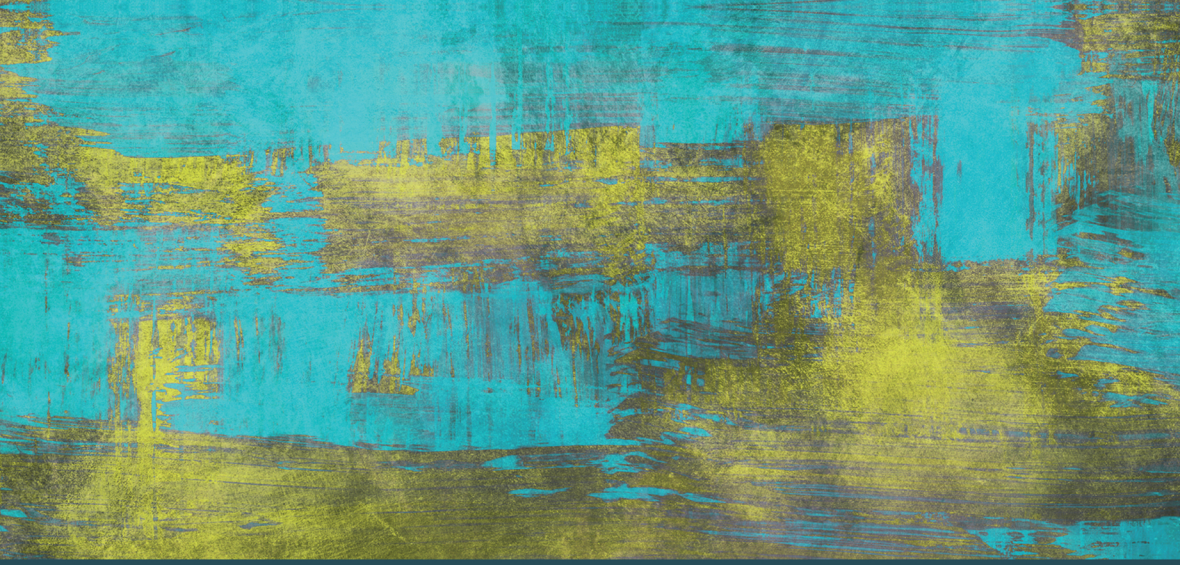
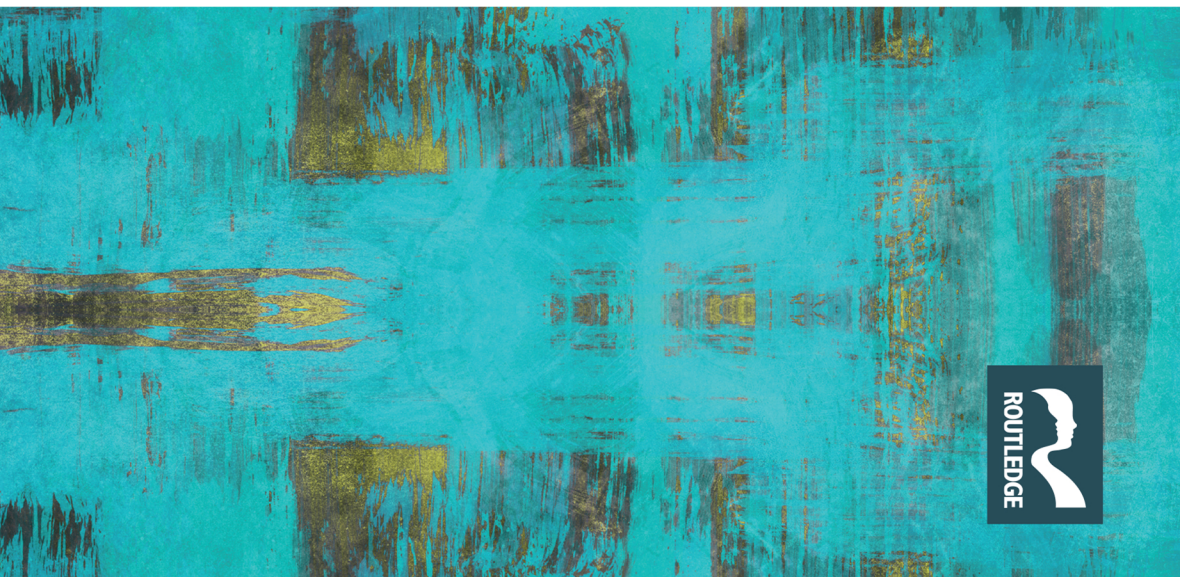


Routledge Research in Human Rights Law

BEYOND HUMAN RIGHTS AND THE WAR ON TERROR

Edited by
Satvinder S. Juss

With a foreword by
Manfred Nowak



Beyond Human Rights and the War on Terror

This edited collection provides a comprehensive, insightful, and detailed study of a vital area of public policy debate as it is currently occurring in countries across the world from India to South Africa and the United Kingdom to Australia. Bringing together academics and experts from a variety of jurisdictions, it reflects upon the impact on human rights of the application of more than a decade of the "War on Terror" as enunciated soon after 9/11.

The volume identifies and critically examines the principal and enduring resonances of the concept of the "War on Terror". The examination covers not only the obvious impacts but also the more insidious and enduring changes within domestic laws. The rationale for this collection is therefore not just to plot how the "War on Terror" has operated within the folds of the cloak of liberal democracy, but how they render that cloak ragged, especially in the sight of those sections of society who pay the heaviest price in terms of their human rights.

This book engages with the public policy strand of the last decade that has arguably most shaped perceptions of human rights and engendered debates about their worth and meaning. It will be of interest to researchers, academics, practitioners, and students in the fields of human rights law, criminal justice, criminology, politics, and international studies.

Satvinder Singh Juss, PhD (Cantab), FRSA, is a Professor of Law at King's College London, a Barrister-at-Law practising from 3 Hare Court, Temple, London, and a Deputy Judge of the Upper Tribunal (IAC) in London and Birmingham, UK. He is a former Human Rights Fellow at Harvard Law School, Boston, USA.

Routledge Research in Human Rights Law

Available titles in this series include:

International Human Rights Law and Domestic Violence
The Effectiveness of International Human Rights Law
Ronagh McQuigg

The Right to Religious Freedom in International Law
Between Group Rights and Individual Rights
Anat Scolnicov

The Right to Development in International Law
The Case of Pakistan
Khurshid Iqbal

Global Health and Human Rights
Legal and Philosophical Perspectives
John Harrington and Maria Stuttaford

Human Rights, Constitutional law and Belonging
The Right to Equal Belonging in Democratic Society
Elena Drymiotou

Dignity, Degrading Treatment and Torture in Human Rights Law
The Ends of Article 3 of the European Convention on Human Rights
Elaine Webster

The Right to Housing in Law and Society
Nico Moons

Human Rights and America's War on Terror
Edited by Satvinder Juss

Beyond Human Rights and the War on Terror
Edited by Satvinder Juss

For more information about this series, please visit: www.routledge.com/Routledge-Research-in-Human-Rights-Law/book-series/HUMRIGHTSLAW

Beyond Human Rights and the War on Terror

Edited by
Satvinder S. Juss

Routledge
Taylor & Francis Group
LONDON AND NEW YORK

First published 2019
by Routledge
2 Park Square, Milton Park, Abingdon, Oxon OX14 4RN

and by Routledge
711 Third Avenue, New York, NY 10017

Routledge is an imprint of the Taylor & Francis Group, an informa business

British Library Cataloguing in Publication Data
A catalogue record for this book is available from the British Library

Library of Congress Cataloging-in-Publication Data
Names: Juss, Satvinder S. (Satvinder Singh), editor.
Title: Beyond human rights and the war on terror / edited by Satvinder S. Juss.
Description: Abingdon, Oxon ; New York, NY : Routledge, 2019. |
Series: Routledge research in human rights law | Includes bibliographical references and index.
Identifiers: LCCN 2018030647 | ISBN 9781138543775 (hardback)
Subjects: LCSH: Terrorism--Prevention--Law and legislation. | Terrorism (International law)
Classification: LCC K5256 .B49 2019 | DDC 344.05/32517--dc23
LC record available at https://lccn.loc.gov/2018030647

ISBN: 978-1-138-54377-5 (hbk)
ISBN: 978-1-351-00606-4 (ebk)

Typeset in Galliard
by Taylor & Francis Books

Contents

Contributors

Abdullah K. Al-Saud is Director of Research at the King Faisal Centre for Research and Islamic Studies, an Assistant Professor at Naif Arab University for Security Sciences, and an Associate Fellow at the International Centre for the Study of Radicalisation, King's College London.

Roberta Arnold is an Attorney and Lecturer on "Law and Terrorism" at the University of Lucerne (Switzerland). An affiliated visiting scholar of Franklin University Switzerland, she has previously been a Public Prosecutor in Canton Ticino and a Military Investigating Magistrate (Switzerland).

Lord Carlile, CBE, QC, FRSA, is a crossbench member of the House of Lords and the former independent reviewer of terrorism legislation for the British government.

Willem Els is a Senior Training Coordinator at the Institute for Security Studies.

Martin Ewi is the Technical Coordinator and Regional Organised Crime Observatory Coordinator for Southern Africa for the ENACT Project at the Institute for Security Studies (ISS), Pretoria, having previously served as Senior Researcher for Counter-Terrorism with the Transnational Threats and International Crime Programme at the ISS.

Nadirsyah Hosen is a Senior Lecturer at the Faculty of Law, Monash University.

Satvinder S. Juss is a Professor of Law at King's College London and a former Human Rights Fellow at Harvard Law School, Boston.

Ivan Lidarev is a PhD student at King's College London and an advisor to Bulgaria's National Assembly.

Stuart Macdonald is a Professor and a Co-Director of Swansea University's EPSRC-funded £7.6m CHERISH Digital Economy Centre and Director of the university's multidisciplinary cyberterrorism research project.

Jeni Mitchell is a Teaching Fellow and postdoctoral researcher at King's College London specializing in civilian victimization by non-state armed groups.

Harsh V. Pant is Professor of International Relations in the Defence Studies Department and the India Institute at King's College, London. Presently, he is Director, Studies and Head, Strategic Studies Programme at Observer Research Foundation, New Delhi.

Sudha Setty is the Dean and a Professor of Law at Western New England University School of Law. She has been a visiting scholar at the University of Cape Town and a Fulbright Senior Specialist at the Chinese University of Hong Kong.

James C. Simeon is the Head of McLaughlin College and Associate Professor in the School of Public Policy and Administration, Faculty of Liberal Arts and Professional Studies, York University, Toronto.

George Williams is the Dean, the Anthony Mason Professor, and a Scientia Professor at the University of New South Wales Faculty of Law.

Foreword

When the terrorist attacks of 11 September 2001 occurred, I was judge at the Human Rights Chamber for Bosnia and Herzegovina in Sarajevo, a hybrid court established under the Dayton Peace Agreement of 1995 with the purpose of deciding on individual human rights complaints against the State of Bosnia and Herzegovina and its two entities. In October 2001, six Bosnian citizens of Algerian origin were arrested by the Bosnian police on suspicion of having planned a terrorist attack on the US embassy in Sarajevo. Since the Bush administration could not provide the Bosnian authorities with any evidence on which this suspicion (of the CIA) was allegedly based upon, a Bosnian court on 17 January 2002 ordered the release of these six men from pre-trial detention. However, instead of being released, they were again taken into custody by the Bosnian police and handed over to the US military forces, which were based in Bosnia and Herzegovina as part of the NATO-led Stabilization Force (SFOR) in accordance with the Dayton Peace Agreement. Since four of these men had also filed an application to the Human Rights Chamber, we had issued an interim order prohibiting the Bosnian authorities from allowing these men to be deported to the US. Despite various attempts by the High Representative for Bosnia and Herzegovina and European ambassadors to convince the US authorities to comply with a binding order by the highest court in Bosnia and Herzegovina, which was after all established on the basis of the US-brokered Dayton Peace Agreement with the task of developing the rule of law in this post-socialist and post-conflict country, the US forces ignored our binding order and transferred the six men to their military detention centre at Guantánamo Bay, which had been opened by Defense Secretary Donald Rumsfeld only a few days before. These six men spent many years in Guantánamo Bay without ever being formally charged with any criminal offence before their eventual release, one of them on the basis of a landmark judgment by the US Supreme Court (*Boumediene v. Bush*, 2008). In September 2002, the Chamber adopted a judgment in which it found various human rights violations by the State and the Federation of Bosnia and Herzegovina (we had no jurisdiction over the US), including the principle of non-refoulement, as there was at that time a serious risk that the applicants could have been subjected to the death penalty by US military courts.

This blatant violation of international law was my first professional encounter with the consequences of the so-called "War on Terror", in which the Bush

administration would "take off its gloves". When I was appointed as UN Special Rapporteur on Torture in October 2004, the "War on Terror" was in full operation, and I got immediately involved in a joint investigation of the human rights situation at Guantánamo Bay. After long and sometimes absurd negotiations with the US government about international law and independent fact-finding methods, we were finally invited to visit this infamous detention centre in December 2005. However, since Defense Secretary Rumsfeld was not willing to give us the necessary assurances that we could speak in private with the detainees, we finally rejected this invitation and carried out our investigation on the basis of a thorough legal analysis and extensive interviews with ex-Guantánamo detainees. In February 2006, we published our joint report, in which we had established serious violations of international human rights law applicable at Guantánamo Bay, including arbitrary detention and torture. As a consequence, we urged the Bush administration to immediately close this illegal detention facility. Although President Obama, immediately after taking office in January 2009, had signed an Executive Order with the aim of closing this detention facility within one year, it is still in operation.

During my six years as UN Special Rapporteur on Torture, I was constantly confronted with allegations of torture in many parts of the world as a consequence of the so-called "War on Terror". The attempts of the Bush administration to justify torture as the "lesser evil" and to openly undermine the absolute prohibition of torture had devastating effects in many other democratic and less democratic countries. I vividly remember a fairly escalated and emotional dispute with the former British Home Secretary Charles Clark in the British Houses of Parliament in early 2006, in which he openly stated that defending British security against terrorism was far more important than the prohibition of torture and refoulement. During my fact-finding mission to Jordan in 2006, the speaker of the Parliament asked me why I was criticizing the practice of torture in his country when even the US, the alleged epitome of Western democracy and human rights, openly practised and advocated torture in its "War on Terror". During our joint investigation of secret detention in the fight against terrorism, which was published in 2010 and led to angry reactions by many states in the UN Human Rights Council, we identified not less than 66 states in all world regions that had used secret detention in combating terrorism. Many of these states had closely cooperated with the US government by having permitted CIA "black sites" on their territory, including European states such as Poland, Romania, and Lithuania, having actively participated in illegal CIA "rendition" practices or having applied the most brutal torture practices in their own secret detention centres for the purpose of providing intelligence information to the US ("detention by proxy"). Many of our findings were later confirmed by the US Senate Intelligence Committee's Report on CIA torture, a part of which was released in December 2014.

In a recently published book which I edited together with Anne Charbord (*Using Human Rights to Counter Terrorism*, Elgar Studies in Human Rights, 2018), we use many practical examples to argue that a state's lack of respect for human rights is counter-productive and hinders its fight against terrorism. The authors of this book, who have a wide breath of experience with counter-terrorism

work at a national and international level, examined various counter-terrorism measures, including mass digital surveillance, the use of drones and the practice of torture. Our analysis shows that a lack of accountability for human rights violations in these areas can be conducive to an increase in terrorist activity.

The current crisis of democracy, the rule of law and human rights has many root causes, including the neoliberal economic policies in times of rapid globalization which led to a dangerous level of economic inequality, to the outsourcing of core governmental functions to the private sector, including to private military and security companies, to failed and fragile states, to insecurity, armed conflicts, organized crime, terrorism, and other forms of radicalization and violent extremism. One of the most obvious root causes for the erosion of human rights, democracy, and the rule of law is the so-called "War on Terror", both at the global and the local level. By reviewing the human rights implications of anti-terrorism laws in a variety of countries in different world regions, the authors of the book *Beyond Human Rights and the War on Terror*, edited by Satvinder Juss, provide many alarming examples of the extent to which the so-called "Global War on Terrorism" has had detrimental effects on the rule of law, democracy and human rights in these countries as well as on the basic values on which the post-Second World War international architecture has been built.

Manfred Nowak

Manfred Nowak is Professor of International Human Rights at Vienna University, Secretary General of the European Inter-University Centre for Human Rights and Democratisation in Venice, and Independent Expert leading the UN Global Study on Children Deprived of Liberty. Between 2004 and 2010 he served as UN Special Rapporteur on Torture.

Preface

The purpose of this compilation of highly topical essays is to elucidate and unravel the persistent influence of the "War on Terror" on both the domestic laws of the countries under consideration and on international law in general as it is today. This is important because the interface between the "Global War on Terrorism" and the "local war on terror" is one that needs constant assessment and evaluation if one is to keep an eye on how the erosion of civil liberties has become the "new normal", following the horror of 9/11. It is also important because of the readiness, not just of Western, but also of non-Western countries, to resort to violence in a way that moved the world "beyond human rights and the War on Terror" to something much more ominous and eerie. This is perhaps not so altogether surprising because the "War on Terror" was never simply a "war" of counter-terrorism. If so, it could have been waged through complex amalgams of criminal justice systems, administrative mechanisms, and internationally agreed rules and norms. What the "War on Terror" was also pivotally concerned with was the forcible installing of liberal regimes in countries where they had never existed, not realizing that not only do they not work, but they had not even worked in the post-Communist world after the fall of the Iron Curtain in 1989. But the "War on Terror" was also a "war" within the divine temple of liberalism itself.

On the one hand, it gave way to what has become well recognized now, namely the unleashing of populist forces on both the far left and the far right, so that leaders from across the political divide were able to rise, such as the Labour Party's Jeremy Corbyn in the UK and Pablo Iglesias from the anti-austerity *Podemos* party in Spain, to Matteo Salvini, the leader of the Anti-Immigrant League, and Luigi Di Maio of the Five Star Movement in Italy (the latter being a founding member of the European Union, the world's eighth-largest economy, but poised to threaten European stability itself). On the other hand, it gave way to what is so far barely recognized, namely a miscreation and malformation of the liberal ideal that was transfigured in a naked and blatant attack on Western civilization's liberal way of life, as epitomized by Donald Trump and Victor Orban, and further afield by Narendra Modi of India and Recep Erdogan of Turkey, so that a falling away from tolerance, diversity, and human rights has begun to take shape. They epitomize the battle between "nationalists" and "globalists" that is leading to the defeat of liberal and universalist values. The "War on Terror" was in this sense a very real

"war" on the goods of liberal democracy, forcing progressive liberalism to beat a retreat everywhere. Small wonder, then, that the "Third Way" internationalist approach to the world, as characterized by leaders such as Tony Blair and Gerhard Schröder, is a thing of the past for many of today's vulnerable and embattled societies.

Political oppression anywhere in the world is hyped up and given a notoriety that has rarely been seen since the Cold War, so that for the military elites of NATO, the UN, the US, and the UK, it can serve as an intolerable affront and a standing *casus belli*. Yet, institutions such as NATO, the European Union, and the World Trade Organization were crafted following the carnage of the Second World War by the triumphant powers precisely in order to maintain peace, not just through collective military strength but also through mutual prosperity and well-being. For 70 years this model of geo-political affairs dominated the international system, but its credo is now being challenged by a deluge of nationalism, xenophobia and religious intolerance, which is leading to the rise of authoritarian impulses that make our representative institutions looking increasingly fragile and ineffectual. This digest *Beyond Human Rights and the War on Terror* is intended to show how historical and political developments are now challenging the very basis of human rights; and that the "War on Terror" is now constructed explicitly as a "civilizational conflict" between a radical Islamist foe and a Judeo-Christian "West". In fact, a "war" is now being waged exactly as Bernard Lewis and Samuel Huntington had "predicted".

It is against this background that the "War on Terror" needs to be understood. Terror is not some hazy and mysterious or boundless and infinite menace ready to engulf us from everywhere. It is a narrative of normal historical conflict.[1] In times past, this is precisely how it was understood by governments when they spoke of insurrections, political assassinations, and civil wars that were epoch-making. Governments did not intermix all forms of political violence into a single terrorist threat. Our military leaders understood – what our political leaders are reluctant to do today – that political violence can never be entirely eliminated. Terror cannot end. It is this flawed understanding that has led to armed forces being sent into foolhardy and blunderingly fought wars that have left Western cities in a state of endless terrorist alert. It is hard to think of any gain to Western foreign interests that has come from these wars. Yet, humanitarian interventionists almost daily remain on the look-out for some global horror or other by which they can justify the curtailment of civil liberties at home and usher in ever more harsher "anti-terrorist" laws. In many cases, there has not been the remotest threat to the national sovereignty of many of these countries by any other state over the last decade and half that the "War on Terror" has been waging. Yet, they have come to adopt a bellicose and aggressive posture that has laid a heavy cost on civil liberties and fundamental freedoms.

1 See Satvinder Juss, "Terrorism and the Exclusion of Refugee Status in the UK", *Journal of Conflict & Security Law* (Vol. 17, No. 33, Winter 2012, pp. 465–499) at p. 468.

The aim of this anthology, of different chapters written by different authors but that are linked thematically, is two-fold.

First, it aims to demonstrate to policy-makers how the normalization of war powers has meant that the liberties that we take for granted have been so much eroded today, and how the roots of liberal democracy and universal human values can be salvaged and reasserted. It is hoped that this approach will appeal to the increasing numbers rallying against the sweep to power of the "alt-right" in many democracies in the world that are currently facing a backlash because of a public distrust of institutions, where the masses feel that they have been abandoned. In this return to "great power" politics what is needed is not a rejection of the liberal order but its enrichment with government policies that provide for sustainable security and economic progress. There are now so many interest groups – from domestic law-enforcement agencies to national security agencies and to military sections – who now rely on the "War on Terror" for their raison d'être that unless the normalization of war powers is questioned by policy-makers, the "War on Terror" looks set to continue in perpetuity. For the avoidance of doubt, this is not because terrorism will continue to be a problem but because so many jobs everywhere rely on the "War on Terror" continuing.

Second, the intention behind this anthology is to provide a review of the human rights implications of anti-terrorism laws in different countries. Given the increasing interest even in the US in foreign law, this volume is intended to function as a strong entry-way for comparativists. University professors can assign such an anthology, together with a primary reading text (along with primary sources such as statutes and cases), in a seminar on national security law. An anthology such as this, with self-contained chapters of roughly equal length, will be ideal for a seminar whereby each chapter can be assigned to one student to lead a class discussion. This should prove particularly valuable given the diversity and range of expertise that this volume brings together with a combination of senior academics and professors from the UK, US, Australia and further afield, along with practitioners and politicians. The chapters are timely, moreover, given the arrival of the "Trumpian era". There is already in existence a large body of work on terrorism and violations of human rights going back to the 1970s and the chapters in this book feeds in and out of this literature, as they do with the political science literature post 9/11. However, most of the academic discussions on the "War on Terror" and the impacts on human rights have focused traditionally on the period between 2004 and 2008. After that, we became more concerned and preoccupied with the global financial crisis. In the age of ISIS and Donald Trump, the pendulum has now swung back. The effects of populism and anti-elitism on the "War on Terror" are beginning to emerge and these are addressed in several chapters in this work. Furthermore, this compendium considers the responses to the "War on Terror" in Arab states, in the East and the Far East, together with the human rights implications in those countries in the "gloves-off" approach to countering terrorism, and its exacerbation of the human rights abuses overseas and in these countries specifically. The universal impact of the discourse on human rights, moreover, means that it is essential that there are these chapters on non-Western states who are at the forefront of the "War on Terror".

The book opens with three chapters on modernity's fixation with the terrorism label, and challenges the belief in modern societies that our present-day concerns with stability and sustainable security can be tackled through the prism of "terrorism"-targeted laws. Chapter 1 asks what qualifies as terrorism, Chapter 2 suggests that we risk undermining the values of negotiation and reconciliation if we are not careful, and Chapter 3 calls for a disaggregation of the violence that lies behind conflict-induced displacement and gives the example of refugees today. We may consider these three chapters first.

Chapter 1 opens with Sudha Setty's "Assessing Unconventional Applications of the 'Terrorism' label", where she engages in an enquiry into what acts qualify as terrorism today in a general sense. The question is important because of the way that the enormous power of the law and government is ratcheted up to meet its "threat". It is also important because international law itself has failed to define it fully. Indeed, lawmakers and judges struggle to understand the parameters and the application of the term. Herein, however, lies the problem, in her view, because it is this very ambiguity that has been used by politicians and government officials to increase public fear, reduce levels of scrutiny by other branches of government, and treat traditional non-terrorism crimes as terrorism. Therefore, this chapter explores some non-conventional applications of the label of "terrorism" from the US point of view before the application of the label of "terrorism" more broadly, such as in India, which has led to a religious bias against Muslims and the targeting of disfavoured political minorities, combined with extraordinary powers granted to the government to deal with the threat of terrorism. The author makes out a case for why this poses a serious risk to due process and the rule of law because of the persistence of India's expansive definition of terrorism where India is more focused on prosecuting "terrorist" threats than proscribing human rights abuses. She traces the legal developments of the Terrorist Affected Areas Act 1984 ("TAAA"), the Terrorist and Disruptive Activities (Prevention) Act 1985 ("TADA"), and the Prevention of Terrorism Act 2002 ("POTA"), by the end of which selective prosecutions of Muslims, the poor, members of tribal groups, civilian protestors, and Dalits as "terrorists" were becoming commonplace. POTA was therefore repealed and replaced by Unlawful Activities (Prevention) Act 2004 ("UAPA"). This statute itself was amended in 2012, only to make the definition of "terrorism" even broader, so that the definition of "security" and a threat to it now includes "economic security", which means "financial, monetary, and fiscal stability" but even more remarkably goes on to include "security of means of production and distribution, food security, livelihood security". Unsurprisingly, the author is concerned with the proliferation in Indian law with the "unconventional applications of the label of terrorism".

In Chapter 2, Nadirsyah Hosen describes how self-determination movements are often castigated as terrorist in his "Separatist, Not Terrorist: Case Studies from Southeast Asia". Today, what matters most, he argues, is not so much a definition of terrorism, but rather the effect of what is labelled terrorism, because as a label terrorism promotes a greater attention from the media and policy makers in the West. This in turn helps people to associate the term "terrorism" exclusively with

fanatical, radical Islamic sects, and it is this that has distorted views towards organizational violence after 9/11. The author makes good his thesis by looking at two case studies. These illustrate the difficulties in distinguishing between terrorism and religious-separatist movements in Southeast Asia. These comprise, first, the organized violence in Patani and, second, the Mindanao. Both involve Muslim separatist groups. A third case study involves the separatist movement in Aceh and Papua Indonesia. While the main source of conflict in Papua is not about religion, like in Patani and Mindanao, the tension in Papua leads to a separatist movement. However, the conflict in Aceh involved Islamic communities, which made the Indonesian government treat the Aceh differently from the Papua conflict. The three case studies reveal how the use of the label "terrorism" in the name of national security is misconceived. This is because the threats posed by separatist movements cannot be solved by labelling them as "terrorist groups/organizations". There has to be a better way of dealing with radical Islamist and ethnonationalist/separatist struggles, where there is in any event the absence of an agreement on what terrorism is, this making it difficult to delineate the boundaries between using ordinary criminal law as against specific anti-terrorism law. The experience of the south-east region, may offer a valuable non-western perspective in determining what may or may not constitute "terrorism", because it takes into account the unique social, political, economic and historical factors against the background of which each of the three separatist movements that are considered exist. It is important, Hosen argues, that we identify organisational demands, assess our optimal approaches, and minimise their impact in the international arena. Western ethnocentricity has, on the other hand, has served only to produce definitions of "terrorism" that are sensationalistic. What would serve our interests best, he suggests, is a decisive move away from policies of counter-terrorism and states-of-emergency, to policies of negotiation and reconciliation.

In Chapter 3, "The 'Refugee Warrior' in an Age of Revolutionary Violence", Satvinder S. Juss and Jeni Mitchell develop this line of thought further and show that even refugees from war-torn areas of the world all too often become engaged in vindicating rights of self-determination against oppressive regimes, so that if refugees are to be given the protection they deserve, it is important to recognize the emerging phenomenon of the "refugee warrior". In fact, because this aspect of refugees' lives is shrouded in much obscurity and obscurantism, they are often nowadays feared and resented. We should not be surprised, however, if refugees are both victims and perpetrators of violence. But although they may be engaged in "refugee-based insurgency" this does not make them, by that fact alone, "refugee-terrorists". It is necessary once again to move away from conventional stereotypes in the West of such people and to disaggregate the violence that lies behind conflict-induced displacement. The authors look at the legal basis for the exclusion of refugees who have committed a crime against peace, a war crime or a crime against humanity. This is to be found in Article 1(F) of the Geneva Convention Relating to the Status of Refugees 1951, as well as the Qualification Directive (2004/83/EC) in European Law. Yet, neither of these provisions tell us anything about the level of "responsibility" required of a person before it can be

said that there are serious reasons for considering their exclusion from refugee status. It is for this reason that the emerging case law has asked decision-makers to apply these provisions of exclusion cautiously and restrictively. The authors then go on to give consideration to the "War on Terror" itself and how the post-9/11 developments have led to no less than three Security Council Resolutions in September, November, and December 2001, and then another one in September 2005. The emphasis in all has been on "acts, methods, and practices of terrorism", their "financing and planning" being "regardless of their motivation" and requiring states "to take urgent action" so as to "eliminate the scourge of terrorism". Once again, precisely what is meant by "terrorism" is not clear. Moreover, there is no recognition of the right of oppressed peoples to revolt and take up insurgent action against an oppressor or aggressor entity. A series of cases discussed show the courts grappling with these difficult questions. It is noted how there is recognition in the British cases of the legitimate use of violence for political ends which is often overlooked even in legal circles. Finally, the reader is taken by the authors to the "age of revolutionary violence" and reminded how, in both law and security studies, the context of violent behaviour is critical. The complexity of contemporary political violence and lack of firm normative frameworks mean that decision-makers have difficulty in understanding violence and the role of participants in it. This is important because today "terrorism" is invoked in a vast range of ideological and political acts, whereas previously it was confined to the narrow acts of such groups as non-state armed groups targeting civilians. The durability of the "terrorist" label today has implications for the unfair treatment of both civilians and fighters involved in conflict situations, in the view of the authors. Accordingly, the answer lies today in characterizing contemporary violence as "revolutionary violence", when seen in campaigns in the Middle East today by violent sub-state actors, in a quest for the radical transformation of the existing political and social order. This would in turn help the international community to fully comprehend the legitimacy and legality of acts of violence in conflict-ridden societies around us.

After these three introductory chapters, which engage in a discussion of the problem of "terrorism" as a workable concept in an increasingly complex and multi-polar world, this compendium moves on to consider the specific threat from ISIS in the world today in the following three chapters. Chapter 4 deals with the origin and the nerve-centre of ISIS in Saudi Arabia. Chapter 5 considers how when such terror is exported; for example, to a country like Switzerland, law-enforcement and anti-terrorism policies compete with each other for the attainment of peace and security. Chapter 6 considers how the UK has enacted "terrorism precursor offences", so that non-criminal methods of disrupting terrorist activity are prioritized, such as asset-freezing and proscription, but which it is argued need greater legislative restraint. We may now consider the next three chapters in more detail.

In Chapter 4, "The ISIL Jihadists of Saudi Arabia", Abdullah K. Al-Saud offers a rare and unique account from the Middle East of how jihadist groups have arisen, particularly ISIL in Saudi Arabia. He considers how we can explain the

relative rise in recent years of radicalization and Salafi-jihadist ideology in the province of al-Qassim in Saudi Arabia. This has seen a sharp increase in the number of Saudi ISIL foreign fighters in comparison to other regions when the numbers are indexed to each region's population size. The province known as al-Qassim is at the heart of the Najd region in Saudi Arabia, and it is known as the "agricultural basket" of the country. It is one of the thirteen administrative regions of Saudi Arabia and the seventh most populated region in the country. It has come to be regarded as the centre of the Salafi movement. Al-Saud focuses on this area, not only because it has seen a high ratio of ISIL recruits from al-Qassim, but because of the nature of the upsurge in this region, which is qualitatively and quantitatively different from the earlier waves of Saudi Arabian foreign fighters. Given that the process of radicalization is complex and not reducible to a single cause or factor, Al-Saud explores three possible explanations for this difference. First is the *Fukkio al-'Ani* (set free the captive) campaign, which arose in the social media in the post-Arab Spring environment and sought to capitalize on the prevalent mood of rebellion at the time. Publically, the campaign focused on issues of human rights and the release of "political prisoners", but many of its organizers and supporters had more ominous and nefarious aims. It did not take extremists, who were longing for radical change in Saudi Arabia, long to join the campaign, and this resulted in marches and sit-ins that were mainly organized in the al-Qassim region and its main city of Buraydah. The second possible explanation is the role of facilitators and social networks, which argue that highly influential early travellers from the al-Qassim province to the Syrian conflict may have become very instrumental in garnering support, recruiting, facilitating, and connecting the local (al-Qassim) to the transnational (Syria and Iraq). Lastly, the role of a local group of Saudi neo-jihadi scholars, several of whom have come from the al-Qassim province, is explored as a reason for the distinct nature of this particular wave of jihadi fighters from the country. In the end, however, whereas terrorists come from different locations with different social backgrounds, and whilst they may have complex grievances, making them vulnerable and susceptible to recruitment, it is imperative, argues Al-Saud, to have deep contextual knowledge behind the complex process of radicalization if we are to be successful in devising solutions that can disrupt terrorist networks.

The challenge posed by ISIS is also considered in Chapter 5 by Roberta Arnold who provides a Swiss example in "The Criminal Implications of the 'War on Terror' and the Status of 'Foreign Fighters': A Swiss Perspective". The emphasis here is on prioritizing law-enforcement techniques over ant-terrorism mechanism. The Swiss government too, she argues, has made efforts to grapple with the geographical boundaries of the "War on Terror" and to inquire into the status of those involved in it. Accordingly, Arnold asks whether the "foreign fighters" supporting ISIS in Syria (where, as Al-Saud had shown, many Saudi fighters end up) also share the status of those promoting the movement elsewhere, such as in Europe. Her chapter analyses the legislative counter-terrorism measures adopted by Switzerland recently, including the Anti-IS Federal Act of 12 December 2012, the Federal Law on the Federal Intelligence Service of 1 January 2017, and the

legislative amendment proposals of June 2017. It then discusses the outcomes of the first judgment of the Swiss Federal Criminal Tribunal based on the Anti-IS Federal Act, which was rendered on 15 July 2016 and confirmed on 22 February 2017 by the Swiss Federal Tribunal (FT). It concludes with the observation that the recent Swiss efforts are to be welcomed because, as highlighted in the Third TETRA (TErrorist TRAcking) Report, an interdisciplinary and global approach is taken to the fight against terrorism. This approach sets out to identify and solve the problem at its roots. It proposes solutions that have positive mid- and long-term effects (e.g. with regard to de-radicalization). The way this is done is by the effective exchange of information between law-enforcement authorities and the intelligence services because recourse to "armed conflict" norms is unhelpful given that the notion of the "War on Terror" has no legal foundation under international law, as noted by the ICRC.

In Chapter 6, "Disrupting Terrorist Activity: What Are the Limits to Criminal Methods of Disruption?", Stuart Macdonald and Lord Carlisle make a plea for the greater use of the criminal law. They draw attention to how the UK has enacted a large number of "terrorism precursor offences", which it is argued need greater legislative restraint. This is explained by an analysis of three non-criminal methods of disrupting terrorist activity: terrorism prevention and investigation measures (TPIMs); asset-freezing; and proscription. Four sets of concerns about them are then discussed explaining why they are regarded as less desirable in principle than prosecution. Whilst the authors agree that terrorism precursor offences are needed for the sake of prevention, the wide range of such offences currently in force in the UK go too far in pursuit of this objective. They argue that the same concerns that apply to the non-criminal methods of disruption apply also to terrorism precursor offences. This is counter-productive, for it risks undermining the very features of the criminal law that give such laws its unique moral authority and legitimacy. It is, in the authors' view, self-defeating to create offences in the name of prioritizing prosecution if those same offences undermine the basis on which prosecution is prioritized in the first place.

Finally, towards the end of this anthology, we return to how the fight against terrorism still prioritizes counter-terrorism initiatives through anti-terrorism laws, and this is most evident in countries like Canada, Australia, South Africa, and India. Chapter 7 shows that most advanced liberal democracies are converging in their laws so that they defer to the government to take the lead in the battle against terrorism, and the example of Canada is given. Chapter 8 gives the example of Australia, a latecomer to anti-terrorism laws, but which has had no qualms in imposing restrictions on freedom of speech, creation of new sedition offences and censorship rules, and introduction of detention without trial. Chapter 9 explains that even South Africa, which has experienced no major terrorist incident, now has systems, procedures, and governmental agencies that are responsible for the interception, investigation, prosecution, and adjudication of terrorist-related crimes. Chapter 10 focuses on India's experimentation with a muscular counter-terror policy, only for it to realize that not only has it been ineffective, but that there are now new terrorist threats from global organizations, such as al-Qaeda

and ISIS, which it faces, requiring a more nuanced approach, thus bringing us full circle in this collection of essays to how we started off. So, let us consider in more detail the last four chapters.

Chapter 7 by James C. Simeon, titled "Terrorism Law in Canada: Combatting Terrorism through the Defense of Human Rights", is an excellent analysis of how terrorism should be understood. He explains how the legal definition of the crime of terrorism in Canada is found in the extensive provisions of the Canadian Criminal Code 1985, which covers everything from the definition of terrorism to the financing of terrorism, the freezing, seizing and restraint, and forfeiture of property, to a hoax regarding terrorist activity, proceedings and aggravated punishment, investigative hearing, and recognizance and conditions. The Canadian definition of terrorism is in two parts: terrorist activity and terrorist group. In Canada, the focus is on "an act or omission that is committed in or outside Canada". Canada appears to have the most international definition that draws explicitly on the UN Conventions and Protocols that deal with specific acts of terrorism. Defining what constitutes a terrorist activity by drawing on these international instruments certainly internationalizes the Canadian criminal code definition of the crime of terrorism. This is further reinforced by the explicit exclusion of such activities during an armed conflict provided that they are consistent with the applicable international laws. This is interesting as there are no such references to these in either the UK or the US legislation. The Canadian government is in the process of amending its terrorism laws with the introduction of a new 2017 National Security Act. Interestingly, in Canada mere membership of a terrorist organization is actually sufficient to make a foreign national or permanent resident inadmissible to Canada under IRPA s. 34(1)(f). Yet, what is surprising in this context is that the Canadian judiciary has still not failed to lay emphasis on the protection of human rights. The list of fundamental human rights set out in the Canadian Charter of Rights and *Freedoms* enabled the Supreme Court to ensure that an accused's constitutionally entrenched human rights and freedoms are not infringed. Given that the prosecution of terrorism cases is one of the most effective counter-terrorism strategies employed by states, the Supreme Court has required of the Canadian government that it does not exceed its legal and constitutional authority and that human rights are promoted to the highest degree. At the same time, however, it has recognized that national security too must be protected to the maximum degree possible. Nevertheless, in Canada it is the protection and advancement of fundamental human rights that has been the key to enhancing national security in a liberal democracy. Simeon's chapter is a much needed perspective for our modern polarized times when the maintenance of state security is often juxtaposed against the protection of fundamental human rights for all.

In Chapter 8, "Human Rights and Anti-Terror Laws in Australia", George Williams asks whether Australia needed to enact national anti-terror laws in the wake of September 11. This is because such laws have led to human rights being compromised. He undertakes a detailed examination of the laws actually enacted and the capacity of the Australian legal system to subject those laws to scrutiny on human rights grounds. The chapter is important because, as the author explains,

Australia came relatively late to enacting national anti-terror laws. It had no such laws prior to the September 11 attacks. Afterwards, however, it swiftly enacted new legislation of unprecedented reach. This has led to restrictions on freedom of speech through new sedition offences and censorship rules; the detention and questioning for up to a week by the Australian Security Intelligence Organisation (ASIO) of Australian citizens not suspected of any crime; the banning of organizations by executive decision; control orders that can enable house arrest for up to a year; detention without charge or trial for up to 14 days; and warrantless searches of private property by police officers. In fact, powers and sanctions once thought to lie outside the rules of a liberal democracy except during wartime have now become part of the Australian legal system. At the same time, these laws raise important questions about the protection of human rights, and the capacity of the Australian legal system to operate as a system of checks and balances on the unrestrained use of executive power.

The same concerns are raised in Chapter 9 by Martin Ewi and Willem Els in their "The Legacy of Apartheid and South Africa's Struggle to Contain Contemporary Forms of Terrorism and Violent Extremism", where they argue that although South Africa has not experienced a major terrorist attack in nearly 20 years now, there have been a series of warnings from foreign governments about the potential for terrorist attacks in South Africa. These have generated a great deal of debate, and sometimes panic among South Africans, about their capability to deal with such a terrorist threat. However, as they point out, South Africa's counter-terrorism measures, and the institutions of government that work tirelessly to avert the threat, has often gone unnoticed. Ewi and Els set out to fill this information void, by explaining how the South African government is organized internally to counter the prevailing threat of terrorism and violent extremism. They then identify and provide an overview of the systems, procedures, and governmental agencies responsible for the interception, investigation, prosecution, adjudication, and policy coordination on matters relating to counter-terrorism and the countering of violent extremism. Ewi and Els use the Henry Okah trial as a case study before concluding that South Africa has developed a reliable architecture for dealing with terrorism and violent extremism.

In Chapter 10, "Indian Counterterrorism and the Influence of the Global War on Terror", Harsh V. Pant and Ivan Lidarev suggest that India's approach to counter-terrorism has been influenced by the Global War on Terror (GWOT). This has meant that India has adopted a localized, defensive, law-and-order approach to counter-terrorism, using its internal security and legal apparatus. This approach itself has evolved in response to various attacks over the years. However, the authors argue that it still remains underdeveloped and incoherent due to domestic politics and bureaucratic resistance. Nevertheless, as a major target of Islamist terrorism, India has stood at the forefront of the GWOT. What is noteworthy is that India's terrorist threat has come primarily from local groups, either home-grown or Pakistan-based. For this reason, Delhi has refrained from combating global terrorism on the international stage, as the US and Britain have done. Instead, India has fought in the GWOT by waging its own "local war on

terror". The question now, the authors ask, is whether the time has come for India to change its approach to counter-terrorism. One sobering thought, however, is that Indian counter-terrorism has produced few successes and it has neither checked home-grown terrorism, nor persuaded Pakistan to cease its support for terrorists. This is despite Delhi experimenting with a more muscular counter-terror policy, for instance after the Uri attacks in 2016. It is also noteworthy that the terrorist threat that India faces is changing. Global terrorist organizations, such as al-Qaeda and ISIS, now target the subcontinent, while militants returning from the Middle East threaten to revitalize India's home-grown Islamist movement. Pant and Lidarev conclude that presently it is not readily evident if Indian counter-terrorism policy as it stands currently can effectively address these threats. Indian counter-terrorism policy therefore increasingly stands at a crossroads today.

In ending this Preface, one could add to this chastening thought that so must it be true of a great many of the world's countries, as we go into an epoch "beyond the War on Terror", that counter-terrorism policy is increasingly and invariably at a crossroads today.

I would like to thank my authors for so ardently agreeing to participate in this project and I trust that readers will find these accounts enlightening, stirring and alarming in equal measure. I would like to record my praise and gratitude to Ghogi for the strategic support rendered in difficult circumstances. I would also like to thank my publisher Routledge, and especially Senior Editor Alison Kirk, as well as Seth Townley and Neil Dowden, for their abundant support for the production of two edited books of mine on terrorism at the same time. The other book, the prequel to this, is *Human Rights and America's War on Terror*, which tracks the development of anti-terror laws in America following 9/11 and the impact of these on human rights. I thank Alexandra Buckley for her attentive and conscientious overseeing of this project. And, finally, I would like to record my deep gratitude to Manfred Nowak, the former United Nations Special Rapporteur for Torture, for his impressive Foreword, written at my request at such short notice.

Satvinder S. Juss
4 June 2018

1 Assessing unconventional applications of the "terrorism" label

Sudha Setty[1]

Introduction

When the government deems a situation to involve anything labeled as "terrorism," a lot of things happen. Resources that are not available in other contexts are made available for the government to investigate and surveil suspects. The legal authority of the government to investigate, detain, interrogate, and punish increases dramatically. The right of the public to access information about the government's actions diminishes significantly. The willingness of legislatures and judges to engage in meaningful oversight wanes. The sense of fear experienced by much of the public, as well as the societal stigma associated with the underlying suspect behavior, skyrockets.

Fully understanding what acts qualify as terrorism such that the enormous power of the law and the government ratchets up is essential. Yet international law has failed to define it fully, and lawmakers and judges in numerous countries struggle to understand the parameters and the application of the term. This ambiguity has been used by politicians and government officials for a variety of goals: sometimes to increase public fear and reduce levels of scrutiny by other branches of government,[2] sometimes to recognize a traditionally underfunded or politically marginal issue as "terrorism" in a good faith effort to increase public attention and resources, but sometimes for political manipulation such that non-terrorism crimes are redefined as terrorism, bringing with it all of the consequences that follow.

This chapter explores some non-conventional applications of the label of "terrorism" and considers calls for continued expansion of the definition of terrorism to encompass crimes that have not traditionally been considered terrorism.[3]

1 I am grateful to Matthew H. Charity and Surabhi Chopra for suggestions and comments, and to Renee Rastorfer for excellent research assistance. I thank the Fulbright Senior Specialist program and the Centre for Rights and Justice at the Chinese University of Hong Kong Faculty of Law for their support as I began work on this Chapter.

2 See A. Trevor Thrall and Erik Goepner, Trump's Terrorism Fearmongering vs. the Facts, Cato Institute (Feb. 22, 2017), available at www.cato.org/publications/commentary/trumps-terrorism-fearmongering-vs-facts.

3 Some analysis here is drawn from a previous work: Sudha Setty, What's in a Name? How Nations Define Terrorism Ten Years After 9/11, 33 *U. Penn. J. Int'l L.* 1 (2011) (analyzing definitions of terrorism as developed and used on an international, comparative, and domestic level).

The first part briefly lays out the working definition of terrorism on an international level, and the gray areas in which individual nations make their own determinations as to what constitutes terrorism and what is instead considered ordinary crime.

The second part focuses on the definitions of terrorism under a number of common counterterrorism statutes in U.S. federal law, and then considers contexts that fall outside of the common usage terrorism in the context of U.S. law, exploring instances in which gang violence and animal rights-based crimes are treated legally as terrorism.[4]

The third part briefly considers the application of the label of "terrorism" in India, where concerns that broad and vague definitions of terrorism, religious bias against Muslims, and targeting of disfavored political minorities, combined with extraordinary powers granted to the government to deal with the threat of terrorism, pose a serious risk to due process and the rule of law.

Some have called on governments to continue to broaden the reach of counterterrorism law to reach other issues, such as sex trafficking[5] or some mass shootings.[6] This chapter concludes that most such efforts are founded in a good faith belief that the resources available to counterterrorism efforts will benefit other social justice causes,[7] while some efforts are backed by powerful groups with

4 These issues serve only as exemplars of the many unconventional contexts in which the federal government has identified the threat of terrorism. See, e.g., Jerome P. Bjelopera, *The Domestic Terrorist Threat: Background and Issues for Congress*, Congressional Research Service, Jan. 17, 2013, available at http://fas.org/sgp/crs/terror/R42536.pdf (visited Oct. 16, 2014) (listing anarchism, white supremacy, anti-government ideals, black separatism, and anti-abortion beliefs as additional areas in which the government has evinced heightened concern over terrorism). Further, the question of whether counterterrorism statutes have unconstitutionally criminalized speech and expressive conduct is a related but separate question from what this chapter addresses.

5 Human trafficking is already conflated with terrorism in particular sections of U.S. law. See Intelligence Reform and Terrorism Prevention Act of 2004: Title VII—Implementation of the 9/11 Commission Recommendations, Subtitle B—Terrorist Travel and Effective Screening, §7202 (2004) (establishing a Human Smuggling and Trafficking Center, in accordance with recommendations of the 9/11 Commission). Calls for the treatment of sexual violence as "terrorism" go back at least two decades. See, e.g., Carole J. Sheffield, Sexual Terrorism, in Jo Freeman, ed., *Women: A Feminist Perspective* 409, 409–10 (5th ed., Mayfield Publishing Co., 1995). Sheffield analyzes rape, spousal abuse, sexual abuse of children, and sexual harassment as four forms of "sexual terrorism," and identifies several more, including threats of violence, stalking, coercive sex, pornography, prostitution, sexual slavery and femicide. Id. at 412.

6 See Brian Michael Jenkins and Richard C. Daddario, Think Mass Shootings Are Terrorism? Careful What You Wish For, *Politico* (Nov. 7, 2017), www.politico.com/magazine/story/2017/11/07/think-mass-shootings-are-terrorism-careful-what-you-wish-for-215797 (countering arguments that the October 2017 mass shooting in Las Vegas, in which 58 people were killed, should be considered a terrorist attack).

7 E.g., L.Z. Granderson, Treat Chicago Gangs as Terrorists, CNN, Apr. 24, 2013, available at http://edition.cnn.com/2013/04/24/opinion/granderson-chicago-terror/ (lamenting that the level of resources often allocated toward counterterrorism efforts is not also directed at gang violence).

political influence. However, because in many democratic nations terrorism is granted unique legal treatment as an area in which expansive government power with lessened oversight and protection for individual rights is considered acceptable, importing such standards into other contexts is inviting a distortion of the traditional limits on governmental power and would allow for increases in government abuse and overreach.

The Definitional Dilemma

The quest to establish a universal definition of terrorism is entangled in law, history, philosophy, morality, and religion. Many believe that the definitional question is, by nature, a subjective one that eludes large-scale consensus. However, to address the problem of terrorist activity, the law must first define terrorism's parameters. This foundational question is of the utmost importance in determining who a state, nation, or international body will consider a terrorist and, therefore, who will be subject to the stricter laws, diminished rights protections, and harsher penalties that are concomitant with the designation of "terrorism." For example, in different jurisdictions, the designation of terrorist activity could result in the criminalization of otherwise protected speech,[8] a significant delay in access to counsel and other criminal due-process protections,[9] trial in a specialized court with fewer protections for defendants,[10] and, if convicted, significantly enhanced sentences for crimes.[11]

8 See, e.g., *Holder v. Humanitarian Law Project*, 130 S. Ct. 2705 (2010) (holding constitutional under the First Amendment a Patriot Act provision which made it unlawful to provide material support and assistance to organizations deemed terrorists, even where such support was nonviolent).

9 For example, in 2010, U.S. Attorney General Eric Holder shifted the Justice Department's policy with regard to the public safety exception articulated in *N.Y. v. Quarles*, 467 U.S. 649 (1984). Quarles held that the obligation of law-enforcement officers to inform arrestees of their right to counsel, among other *Miranda* rights, was subject to a public safety exception under certain circumstances. Holder's new policy articulation focused on the "magnitude and complexity of the threat often posed by terrorist organizations" and concomitant need for leeway in interrogation procedures as justification for delaying the reading of *Miranda* rights to suspects. *See* Attorney General Eric Holder, Jr., *Guidance for Conducting Interviews without Providing* Miranda *Warnings in Arrests of Terrorism Suspects*, U.S. Department of Justice, Oct. 19, 2010. A high-profile application of this policy occurred in conjunction with the interrogation of Dzhokhar Tsarnaev, one of the attackers in the April 2013 bombing at the Boston Marathon. See Charlie Savage, Debate over Delaying of Miranda Warning, *The New York Times*, Apr. 20, 2013, available at www.nytimes.com/2013/04/21/us/a-debate-over-delaying-suspects-miranda-rights.html?_r=0.

10 See generally Sudha Setty, Comparative Perspectives on Specialized Trials for Terrorism, 63 *Me. L. Rev.* 131 (2010) (discussing how specialized trials for terrorism in India allow for otherwise inadmissible evidence to be used against the defendant, place unusual limits on the right of the defendant to consult with counsel, and, in some cases, allow for burden shifting on the weight of evidence before the court).

11 See, e.g., U.S. Sentencing Guidelines Manual, 18 U.S.C. Appx. 3A1.4 (allowing for sentence enhancement for federal terrorism crimes). See also Wadie E. Said, Sentencing

The definitional ambiguity surrounding terrorism, along with the heightened legal and societal consequences of being designated as a terrorist, gives rise to international concern that governments will undercut civil liberties and civil rights by defining terrorism in an overly broad manner, allowing them to unfairly punish those who would not, in most situations, be considered by the international community as "terrorists."[12]

The United Nations General Assembly has tried to establish an internationally accepted definition of terrorism numerous times since the 1960s,[13] with the belief that "the effectiveness of the struggle against terrorism could be enhanced by the establishment of a generally agreed definition of international terrorism."[14] Each effort, however, failed based on the perceived subjectivity of any such definition, with some countries seeking exemptions for freedom-fighting or anti-colonial violence,[15] and others seeking to ensure that state-sponsored violence is not categorized as terrorism.[16] Nevertheless, almost all nations agreed that the definition of "terrorism" included common core elements such as the purposeful killing of civilians.

With a strong post-September 11 mandate to establish robust counterterrorism measures,[17] but without universal definition of terrorism on which to depend, the United Nations Security Council has established partial measures, such as including general descriptions of acts that fall within the rubric of terrorist activity without purporting to fully define terrorism. One working definition used by the United Nations is:

Terrorist Crimes, 75 *Ohio St. L. J.* 477 (2014) (describing how terrorism-related crimes carry significantly greater sentences than their non-terrorism counterparts).

12 See U.N. Econ. & Soc. Council, Comm'n on Human Rights, Report of the Special Rapporteur on the Promotion and Protection of Human Rights and Fundamental Freedoms While Countering Terrorism, pp. 26–27, U.N. Doc. E/CN.4/2006/98 (Sept. 28, 2005), at 27 ("[R]epeated calls by the international community for action to eliminate terrorism, in the absence of a universal and comprehensive definition of the term, may give rise to adverse consequences for human rights").

13 The search for a supranational definition of terrorism dates at least back to 1937, when the League of Nations considered the Convention for the Prevention and Punishment of Terrorism, Nov. 16, 1938, 19 League of Nations O. J. 23. Article 1(2) of the proposed Convention defined terrorism as "criminal acts directed against a State and intended or calculated to create a state of terror in the minds of particular persons, or a group of persons or the general public." Id. art. 1(2).

14 G.A. Res. 42/159, U.N. Doc. A/RES/42/159 (Dec. 17, 1987).

15 Alex Schmid, Terrorism—The Definitional Problem, 36 *Case W. Res. J. Int'l L.* 375, 386 (2004).

16 See Bruce Hoffman, *Inside Terrorism* 35 (Columbia University Press, 1998) (arguing that state-sponsored actions may be distinguished from terrorism because such actions can be deemed violations of international law or military rules of engagement and prosecuted accordingly as war crimes).

17 See S.C. Res. 1373, U.N. Doc. S/RES/1373 (Sept. 28, 2001) (mandating that all U.N. harsher sentencing for terrorist acts, freezing funds of those financing terrorist acts, sharing intelligence information with other member nations, and tightening border controls to prevent the migration of terrorists).

> Terrorism is, in most cases, essentially a political act. It is meant to inflict dramatic and deadly injury on civilians and to create an atmosphere of fear, generally for a political or ideological (whether secular or religious) purpose. Terrorism is a criminal act, but it is more than mere criminality.[18]

Security Council Resolution 1566 offers this partial definition:

> criminal acts, including against civilians, committed with the intent to cause death or serious bodily injury, or taking of hostages, with the purpose to provoke a state of terror in the general public or in a group of persons or particular persons, intimidate a population or compel a government or an international organization to do or to abstain from doing any act, which constitute offences within the scope of and as defined in the international conventions and protocols relating to terrorism … .[19]

Although seemingly expansive, Resolution 1566 limits the use of the label of "terrorism" to offenses that are recognized in previously agreed-upon international conventions and protocols, thereby tethering the implementation of Resolution 1566 to offenses commonly understood to fall under the umbrella of terrorism. Further, the language of the resolution limits its application to acts that are intended to provoke terror and/or compel a political response from a government.

Even with these interpretive limitations, the Security Council went further in protecting individuals and organizations from inappropriate designation as "terrorists" given the harsh consequences of such a designation. The Security Council designated an Ombudsperson to field petitions from individuals and organizations seeking to be delisted from being subject to international sanctions as terrorists.[20] Concerned about the severe repercussions of being designated as a terrorist, various Member States also moved to make the designation process more transparent, allowing for a challenge and delisting process for individuals and organizations, and strengthening international security by bolstering the perceived legitimacy of the United Nations as a regulator of security matters.[21]

18 *Measures to Eliminate International Terrorism: Report of the Policy Working Group on the United Nations and Terrorism*, U.N. GA/SCOR, 57th Sess., Annex at para. 13, U.N. Doc. A/57/273-S/2002/875 (2002).

19 See S.C. Res. 1566, P 1, U.N. Doc. S/RES/1566, at ¶ 3 (Oct. 8, 2004) (condemning all forms of terrorism, regardless of its motivations).

20 See S.C. Res. 1904, P 20, U.N. Doc. S/RES/1904 (Dec. 17, 2009) (mandating that "when considering delisting requests, the [Counter-Terrorism] Committee shall be assisted by an Office of the Ombudsperson").

21 E.g., Press Release, Security Council, Security Council Amends United Nations Al-Qaida/Taliban Sanctions Regime, Authorizes Appointment of Ombudsperson to Handle Delisting Issues, P 14, U.N. Press Release SC/9825 (Dec. 17, 2009), available at www.un.org/News/Press/docs/2009/sc9825.doc.htm (noting the concern of delegations from various nations that the process of designating terrorists be made more accessible, transparent, and equitable).