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Introduction

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I. Global anti-terrorism law and policy

The terrorist attacks of 11 September 2001 and subsequent attacks in many other parts of the world have resulted in an increased emphasis at the international, regional and national levels on anti-terrorism efforts. All indications are that the prevention of terrorism will be one of the major tasks of domestic governments and regional and international organizations for some time. Anti-terrorism law and policy has become a matter of global concern.

It is important that academics bring their critical and comparative insights to the global development of anti-terrorism law and policy. This will be a challenging task because anti-terrorism law crosses boundaries between states and between domestic, regional and international law. It also crosses traditional disciplinary boundaries between administrative, constitutional, criminal, immigration, military law and the law of war. In addition, insights from a broad range of disciplines including history, international affairs, military studies, philosophy, religion and politics will assist in understanding the development of anti-terrorism law and policy.

This book is designed to contribute to the growing field of comparative and international studies of anti-terrorism law and policy. The chapters in this book are revised versions of papers presented at a major international research symposium in Singapore in June 2004 that brought together leading legal academics from around the world to examine and compare anti-terrorism laws and policies in many of the major jurisdictions.

A particular feature of this book is the combination of chapters that focus on a particular country or region and overarching thematic chapters that take an overtly comparative approach by examining particular aspects of anti-terrorism law and policy.

Part One adopts various theoretical perspectives on anti-terrorism law and policy. The chapters in this Part examine distinctions between illegitimate terrorism and legitimate anti-terrorism, the definition of terrorism, and the role of risk perception and of legality in anti-terrorism efforts.

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Part Two engages in a comparative study of anti-terrorism measures including the criminal law, laws against the financing of terrorism, immigration and asylum laws, laws involving technology and the regulation of aviation and maritime security.

Part Three discusses anti-terrorism law and policy in the strategically important and theoretical complex region of Asia. Various papers examine the evolution of anti-terrorism law and policy in Malaysia and Singapore, Indonesia, the Philippines, Japan, India and Hong Kong.

Part Four looks at the often neglected role of regional organizations in inspiring and coordinating anti-terrorism efforts. The organizations examined are ASEAN and the European Union.

Part Five examines anti-terrorism law and policy in the West with chapters on the United Kingdom, the United States and Canada. A final chapter examines both Australia and New Zealand. These last two jurisdictions could have been included in the Asian group, but seem to fit more naturally with the other western nations.

Finally, Part Six attempts to complete the world tour with chapters on the important regions of Africa, the Middle East and Latin America. No doubt other countries should have been included but there are limits to what is already a large volume. We have attempted to be as comprehensive and inclusive as we could given limits on time and space, but we are well aware that we are only starting to scratch the surface. Many other thematic topics, jurisdictions and disciplinary perspectives could usefully have been added to this collection. We see this as a preliminary point of departure for a generation of scholarship and debate about anti-terrorism law and policy.

II. Defining terrorism

Terrorism is an emotionally charged, morally laden and political contentious concept, which has nevertheless emerged as a critical and unavoidable feature of the legal landscape both internationally and domestically. As with any attempt to articulate the meaning of a contentious term, the mention of 'terrorism' evokes a range of images. Yet the emergence of terrorism as a crucial legal and political concept has forced the issue, challenging us to articulate a definition that in most cases has profound implications for the way in which individuals, businesses, communities, states, and regional and international organizations conduct their affairs.

The first step in defining terrorism consists in distinguishing terrorism from what it is not. Whatever terrorism is in its contemporary legal use, it is conceptually distinct from: (a) legitimate state responses or *counter*-terrorism, (b) national liberation struggles, and (c) ordinary criminal offences. And yet, on each of these counts, the attempt to define terrorism is fraught with difficulties. One important problem is that terrorism and counter-terrorism are

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indistinguishable in as much as they involve violence and fear, seek a broader audience, are purposive and instrumental, and affect non-combatants (see Chapter 2). Thus, to distinguish *legitimate* state responses from terrorist attacks is more difficult than it might first appear, and might well involve a closer look at what states do and choose not do – at the range of responses available to states and the ways in which they *refrain* from acting in the face of an act of political violence.

The uncertain distinction between terrorism and counter-terrorism has serious implications for the definition of terrorism under international law. While there is some agreement in international law in defining terrorism for specific purposes (such as stopping the flow of funds to terrorism groups – see Chapter 9), the attempt to formulate a comprehensive definition of terrorism is stymied by long-standing concerns over the legitimate use of political violence by national liberation movements.[1] Given the political difficulties involved in finding a comprehensive international definition (see Chapter 3), terrorism is defined at the domestic level with varying degrees of success.

But at the domestic level, the definition of terrorism is plagued by another concern. Once the ordinary criminal law is seen as inadequate for dealing with the perceived threat of terrorism, the tendency of legislators has been to create new super-criminal offences under the banner of terrorism. But this means that the new terrorist offences have to be distinguished from ordinary crimes and the way in which this is done often invites controversy. For example, the United Kingdom's influential Terrorism Act 2000 defines terrorism as requiring proof of religious or political motives. The political or religious motive approach has been followed with some variations in other jurisdictions including Australia (Chapter 24), Canada (Chapter 23), Hong Kong (Chapter 18) and New Zealand (Chapter 24), but has been resisted in others including the United States (Chapter 22), Indonesia (Chapter 14), and many countries in the Middle East (Chapter 26), which define terrorism primarily by reference to the nature of the harm caused.

III. The interplay between international, regional and domestic law and structures

One of the challenges of the study of global anti-terrorism law and policy is the important interplay between international, regional and domestic sources of law. There have been a number of important conventions on specific forms of terrorism at the international and regional levels, but, as discussed above, a

[1] This has important implications in the Philippines, for instance, where the government is involved in armed conflict with two groups which claim to be exercising the right to self-determination: see Chapter 15.

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universal definition of terrorism has so far proved impossible to achieve. On 28 September 2001 the United Nations Security Council issued Resolution 1373 calling on all member states to criminalize terrorists acts and financing, planning, preparation and support for terrorism. This resolution, however, did not define what was terrorism, leaving that crucial, difficult and some might argue impossible task to each national state.

Security Council Resolution 1373 was unprecedented in part because it set forth in detail an anti-terrorism agenda for all member states and because it was issued under the mandatory provisions of Chapter VII of the United Nations Charter and as such bound all member states. It also created a new Counter-Terrorism Committee of the United Nations and called on all states to report to this new Committee no later than ninety days after the resolution was issued. In many countries this facilitated a rush to legislate new anti-terrorism laws, including the United Kingdom which already had tough anti-terrorism laws on the books (see Chapter 21). The country reports to the new Counter-Terrorism Committee provide a unique source of information about how nations are responding to terrorism.[2] At the same time, however, the resolution can be criticized for its relative inattention to international human rights norms and standards.[3] Indeed, it is not clear how this process relates to other rights-based activities at the United Nations. At both the international and domestic level, it can be argued that the imperative of security has, temporally at least, assumed a greater importance than respect for human rights.

The dominant role of the most powerful countries and of the executive in formulating Security Council Resolution 1373 has interesting parallels to the dominant role that the executive has played with respect to security issues at the domestic level (see Chapter 25). One of the starkest examples of executive domination has been the executive compilation of lists of terrorists and terrorist organizations, both domestically and internationally. In some cases, these lists can be subject to judicial review at the domestic level, but in all cases they provide an alternative to the traditional principles of the presumption of innocence and the adjudication of guilt for a specific offence in court.

Although the United Nations has played a very important role in encouraging and shaping anti-terrorism laws throughout the world, the

[2] See the Counter-Terrorism Committee's website at www.un.org/Docs/sc/committees/1373/reports.html.

[3] The only reference in the original resolution to human rights standards is found in paragraph 3(f) that calls on states to 'take appropriate measures in conformity with the relevant provisions of national and international law, including international standards of human rights, before granting refugee status, for the purpose of ensuring that the asylum-seeker has not planned, facilitated or participated in the commission of terrorist acts'.

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role of regional organizations and regional instruments should not be ignored. This collection includes a chapter on the important role that the European Union has played in coordinating and structuring anti-terrorism efforts in members states (see Chapter 20) and the less robust role played by ASEAN (see Chapter 19). The role of regional instruments such as the Arab Convention on the Suppression of Terrorism should also not be ignored (see Chapter 26). Regional bodies and instruments can be an important mediating force between the international and the domestic. In the future, students of comparative anti-terrorism law and policy will have to be attentive to the complex interplay between international, regional and domestic laws and structures.

IV. Fairness, emergencies and the rule of law

State concerns about international terrorism have given rise to important questions of practice and principle concerning the emergence in many countries of a new broad anti-terrorism regime or the revitalization in other countries of older anti-terrorism measures. In Singapore and Malaysia few amendments to the anti-terrorism regime were needed in light of pre-existing internal security legislation dating back to the days of the communist insurgency of the 1950s and 1960s during the British colonial period (see Chapter 13). Steps have been taken under these existing laws to detain without trial suspected terrorists and, some might say, several non-terrorist suspects as well. In neighbouring Indonesia, the newly emerging democracy in the world's most populous Muslim nation, concern about the abrogation of human rights and a return to a not-yet-distant era of authoritarian rule, has so far resisted the imposition of harsh new security laws. The courts have been strict about state incursions into human rights, such as the retroactive application of anti-terrorism laws, including the death penalty (see Chapter 14).

In other countries mostly in the developed West, especially the United Kingdom (see Chapter 21) and the United States (see Chapter 22), governments have been quick to construct a complex anti-terrorism regime, amending the existing regimes of, for example, criminal law and procedure, immigration law, administrative law, aviation and maritime law, and financial law, in response to the perceived new threat of international terrorism. A particularly striking feature of anti-terrorism efforts in many of these regimes is how, despite the many amendments to the formal criminal law, governments have instead relied on alternatives to the criminal law, and in particular immigration law, which often has lower standards of proof than the criminal law. This raises important questions concerning fairness towards non-citizens including refugees seeking asylum (see Chapter 8). Indeed, claims of political and other forms of persecution made by immigrants and especially asylum seekers who in turn may be suspected as terrorists take us back full circle

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to the difficult process of defining what constitutes terrorism, particularly in societies in conflict and failed states.

The breadth of many anti-terrorism regimes and the vigour with which they are being enforced give rise to fundamental normative questions about the constitutional order and their implications for the role of the legislative, executive and judicial branches of government. We might question whether fundamental changes to the legal order are needed or justified in the first place. One of the important theoretical questions arising from the changing legal landscape is the extent to which the rule of law can and should be preserved. This volume features an important debate on this issue between Oren Gross and David Dyzenhaus. Building on his extra-legal measures model,[4] and the work of Dicey, Gross argues that Acts of Indemnity issued by the legislature after state officials have responded in an illegal fashion to an emergency such as terrorism can preserve legality by authorizing and constraining such illegal actions (see Chapter 5). Dyzenhaus, also drawing on Dicey, argues in favour of keeping state actions within the bounds of legality without *ex post* authorization of illegal acts. Drawing on common law principles of administrative law, Dyzenhaus proposes a 'Legality model' according to which, in times of emergency, governments adapt to the new circumstances by creating imaginative institutions with the necessary expertise to review national security decisions. While these institutions might not conform strictly to a formal conception of the separation of powers, the right sort of institution would be able to preserve legality while remaining sensitive to the special circumstances of terrorism that affect national security.

Whether and to what extent the judiciary should play a role in imposing normative constraints on the executive and legislative branches in times of crisis is an important issue. The literature on the psychology of risk perception suggests that public perception of risk may well be distorted after high-profile disasters, with such public fear having an influence on the formulation of anti-terrorism policy in the legislature and the executive branches of government. Either the judiciary or a specialized, independent administrative tribunal may well have a role to play in compelling the other branches of government to justify normatively and publicly any restrictive measure they seek to impose in the name of risk-prevention (see Chapter 6). But whether the courts are ready in practice to use their powers to constrain executive power is, however, another matter. This is so not only in Singapore and Malaysia, where judges might perceive a price to pay for asserting themselves 'against a determined government, especially if the spectre of legislative and constitutional amendment is not very far off' (see Chapter 13), but equally in the United States and the United Kingdom. Even after the United States

[4] 'Chaos and Rules: Should Responses to Violent Crises Always be Constitutional?' (2003) 112 *Yale Law Journal* 1011.

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Supreme Court's decisions in *Hamdi* v. *Rumsfeld*[5] and *Rasul* v. *Bush*,[6] which insisted on judicial review of any detention of enemy combatants, it is 'as likely as not that the limited judicial role required by the *Rasul* and *Hamdi* decisions will be played out ... with little if any inconvenience to the government' (see Chapter 22). Similarly, while in the United Kingdom the courts 'have managed to achieve some amelioration of the scheme through the Human Rights Act ... the prospects for any general curtailment of the draconian legislative scheme ... seem remote indeed' (see Chapter 21).

As with other emergencies, the prospect of terrorist attacks forces us to take a closer look at our assumptions about fundamental values, legality and the role of the branches of government in a crisis. We are forced to consider to what extent we are prepared to subject anti-terrorism measures to judicially imposed normative side-constraints on state power, even if by doing so we reduce the effectiveness of our anti-terrorism policies. To answer this question, we need to consider whether the anti-terrorism agenda is effective in the first place.

V. How effective is the anti-terrorism agenda?

Those who study global anti-terrorism law and policy should be concerned not only with normative questions of fairness, but also more empirical questions concerning the effectiveness of anti-terrorism policy. Indeed, normative and positive analysis may complement each other should it prove to be the case that some of the most problematic anti-terrorism strategies – such as the use of torture and other extra-judicial means or the use of crude stereotypes or profiles based on race, religion or national origins – may be ineffective in stopping terrorism. Indeed, the hypothesis that violent overreaction to terrorism may spawn more terrorism should be closely examined.

Security Resolution 1373 placed much emphasis on laws against the financing of terrorism, and international, regional and domestic jurisdictions have devoted much effort to compiling lists of terrorists who cannot be financially supported and to broad laws against the financing of terrorism (see Chapter 9). The effectiveness of these interventions, however, remains an open question. The American 9/11 commission for example found that the costs of the attacks were less than half a million US dollars and expressed considerable scepticism about the ability to stop terrorists by stopping their financing.[7]

This book includes chapters outlining steps that have been taken at various levels since 9/11 to improve aviation (Chapter 12) and maritime (Chapter 11) security. The strategies to protect aircraft and ports often rely on

[5] 124 S Ct 2633 (2004). [6] 124 S Ct 2686 (2004).
[7] National Commission on Terrorist Attacks Upon the United States, *The 9/11 Commission Report* (New York: Norton, 2004) at 12.3.

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administrative and licensing measures that are softer or less coercive than the use of criminal or immigration law or military force. Technology can play an important role in anti-terrorism law and policy by, for example, increasing the ability to screen material on aircraft and ships for hazardous substances. At the same time, the use of technology to facilitate surveillance presents serious risks to privacy (see Chapter 10).

After initially stressing the use of criminal or immigration law as the prime instruments to be used against terrorism, Canada released a new national security policy in 2004 that takes an all-risk approach that seeks to address not only the threats of terrorism including bio-terrorism and terrorism directed at critical infrastructures, but also diseases such as SARS and the disruptions of essential services by man-made or natural disasters (see Chapter 23). Even the American 9/11 Commission has recommended a softer 'hearts and minds' strategy and a strategy to prevent failed states as part of its anti-terrorism recommendations.[8] Two chapters in this book (Chapters 2 and 7) raise the issue of what would constitute a comprehensive approach to terrorism and security issues as an alternative to the use of coercive force. It remains to be seen whether a comprehensive all-risk approach to human security will result in a more rational allocation of resources and restrain some of the excesses and failures that may be associated with interventions that place all of their energies on detecting and detaining suspected terrorists.

VI. Convergence, divergence and context in anti-terrorism law and policy

It is understandable that the many lawyers that have contributed to this volume should focus on the analysis of law and legal institutions. That should not, however, be allowed to tempt us to underestimate the often decisive political and historical forces that are at play. At the level of regional cooperation in anti-terrorism initiatives, there is a striking contrast between the highly advanced discourse in Europe over the details of regional law and institutions devoted to the enterprise (see Chapter 20), and the growing accumulation of non-binding declarations of intent in Southeast Asia (see Chapter 19). In anti-terrorism as in other areas, historical reasons appear to explain the degree to which the nations of Europe trust each other, and the manner in which the nations of Southeast Asia jealously guard their national sovereignty.[9]

[8] *The 9/11 Commission* at 12.3 or pp. 361–98.

[9] Simplistically, European unity was forged in the fires of (at least) two catastrophic wars, while Southeast Asia bears the legacy of being colonized by different colonial powers, with the result that nations in the region have historically very little to do with each other.

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Exclusive attention to legal and institutional design in anti-terrorism efforts will also fail to capture the fascinating, but troubling experience of countries like Argentina (see Chapter 27) and the Philippines (see Chapter 15) where the complicity of governmental elements in acts of terrorism reveal far more basic problems, such as the establishment of a sufficiently orderly and corruption-free government. Here it will be more fruitful to talk about how 'rule by law' may be installed, rather than how the 'rule of law' might constrain governmental excesses in the fight against terrorism.

The widely perceived 'anti-Islamic' flavour of anti-terrorism efforts since 9/11 is a serious problem anywhere, but nowhere does it influence public affairs more strongly than it does in Muslim or Muslim majority jurisdictions. In Indonesia (see Chapter 14) and the Middle East (see Chapter 26) there is a popular sentiment that many governments are being pressured by the United States to enact anti-Islamic legislation in the name of anti-terrorism. The results can be both surprising and alarming. Some governments at times appear to 'allow' real terrorists to escape the full force of the law, while at other times they use anti-terrorism legislation against mere political opponents, labelled 'extremist' for this purpose. Anti-terrorism law and policy may frequently be shaped at international and regional levels, but it also often has particular domestic uses that can only be fully understood by those familiar with local context and history.

This volume can only scratch the surface of what is really going on with anti-terrorism law and policy around the globe. In the Philippines, where the lack of institutional capacity to deal with terrorism is the most prominent issue, the alternative of importing US troops to do the work has sparked off an intense political controversy stemming from the historical experience of the Philippines being a US colony, and of the subsequent location of major US military bases there (see Chapter 15). Calls for Japan to be more proactive in the 'war against terrorism' is snagged by the nation's professed total and perpetual renunciation of military solutions in international relations, a legacy of Japan's aggression and subsequent defeat in the Second World War (see Chapter 16). For better or for worse, attempts in Hong Kong to enact security legislation foundered, perhaps more out of a desire not to be dictated to by China, than because of human rights concerns (see Chapter 18). In many countries such as India and Pakistan, post-September 11 developments in anti-terrorism policy can only be fully understood in the context of past historical concerns and current geo-political realities (see Chapter 17).

In talking about regional and national peculiarities, care ought to be taken not to go to the other extreme of dismissing the common challenges and similarities in anti-terrorism law and policies throughout the world. Indeed, the indefinite detention of suspected terrorists under immigration laws and military orders in countries such as the United Kingdom, the United States and Canada calls into question any thesis that suggests that western responses

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to terrorism will necessarily reflect a more individualistic and libertarian culture than those found in the east and the south. This volume will have served its purpose if it gives some insight into the extent to which nations can usefully learn from each other, or simply talk to each other, about the problem of terrorism, a phenomenon which, however it may be defined, is common to all.[10]

[10] The chapters in this book were last revised between September and November 2004 and thus do not reflect changes in the law after that period. However, some of the important recent developments through June 2005 that bear directly on the chapters in this book are discussed in the Postscript (Chapter 28).

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