1 Introduction

1. THE POST-9/11 FALLOUT

Terrorism was not invented with the September 11, 2001 (9/11), terrorist attacks on the United States. Nevertheless, the coordinated attacks that killed almost 3,000 people were unprecedented as a single act of terrorism. So, too, was the global response to those events. Although individual countries had panicked and reacted to terrorism with repressive and ineffective laws and measures before, the response to 9/11 was an unprecedented global phenomenon. 9/11 produced a horrible natural experiment that allows us to compare how international institutions and different countries responded. Some reacted to 9/11 in novel and disturbing ways; others did very little to respond. All countries responded in a manner that reflected their own particular histories and legal, political, and social cultures.

The United Nations (UN) Security Council had, before 9/11, already used its mandatory powers under Chapter VII of the UN Charter in relation to international peace and security in an attempt to impose an asset freeze and travel and arms bans on all those associated with Osama bin Laden, al Qaeda, and the Taliban. Although the individual sanctions of this process under Security Council Resolution 1267 had failed to stop 9/11, likely the most expensive act of terrorism ever, the Security Council heavily reinvested in attempts to stop terrorism through criminalizing terrorism financing by enacting Security Council Resolution 1373 a few weeks after 9/11. This resolution called on all states to ensure that terrorism and financing of terrorism were serious crimes.

Resolution 1373 constituted a novel form of global legislation imposing permanent and general obligations on all states,[1] but it was also legislation

[1] Paul Szasz, "The Security Council Starts Legislating" (2002) 96 American Journal of International Law 901, at 902; Eric Rosand, "The Security Council as 'Global Legislator': Ultra Vires

that had many of the flaws of domestic legislation frequently enacted in an attempt to reassure the public after other acts of terrorism.[2] The Security Council acted quickly with what was at hand,[3] with limited information and time for deliberation. It invested in attempts to prevent terrorism financing even though existing financial sanctions against al Qaeda had failed to prevent 9/11 and subsequent investigations suggested that 9/11 would not have been prevented by even the most robust terrorism financing laws.[4] Resolution 1373 barely mentioned the importance of respecting human rights while countering terrorism and allowed countries with poor human rights records to defend repressive laws as attempts to prevent terrorism.

Although it called on all states to ensure that terrorism and its financing were serious crimes, Resolution 1373 did not provide any guidance about how states should define terrorism. This reflected continued disagreement about the proper definition of terrorism but also a missed opportunity to promote a restrained definition of terrorism that would declare that no motive and no cause justify the murder of civilians to intimidate populations or coerce governments.[5] The lack of a restrained definition of terrorism helped states justify repressive laws that can be used against political opposition in the fashionable garb of antiterrorism.

Resolution 1373 warned states not to allow terrorists to be granted refugee status but provided no advice about how to deal with suspected terrorists who would be tortured if returned to countries like Egypt and Syria. Resolution 1373 called on states to provide more information to each other to prevent terrorism but did not advert to the dangers that intelligence was a very inexact science that might wrongly identify people as terrorists.

Many countries responded to 9/11 and Security Council Resolution 1373 with tough new antiterrorism laws. Most countries did not invoke emergency powers or make formal derogations from human rights, but this raised concerns about permanent emergencies that would limit a variety of rights. In some countries,

or Ultra Innovative?" (2004–5) 28 Fordham International Law Journal 542; Marti Koskenniemi, "International Legislation Today: Limits and Possibilities" (2005) 23 Wisconsin International Law Journal 61.

[2] For a defense of legislation designed to reassure a public after large-scale terrorism attacks, including harsh legislation designed to impose large-scale detentions, see Bruce Ackerman, *Before the Next Attack* (New Haven, CT: Yale University Press, 2006).

[3] Mark Tushnet, "The Possibilities of Comparative Constitutional Law" (1999) 108 Yale Law Journal 1225.

[4] National Commission on Terrorist Attacks upon the United States, *The 9/11 Report* (New York: St. Martin's Press, 2004), at 5.4.

[5] Such a definition could be found in Article 2(1)(b) of the International Convention for the Suppression of the Financing of Terrorism, December 9, 1999, UN 54 th Session, UN Document A/RES/54/109 (1999).

post-9/11 laws and practices provoked debates about whether governments were overreacting to 9/11 and sacrificing democratic and due process values in an attempt to prevent terrorism. Indonesia, the world's most populous Muslim country, had a long debate about the appropriate response to 9/11 and Resolution 1373. It refused to enact a draft law that would have brought back some repressive Suharto-era practices. Nevertheless, it quickly enacted an antiterrorism law as an executive regulation less than a week after the October 2002 Bali bombings that killed more than 200 people.

Some countries did not have to do much to respond to 9/11 because they already had tough, if not repressive, laws on the books.[6] Singapore and Malaysia relied on indeterminate detention without trial under their Internal Security Acts. Israel and Egypt also relied on various forms of administrative and military detention of suspected terrorists. The United States was directly implicated in Egyptian antiterrorism policies as the Central Intelligence Agency (CIA) intensified its extraordinary rendition program. A comparison between the way established democracies and other countries with questionable or poor human rights records responded to 9/11 allows for better understanding of how the balance between security and liberty has shifted. In this respect, it is significant that countries that were criticized for abusing the human rights of suspected terrorists before 9/11 were able proudly to report their repressive laws to a new Counter-Terrorism Committee (CTC) created by the UN Security Council without fear of being criticized. Established democracies, most notably the United States, but also Canada and the United Kingdom, were less able to criticize countries with poor human rights records given their own complicity with indeterminate detention and torture.

The differences between the responses of democracies and countries with poor human rights records to terrorism diminished in the wake of 9/11. Australia empowered its intelligence agency to detain and question those with information that would be relevant to terrorism investigations. The United Kingdom derogated from the European Convention on Human Rights to enact a scheme for indeterminate detention on the basis of secret evidence of noncitizens suspected of involvement in terrorism who could not be deported because of concerns that they would be tortured. When this law was declared

[6] This is not to say that more repressive regimes did not take advantage of 9/11 to enact new laws. One study has found a correlation between the enactment of new antiterrorism laws in developing countries and high scores on the Freedom House rankings of authoritarianism (14 countries that enacted new laws with minimal debate had a freedom rating of 4.36, whereas 13 countries that engaged in extensive debate had a freedom ranking of 2.54, where 1 is most democratic and 7 is most authoritarian). Beth Whitaker, "Exporting the Patriot Act?" (2007) 28 Third World Quarterly 1017, at 1020.

to be discriminatory and disproportionate by the courts, the United Kingdom responded with new legislation allowing control orders to be imposed on suspected terrorists on the basis of secret evidence. Canada used immigration law as antiterrorism law to impose indeterminate detention on the basis of secret evidence. It even contemplated the possibility of judicially approved deportation of noncitizens to face possible torture. Administrative detention, secret evidence, and control orders in the United Kingdom, Australia, and Canada have some striking similarities to administrative detention schemes that Singapore and Israel inherited from colonial British emergency rule. One difference, however, is that Western democracies were more punitive to suspected terrorists than Singapore, which released the majority of its administrative detainees suspected of involvement in terrorism after imposing a sophisticated rehabilitation program.[7]

The United States was less burdened by a colonial legacy of harsh anti-insurgency and subversion laws, but it famously explored the "dark side"[8] of secret executive counter-terrorism measures in the immediate aftermath of 9/11. Unlike in other democracies, many of these American responses were not initially authorized in legislation and they were mainly directed to external threats. They included harsh interrogation tactics and indeterminate detention without trial at Guantánamo Bay and other venues, the use of extraordinary renditions to countries that notoriously tortured terrorist suspects, and warrantless spying by the National Security Agency. None of these practices were at first authorized by democratically enacted legislation but were purportedly authorized under a dubious doctrine of inherent presidential power to protect national security. The American reaction has evolved in response to media exposés and judicial challenges. Some harsh practices have been repudiated, whereas others have received legislative ratification. Nevertheless, the American response to 9/11, even under President Obama, still differs from that of other democracies in its reliance on executive and warlike powers. The majority of the detainees at Guantánamo have been released, albeit without rehabilitation or compensation, but the United States still asserts its right to indefinitely hold people there without trial before either a court or a military commission. The only legislative authorization for detention without trial is

[7] Angel Rabasa et al., *Deradicalizing Islamic Extremists* (Santa Monica, CA: RAND Corporation, 2010), at 104.

[8] The Sunday after 9/11, Vice President Cheney told the press that "we have to work sort of the dark side, if you will. We've got to spend time in the shadows in the intelligence world . . . using sources and methods that are available to our intelligence agencies. . . . It's going to be vital for us to use any means at our disposal basically, to achieve our objectives." Jane Mayer, *The Dark Side* (New York: Anchor Books, 1998), at 9–10.

Congress's bare-bones 2001 Authorization of the Use of Military Force to use force against those who aided 9/11 to prevent future acts. Under President Obama, the extraordinary rendition program reportedly continues, and targeted killings of suspected terrorists have increased without the transparency and judicial review used in Israel.

II. METHODOLOGY

This book is part of the "growing field of comparative and international studies of anti-terrorism law and policy."[9] It examines not only national responses to 9/11 in a number of countries but also the influential response of the UN. It falls between low-*N* studies, which typically focus on two or perhaps three jurisdictions, and high-N studies, which attempt to provide more comprehensive and often quantitative global coverage.[10] My attempt is to provide both a relatively detailed, nuanced, and contextual examination of antiterrorism law and policy in particular countries and a sense of the global sweep of the 9/11 effect on antiterrorism law and policy, the rule of law, and democracy.

The methodological approach of this book will be to attempt to write what David Garland has called "a history of the present"[11] to reveal many of the forces affecting the framing and development of modern laws and policies, in this case, those countering terrorism. As an academic lawyer, I will take the text of various antiterrorism laws seriously, but I will also attempt to account for historical, political, and organizational factors that have affected the development of antiterrorism laws and policies. Like others, I am conscious that it is impossible to tell the full story of counter-terrorism developments from public sources and that the public record will be skewed to reporting the failures and costs of counter-terrorism policies.[12] Nevertheless, we should not

[9] Victor Ramraj, Michael Hor, and Kent Roach, introduction to *Global Anti-Terrorism Law and Policy*, ed. Victor Ramraj, Michael Hor, and Kent Roach (New York: Cambridge University Press, 2005), at 1. See also Laura Donohue, *The Cost of Counterterrorism* (New York: Cambridge University Press, 2008) (comparison of the United Kingdom and the United States); Stefan Sottiaux, *Terrorism and the Limitation of Rights: The ECHR and the US Constitution* (Oxford: Hart, 2008); Daniel Moeckli, *Human Rights and Non-Discrimination in the "War on Terror"* (Oxford: Oxford University Press, 2008); and Ian Cram, *Terror and the War on Dissent* (Berlin: Springer, 2009).

[10] Ran Hirschl, "The Question of Case Selection in Comparative Constitutional Law" (2005) 53 American Journal of Comparative Law 125, at 132. For an excellent example of a high-N study of 32 jurisdictions, see Stella Burch Elias, "Rethinking 'Preventive Detention' from a Comparative Perspective" (2009) 41 Columbia Human Rights Review 99.

[11] David Garland, *The Culture of Control: Crime and Social Order in Contemporary Society* (Chicago: University of Chicago Press, 2001), chap. 1.

[12] Donohue, *Cost of Counterterrorism*, at 3.

underestimate the extraordinary amount of new material that has been put into the public domain since 9/11. Some of this material is collected in the multiple country reports that almost every state filed with the UN Security Council's CTC and that, until recently, were publicly posted by that committee. Other valuable sources of information include the monthly bulletins and reports by the International Commission of Jurists and public inquiry reports, including those of the 9/11 Commission in the United States, reports of Parliamentary committees and review bodies in the United Kingdom and Australia, and three Canadian commissions of inquiry that have had access to secret information. Although the benefits of counter-terrorism laws and policies may never be fully known, they must be estimated if the proportionality and necessity of counter-terrorism laws and policies are to be judged by courts and, ultimately, by citizens. An assessment of the proportionality of counter-terrorism measures requires an evaluation of both their propriety and their effectiveness.

One of the great challenges of studying counter-terrorism laws and policies is that they cross traditional disciplinary boundaries within academe and even within law. To begin to understand the global response to 9/11, it is necessary to understand how international law, constitutional law, military and war law, criminal law and procedure, evidence law, immigration law, and various forms of administrative law, including the regulation of financial institutions and charities, have been used to combat terrorism.[13] It is also important to understand the challenges of reviewing both the propriety and efficacy of whole-of-government approaches to terrorism. My approach to these issues is rooted in a new legal process and institutionalist approach to scholarship that focuses on the interplay of multiple forms of law and the dialogues or interchanges that have occurred between courts and other branches of government and society over the legality and proportionality of counter-terrorism measures. The complexities and challenges of such broad-ranging studies are daunting,

[13] Leading books on the responses of various countries to 9/11 all span various genres of law, including immigration, criminal, administrative, and international law. See, e.g., David Cole and Jules Lobel, *Less Safe Less Free* (New York: New Press, 2007); Donohue, *Costs of Counterterrorism*; Craig Forcese, *National Security Law* (Toronto, ON, Canada: Irwin Law, 2008); Andrew Lynch and George Williams, *What Price Security?* (Sydney, NSW, Australia: University of New South Wales, 2006); Emmanuel Gross, *The Struggle of Democracy against Terrorism* (Charlottesville: University of Virginia Press, 2006); and Clive Walker, *Guide to Anti-Terrorism Legislation*, 2nd ed. (Oxford: Oxford University Press, 2009). On the legal process and interactional and institutional approaches to legal scholarship, see Kent Roach, "What's Old and New about the Legal Process?" (1997) 47 University of Toronto Law Journal 363, and Jutta Brunee and Stephen Toope, *Legitimacy and Legality in Interactional Law: An Interactional Account* (New York: Cambridge University Press, 2010).

but a comparative approach can be helpful in identifying patterns and discontinuities in the ways various countries and institutions have responded to 9/11.

The book takes a comparative approach that attempts to identify both convergences and divergences in the post-9/11 development of antiterrorism laws and policies. The focus of the book is on in-depth studies of how four established democracies – the United States, the United Kingdom, Australia, and Canada – have responded to 9/11. The book devotes a chapter to each country to allow for a more contextual approach that engages with the pre-9/11 experience and political and legal contexts of each country. A number of common themes – the initial response to 9/11, the use of criminal and immigration law to respond to terrorism, the regulation of speech associated with terrorism, the review of the state's whole-of-government counter-terrorism activities, and the development of national security policies – are discussed in each chapter. These countries have been selected in part because so much information about their laws and practices is available and because they represent how established democracies that profess respect for human rights and the rule of law have responded to the challenges of terrorism. As such, this part of the book follows a "most similar cases logic"[14] that nevertheless can help to isolate differences in how similar countries respond to terrorism such as the effects of judicial review under a bill of rights; differences in governance; differences in history and threat perception, and differences in approaches to multiculturalism, free speech, and law and illegality.

In addition to these countries, I will provide briefer examinations of how five other countries – Egypt, Syria, Israel, Singapore, and Indonesia – responded and, in some cases, had to do little in the way of responding to 9/11. These countries have been chosen in part to allow for comparisons between the responses of established democracies and those with more questionable human rights records. They also allow comparisons between the responses of countries, such as Israel, that have extensive experience with terrorism with those of other democracies, such as the United States, that had minimal experience with terrorism until 9/11. Egypt under Mubarak and Syria are examined as prototypes[15] of countries with poor human rights records. These countries are of particular relevance to the post-9/11 response to al Qaeda because both the United States and Canada have been complicit in some antiterrorism abuses in these countries. Comparisons between these countries and established democracies can

[14] Hirschl, "Question of Case Selection," at 133–9.
[15] Ibid., at 142.

help determine if baselines between the state's interests in preventing terrorism and in preserving human rights have shifted post-9/11.

Israel, Singapore, and Indonesia are more difficult cases than Egypt and Syria. As will be seen, Indonesia experienced a similar terrorist threat to its neighbors Malaysia and Singapore but responded in a significantly different manner that did not resort to the use of indeterminate detention or reversion to subversion prosecutions and the militarization of security of the Suharto era. Israel has been included, in part, because of recent interest among Western democracies in Israel's long experience with terrorism and because of the distinctive role that the Israeli Supreme Court has played in reviewing a broad range of antiterrorism measures, including administrative detention, interrogations, and targeted killings. The use of administrative detention in Israel also shares a common British colonial heritage with the Internal Security Acts of Singapore and Malaysia and thus allows for a comparison of the significant transnational British influence on antiterrorism law both before and after 9/11.

The purpose of this book is to provide a critical and comparative assessment of how a number of democracies and some countries with poor human rights records have responded to 9/11. One object of this examination is to assess the degree to which there has been convergence as Western democracies and more repressive regimes have responded to terrorism, often by strengthening the powers of the executive and employing indeterminate administrative or military detention of suspected terrorists without the due process protections generally associated with criminal trials. Led by Security Council Resolution 1624 and British proposals, many democracies also enacted new laws punishing speech that may be associated with terrorism. The United States and Canada, however, resisted this trend to punish speech associated with terrorism, despite facing homegrown and al Qaeda–inspired terrorist threats.

The degree of convergence in counter-terrorism law and policy is striking. Egypt, Syria, Israel, and Singapore have all been better able to justify harsh antiterrorism policies in the new post-9/11 environment. These countries were able to rely on and rehabilitate old antiterrorism laws that had attracted criticism before 9/11. The Security Council's CTC took a nonconfrontational approach that largely ignored questions such as the proper definition of terrorism or human rights. Although none of these countries had to scramble to enact new antiterrorism laws after 9/11, they were also not immune to post-9/11 trends. Israel enacted a new law that built on its prior use of administrative detention on the basis of secret evidence but also followed the Bush administration's practice of focusing on so-called unlawful combatants who were noncitizens. The Egyptian Constitution was amended in 2007 to ensure that an expected

new antiterrorism law could not be invalidated for infringing constitutional rights and to entrench the president's powers to refer terrorism cases to special security or military courts. Both Egypt and Israel are discussing enacting new comprehensive antiterrorism laws that will likely seek support from the post-9/11 laws and practices of Western democracies. Singapore enacted new post-9/11 laws on terrorism financing, terrorist bombings, and hostage taking to demonstrate that the country was participating in international efforts to combat terrorism but has relied on its older and constitutionally entrenched Internal Security Act to deal with actual terrorist suspects. The convergence between post-9/11 laws in democracies and those in countries with poor human rights records is telling and disturbing.

Although the convergence between the counter-terrorism practices of democracies and countries with poor human rights records is a matter of serious concern, it would be wrong to conclude that nothing can be learned from the practices of those countries. After decades of repression, a number of important terrorist groups in Egypt have renounced violence in part because of reinterpretations of Islam that were facilitated by the state. Rehabilitation programs in Indonesia and, especially, Singapore that involved religious counseling have resulted in the release of suspected terrorists, apparently with some success in preventing recidivism. There has been very little thinking in the West about the rehabilitation of terrorists or constructive engagement with Islam, but these issues will not go away.

The resignation of President Mubarak in February, 2011 and the approval in a referendum of proposals to repeal Egypt's 2007 constitutional amendments that would shelter anti-terrorism laws from constitutional challenge and entrench emergency rule and exceptional courts suggests that the post-9/11 emphasis on security over liberty can be contested. It remains to be seen whether a more democratic Egypt will also be one with less terrorism. Indonesia's post-9/11 experience reveals some of the challenges that Egypt will face.

The Israeli reaction to Palestinian terrorism remains controversial, but Israel provides an important example of the role that courts can play in the review of a wide range of counter-terrorism activities. The Israeli approach has been to require judicial authorization for counter-terrorism measures, such as targeted killings, that, in the United States, are only authorized in secret by the executive and that resist judicial review. Israel, like the United Kingdom, also had experience with the problems caused by harsh interrogation long before controversies erupted over the issue in the United States.

Although convergence in post-9/11 counter-terrorism laws and policies is the most striking development, divergences in the global reaction to 9/11 are important to understand. Although there has been significant evolution in

American laws and policies since 9/11, the traditional hypothesis of American exceptionalism still needs to be examined. Much of the American response has been rooted in executive action and on the basis of the bare-bones Authorization of Military Force enacted by Congress in the days after 9/11. One thesis I explore is that the United States' advanced degree of legalism may encourage the use of extralegal approaches and those based more on a war model than a crime model. The American descent into illegality was not crude or open: indeed it was almost always supported by dubious claims of legality as symbolized by the infamous torture memos, but also seen by pre-textual use of existing laws against suspected terrorists. The result was extra-legalism – legal resources and arguments employed to support illegal measures. American exceptionalism may also help explain why the United States has not made it an offense to engage in speech that indirectly advocates terrorism, as done by the United Kingdom in the wake of the 2005 London bombings and as encouraged by UN Security Council Resolution 1624. The free press in the United States also helps explain why much misconduct by American officials in the generally secret realm of counter-terrorism activities has come to light. At the same time, however, a blunt state-secrets doctrine has stopped many civil lawsuits arising from illegal conduct. Indeed, there has been almost no individual accountability for illegal American counter-terrorism activities.

Indonesia also provides an interesting case study of divergence from the more repressive approach to terrorism taken in neighboring Singapore and Malaysia. Indonesia resisted an initial attempt to enact a harsh antiterrorism law after 9/11. Indonesia was criticized for not preventing the 2002 Bali bombings that killed more than 200 people but quickly enacted a new antiterrorism law by presidential decree within a week of the bombing. An attempt was made to apply this law retroactively to the Bali bombings, but this was declared unconstitutional by the Indonesian Constitutional Court. The Indonesian law allows for the use of secret intelligence, but only as preliminary evidence. It does not provide for the proscription of terrorist organizations and stresses the importance of nondiscrimination and the use of regular procedures in the administration of the law. The fledging democracy of Indonesia has continued to experience serious acts of terrorism. In response, there have been proposals both for tougher antiterrorism laws and to bring the military back into internal security matters, but so far, Indonesia has resisted such calls.[16] Recent and disturbing reports of extralegal abuses by specialized Indonesian antiterrorism

[16] Hikmanto Juwana, "Anti-Terrorism Efforts in Indonesia," in *Global Anti-Terrorism Law and Policy*, 2nd ed., ed. Victor Ramraj et al. (New York: Cambridge University Press, forthcoming 2011).