Taylor, 'Iraq Inquiry: Eliza Manningham-Buller's devastating testimony', available at www.guardian.co.uk/uk/2010/jul/20/iraq-inquiry-eliza-manningham-buller.

work effectively so as to offer constructive and clear criticism, their influence is inevitably circumscribed by a range of political and institutional factors beyond their control. Walker has suggested that the existence of ongoing independent review, such as that provided by the office of the Independent Reviewer in the United Kingdom, is another way in which to 'ensure rational policy-making and not panic legislation' since it provides a more immediate form of scrutiny as to the effectiveness and impact of anti-terrorism laws than the judicial arm can offer.[122] Certainly post-enactment review is intrinsically valuable, but it may prove difficult to structure and empower the office of review in such a way that it has a cautionary effect upon governments at times of actual or perceived crisis.

Reference to the post-enactment review of anti-terrorism laws passed in haste or otherwise aggressively pushed through legislatures prompts one final observation. There is a very discernible contrast between the way in which these laws have been created and the distinct lack of enthusiasm that governments (even subsequent to a different political party winning office) have shown for their sober appraisal afterward, let alone the amendment or excision of those aspects which are demonstrably problematic in terms of providing effective security and/or respecting human rights. The focus is almost entirely upon the making of new laws or the extension of existing ones – rarely on refinement or repair. Perhaps the latter course is seen as riskily amounting to an admission of executive fallibility? In the area of national security, the politics of avoiding that perception exerts a most powerful influence on a government's legislative agenda.

[122] Clive Walker, 'Clamping down on terrorism in the United Kingdom' (2006) 4 *Journal of International Criminal Justice* 1137, 1144.