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Introduction

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1. Global anti-terrorism law and policy

The terrorist attacks of 11 September 2001 and subsequent attacks in many other parts of the world have resulted in an increased emphasis on anti-terrorism efforts at all levels of governance. Although many countries had experienced terrorism before 9/11, the prevention of terrorism has since emerged as one of the major tasks of domestic governments and regional and international organisations; as has the need to prevent the abuse of state power in the pursuit of an anti-terrorism agenda. By anti-terrorism law and policy, then, we mean not only efforts to empower governments to prevent and respond to terrorism, but the corresponding need to constrain abuses of those powers. The intensity of the global concern about terrorism is matched by the complexity of devising a proportionate response to it.

The multi-layered nature of anti-terrorism law and policy design makes it especially important for academics to bring their critical and comparative insights to the global development of anti-terrorism law and policy. This is a challenging task because anti-terrorism law crosses boundaries between states and conventional divisions between domestic, regional and international law. Anti-terrorism law and policy also crosses traditional disciplinary boundaries between administrative, constitutional, criminal, financial, immigration, international and military law, as well as the law of war. In addition, insights from a broad range of disciplines including history, international affairs, military studies, philosophy, psychology, religion, sociology and politics are essential in understanding the development of anti-terrorism law and policy. A global view is all the more urgent because what is done in one jurisdiction or international forum has the potential to ripple around the world, one set of decision-makers drawing inspiration from another.

The first edition of this collection was published in 2005, with most chapters having been completed in late 2004. Both terrorism and anti-terrorism are dynamic and much has changed since that time. This new edition represents complete revisions and, in several cases, new chapters with the addition of new authors, new topics and a new co-editor. As before, our aim is to contribute to the growing field of comparative and international studies of anti-terrorism law and policy. The first edition was preceded by a major international research symposium at the National University of Singapore in June 2004. For the second edition, we were fortunate to have a similar meeting in August 2010 at the University of New South Wales in Sydney that brought together leading legal academics from around the world to examine and compare anti-terrorism laws and policies in many major jurisdictions. This meeting allowed the contributors to this volume to revise and refine their chapters in light of our discussions and to provide cross-references to the chapters written by their colleagues.

As with the first edition, a particular feature of this collection is our attempt to compensate for the focus on Anglo-American and European perspectives in much of the existing literature in English. Although those perspectives are very important and well represented in this collection, we also have contributions dealing with anti-terrorism law and policy in Africa, Asia and the Middle East. We also continue to combine jurisdictionally-based chapters that focus on a particular country or region with overarching thematic chapters that take an overtly comparative approach by examining particular aspects of anti-terrorism law and policy, such as criminal or immigration law, in a number of jurisdictions.

The thematically-oriented chapters form the first two parts of the book. The first group of chapters examines some overarching transnational perspectives on terrorism. It includes a chapter that examines the leading role played by the United Nations and in particular its Security Council in responding to 9/11 and shaping anti-terrorism measures, and a chapter which questions whether a truly global anti-terrorism law is possible given the very different ('asymmetric') contexts of various nations. A third chapter considers the problem of 'transplantation' of anti-terrorism regimes both substantively, within a legal system, and geographically, from one state to another. The second set of thematic essays consists of chapters that engage in a comparative study of anti-terrorism measures. They include the criminal law, the legislative process, the effects anti-terrorism efforts have had on fair trial rights, laws against the financing of terrorism, immigration and asylum laws, and policies designed to prevent

religious or ideological extremism which have the potential to lead to terrorism.

The next three parts of the book consist of surveys of anti-terrorism law and policy in three groups of states. The chapters in Part III examine anti-terrorism law and policy in the strategically important and theoretically complex region of Asia, looking at the evolution of anti-terrorism law and policy in Singapore, Indonesia, the Philippines, China, Hong Kong, Japan and India. Part IV examines anti-terrorism law and policy in the West with chapters on the United States, United Kingdom and Canada. A final chapter examines both Australia and New Zealand. The last two jurisdictions could have been included in the Asian group, but seem to fit more naturally, in cultural and developmental terms, with the other 'Western' nations. The final Part attempts to complete the world tour with chapters on the important regions of Africa, Israel and the Occupied Territories and a number of countries in the Middle East including Egypt and Tunisia. We are fortunate that the last chapter even examines some of the possible implications of the apparently pro-democracy events of early 2011 on anti-terrorism law and policy in that critically important region.

No doubt other countries should have been included but there are limits to what is already a large volume. We have attempted to be as comprehensive and inclusive as we could given our limits on time and space, but we are well aware that we are only starting to scratch the surface and many other thematic topics, jurisdictions and disciplinary perspectives could usefully have been added to this collection. Although this is a second edition, we see this collection as complementing its earlier edition, the combination of both being a preliminary point of departure for a future generation of scholarship and debate about anti-terrorism law and policy.

2. Transnational anti-terrorism law: the interplay between international and domestic regimes

One of the challenges of the study of global anti-terrorism law and policy is the important interplay between international, regional and domestic sources of law. There have been a number of important conventions on specific forms of terrorism at the international and regional levels, but a universal definition of terrorism has so far proved impossible to achieve. On 28 September 2001, the United Nations Security Council issued Resolution 1373 calling on all member states to criminalise terrorist acts and financing, planning, preparation and support for terrorism. This resolution, however, did not define what was terrorism, leaving that

crucial, difficult and, some might argue, impossible task to each national state. Each nation was then to define terrorism according to its own history, objectives and concerns. The end result cannot be fully understood without taking in both the international and the domestic ends of the conversation as well as mediating regional and supra-national forces.

Security Council Resolution 1373 was unprecedented because it set forth in detail an anti-terrorism agenda for all member states. Like Resolution 1267 before it, Resolution 1373 was issued under the mandatory provisions of Chapter VII of the United Nations Charter relating to the maintenance of international peace and security. It created a new Counter-Terrorism Committee and called on all states to report to this Committee no later than ninety days after the resolution was issued. In many countries this facilitated a rush to legislate new anti-terrorism laws, including in jurisdictions such as the United Kingdom which already had tough anti-terrorism laws on the books. The country reports to the Counter-Terrorism Committee provide a unique source of information about how nations are responding to terrorism, though the Committee has recently and for unexplained reasons made the regrettable decision to no longer publicly post new country reports.[1]

Resolution 1373 can be criticised for its relative inattention to international human rights norms and standards[2] and can be contrasted with the 2006 Counter-Terrorism Strategy approved by the General Assembly which features not only measures to combat terrorism, but also the need to respect human rights while countering terrorism and to respond to the conditions conducive to terrorism.[3] Various rapporteurs and other rights protection officers have also often critically evaluated the anti-terrorism activities of both the United Nations and member states as a means of attempting to reconcile the way that various parts of the UN have responded to terrorism.

[1] The relevant website simply states: 'No new country reports are being added to the website.' See the Counter-Terrorism Committee's website, available at www.un.org/en/sc/ctc/resources/index.html.

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

[3] *The United Nations Global Counter-Terrorism Strategy*, UN Doc.A/Res/60/288 (20 September 2006). For a discussion of the role of various parts of the UN with respect to terrorism, see Kent Roach, *The 9/11 Effect: Comparative Counter-Terrorism* (Cambridge University Press, 2011), Chapter 2.

The United Nations has played an important role, but it does not operate in a vacuum. Before the terrorist acts of 11 September 2001, the Security Council had developed a listing and individual sanctions regime under Security Council Resolution 1267 for those associated with the Taliban and al-Qaeda. In recent years, there has been fascinating but often indirect resistance to this listing and individual sanctions regime as a number of courts have ruled that the secret and intergovernmental process of listing violates various international, regional and domestic due process norms. The Security Council has responded with reforms, including in Security Council Resolution 1904 the appointment of an Ombudsperson to consider de-listing requests and in Security Council Resolution 1989 with a restructuring of the al-Qaeda listing committee and processes. Chapter 2 provides an account of these fascinating developments while Chapter 3 raises the broader question of whether truly global anti-terrorism laws as vigorously promoted by the Security Council and its committees are even possible given the very different ('asymmetic') governmental, socio-legal and political contexts into which they are projected. Chapter 4 tackles the problem of transplantation, cautioning against the assumption that legal regimes can be transplanted substantively, from one part of a legal system to another (e.g. from the national security area to the criminal law) or geographically, from one state to another. An important feature of contemporary anti-terrorism law is the way that it emerged from transnational dialogues between international, regional and national institutions.

3. Defining terrorism

Terrorism is an emotionally charged morally laden and political contentious concept, which has nevertheless emerged as a critical and unavoidable feature of the legal landscape, both internationally and domestically. The United Nation's Security Council in Resolution 1373 required all member states to ensure that terrorism and terrorism financing were treated as serious crimes, but did not provide any guidance to states about how to define terrorism until three years later in Security Council Resolution 1566, after many states had enacted new anti-terrorism laws. As with any attempt to articulate the meaning of a contentious term, the mention of 'terrorism' evokes a range of images. Yet the emergence of terrorism as a crucial legal and political concept has forced the issue, challenging us to articulate a definition that in most cases has profound implications for the way in which individuals, businesses, communities, states and regional and international organisations conduct their affairs.

The first step in defining terrorism consists in distinguishing terrorism from what it is not. Whatever terrorism is in its contemporary legal use, it is conceptually distinct from: (1) legitimate state responses or *counter*-terrorism, (2) national liberation struggles and (3) ordinary criminal offences. And yet, on each of these counts, the attempt to define terrorism is fraught with difficulties. One important problem is that terrorism and counter-terrorism are indistinguishable in as much as they involve violence and fear, seek a broader audience, are purposive and instrumental, and affect noncombatants.[4] Thus, to distinguish *legitimate* state responses from terrorist attacks is more difficult than it might first appear, and might well involve a closer look at what states do and choose not to do – at the range of responses available to states and the ways in which they *refrain* from acting in the face of an act of political violence.

The uncertain distinction between terrorism and counter-terrorism has serious implications for the definition of terrorism under international law. While there is some agreement in international law in defining terrorism for specific purposes (such as stopping the flow of funds to terrorist groups (Chapter 8)), the attempt to formulate a comprehensive definition of terrorism is stymied by long-standing concerns over the legitimate use of political violence by national liberation movements. Given the long-standing political difficulties involved in finding a comprehensive international definition,[5] the task of defining terrorism has fallen on individual states, which have tackled this challenge in distinct ways, with varying degrees of success. Security Council Resolution 1624 calling on all states to enact laws prohibiting the incitement of terrorism also places pressures on the definition of terrorism given that speech in favour of acts in foreign lands may be criminalised under incitement laws.

Once the ordinary criminal law is seen as inadequate for dealing with the perceived threat of terrorism at the domestic level, the tendency of legislators has been to create new super-criminal offences under the banner of terrorism. But this means that the new terrorist offences have to be distinguished from ordinary crimes and the way in which this is done often invites controversy. For example, the UK's influential Terrorism Act 2000 defines terrorism to require proof of religious or political motives. The religious or political motives approach has been followed with some

[4] Laura K. Donohue, 'Terrorism and the counter-terrorism discourse', in Victor V. Ramraj, Michael Hor and Kent Roach (eds.), *Global Anti-Terrorism Law and Policy* (Cambridge University Press, 2005), pp. 13 ff.

[5] See C. L. Lim, 'The question of a generic definition of terrorism under general international law', in Ramraj, Hor and Roach, *Global Anti-Terrorism Law and Policy*, pp. 37–64.

variations in other jurisdictions including Australia (Chapter 21), Canada (Chapter 20), Hong Kong (Chapter 15), Israel (Chapter 23), New Zealand (Chapter 21) and South Africa (Chapter 22), but has not been followed in others including the United States (Chapter 18), Singapore (Chapter 11) Indonesia (Chapter 12), the Philippines (Chapter 13) and many countries in the Middle East (Chapter 24), which define terrorism primarily by reference to the nature of the harm caused. In the Middle East, broad definitions of terrorism found for example in both the Egyptian Penal Code and the Arab Convention on Terrorism raise concerns about the use of terrorism laws against dissenters. They also raise concerns about the ambit of 'freedom fighter' exemptions and whether these are a fair application of any such exemption. As this book was going to press, the centrality of these definitional issues has re-emerged as anti-government movements in Tunisia (January 2011), Egypt (February 2011) and Libya (August 2011), which were spreading to the region, brought down authoritarian governments in circumstances that could fall within some definitions of terrorism. Elsewhere in the region, and especially in Syria, similar anti-government movements have been met with force by the state, again in conditions that could fall within some definitions of terrorism that include state actions.

4. Fairness, emergencies and the rule of law

State concerns about international terrorism have given rise to important questions of practice and principle concerning the emergence in many countries of a new broad anti-terrorism regime or the revitalisation in other countries of older anti-terrorism measures. In Singapore (Chapter 11), Israel (Chapter 23) and many Middle Eastern countries (Chapter 24), few amendments to the anti-terrorism regime were needed in light of pre-existing laws, including those providing for administrative detention and trials before special courts. These countries have not, however, been inactive in responding to new global demands and have enacted new laws. Egypt, for example, enacted constitutional amendments in 2007 to shelter any new anti-terrorism law from much constitutional review and protect the power of the President to refer security cases to special courts including military courts. Recent events at the start of 2011 in Egypt and elsewhere, however, underline the fact that such formal legal developments will not necessarily be the last word and the importance of the continually evolving political and social context. Before he left office, President Hosni Mubarak stated that he was prepared to cancel the 2007 amendments that sheltered terrorism laws from much constitutional review and gave him

as President powers to refer security cases to special courts. Subsequent to his resignation, a committee has proposed constitutional changes that also propose to repeal the 2007 amendment relating to security laws and cases. The committee has also proposed that any subsequent Presidential declaration of a state of emergency would have to be approved by the legislature after seven days and by the people in a referendum after six months. These proposals were subsequently approved in a referendum.[6]

The new emphasis that the United Nations, the United States and other powerful actors have placed on the prevention of terrorism also places pressures on new and emerging democracies. In Hong Kong a new Security Bill was introduced in 2002 but withdrawn after protests (Chapter 15), while in China the legacy of 9/11 is complex and in some respects the legalisation of emergency powers may even strengthen a relatively weak rule of law in that country (Chapter 14). Kenya has also resisted attempts to enact a new anti-terrorism law, in part because of concerns about bowing to US pressure and about such laws being used to discriminate against its Muslim minorities (Chapter 22). Concerns have been expressed that US pressure, including extraordinary renditions, played a role in countering reform movements in some states in the Middle East (Chapter 24).

Indonesia is the world's most populous Muslim nation and a newly emerging democracy. It enacted a new anti-terrorism law initially through Presidential decree in response to the 2002 Bali bombings. Parts of this law, particularly those involving the use of intelligence as evidence, have been resisted and other parts, such as the attempt to apply the law retroactively to the first Bali bombings, have been ruled by the courts to be unconstitutional. Chapter 12 examines the evolving Indonesian situation including calls for tougher anti-terrorism laws and a greater role for the military in anti-terrorism efforts. Increased roles and powers for the military in anti-terrorism efforts can be seen in the United States (Chapter 18), Japan (Chapter 16) and in parts of India (Chapter 17) as well as in Israel (Chapter 23) and the Middle East (Chapter 24). This makes the study of military law an increasingly important facet of anti-terrorism law.

In many countries, particularly in the developed West, governments were quick to construct a complex anti-terrorism regime, amending the existing framework of, to name a few examples, criminal law and

[6] Other proposed constitutional changes include term limits on the President and Vice President and the restoration of judicial supervision of elections: Reuters 'Factbox: Egypt's Constitution' (10 February 2011); Reuters 'Factbox: proposed changes to Egypt's Constitution' (26 February 2011); 'Constitutional changes pass in Egypt referendum', *New York Times*, 20 March 2011.

procedure, immigration law, administrative law, aviation and maritime law, and financial law in response to the perceived new threat of international terrorism. Money laundering and terrorism financing laws were also enacted in less developed states including in Egypt and Syria (Chapter 24). Although much effort has been invested in expanding the criminal law to cover various acts of preparation and support for terrorism, there has also been interest in less restrained alternatives to the criminal law (Chapter 7) and immigration detention (Chapter 8). Immigration law has often allowed for the use of broader liability rules, secret evidence and lower standards of proof than the criminal law, but its use as anti-terrorism law has been challenged in both the United Kingdom (Chapter 19) and Canada (Chapter 20). In the United States, military detention at Guantánamo and elsewhere has famously been used as an alternative to criminal prosecution. Military detention and military trials, as well as targeted killings, have continued in the United States under President Obama (Chapter 18).

The use of targeted killing increased under the Obama Administration and was defended by the Administration as legitimate acts of self-defence even if committed outside an armed conflict in places such as Yemen and Pakistan and as sanctioned by Congress's Authorization of the Use of Military Force against those responsible for the 9/11 attacks. The most famous targeted killing was the May 2011 killing of Osama bin Laden in Abbottabad, Pakistan by a team of US Navy Seals. President Obama defended the killing as an act of justice, Attorney-General Eric Holder defended it as an 'act of national self-defence' and Harold Koh of the State Department argued it was consistent with the Administration's proportionate use of force.[7] There was much celebration of bin Laden's death, but a few commentators, however, raised questions about the legality of the killing, especially after it was learned that bin Laden was not armed when he was shot in the face and the chest and it was not clear on the facts revealed about the secret raid whether bin Laden, even if otherwise participating in the conflict, had surrendered. Pakistan also raised some concerns about the US operation, but they were muted in comparison to those it raised about earlier US targeted killings in that country. The

[7] Thomas Darnstadt, 'Was bin Laden's killing legal', *Der Spiegel*, 3 May 2011; 'US responds to questions about killing's legality', *The Guardian*, 3 May 2011; 'bin Laden killing prompts US–Pakistan War of Words', *The Guardian*, 4 May 2011; 'bin Laden's killing in Pakistan lawful says US', *BBC News*, 4 May 2011; Harold Koh 'The lawfulness of the U.S. operation against bin Laden', available at opiniojuris.org/2011/05/19/the-lawfulness-of-the-us-operation-against-osama-bin-laden/.

killing of bin Laden avoided the need for a trial, but the death penalty is being sought against Khalid sheikh Mohammed and others alleged to have organised the 9/11 attacks. Both the reliance on targeted killing and the use of military commissions as opposed to civil courts underline how the United States had continued to stress a war model towards terrorism a decade after the deadly attacks and despite a change in administration.

The government of the United Kingdom has recently announced plans to reformulate some of its post 9/11 enactments, including the use of control orders and random searches and the reduction of the maximum period of preventive arrests from twenty-eight to fourteen days.[8] The exact nature and effect of these reforms remain to be seen, but they affirm the dynamic nature of anti-terrorism law and policy. India provides an important example of this fluidity: the Prevention of Terrorism Act 2002, enacted after 9/11, was repealed, but has been followed by various amendments of older laws after the 2008 Mumbai terrorist attacks. In India and elsewhere, the changes to the formal law only tell part of the story of how the state has responded to terrorism and the threat of terrorism (Chapter 17).

Despite the retrenchment announced in early 2011, the UK government has affirmed its plans to continue to deport suspected terrorists to a variety of countries on the basis of assurances that the individuals will not be tortured on their return. As outlined in Chapter 9, the UK has concluded agreements and deported terrorist suspects to Algeria and other countries in the Middle East on the basis of assurances that the suspects when returned will not be tortured. Claims of political and other forms of prosecution made by immigrants, and especially asylum seekers who in turn may be suspected as terrorists, take us full circle back to the difficult process of defining what constitutes terrorism, particularly in societies in conflict and failed states. It underlines the transactional complexity and interrelationships that make the study of global anti-terrorism law and policy both challenging and fascinating.

The breadth of many anti-terrorism regimes and the vigour with which they are being enforced give rise to fundamental normative questions about the constitutional order and their implications for the role of the legislative, executive and judicial branches of government. We might question whether fundamental changes to the legal order are needed or justified in the first place. One of the important theoretical questions

[8] Her Majesty's Government, *Review of Counter-Terrorism and Security Powers: Review Findings and Recommendations* (Cm 8004, January 2011).

arising from the changing legal landscape is the extent to which the rule of law can and should be preserved. In the first edition, we included a chapter by Oren Gross that defended an extra-legal approach in order to prevent distortions in the constitutional order in an emergency, while at the same time promoting accountability for extra-legal measures taken by public officials by subjecting them to possible *ex post* political or legal checks.[9] This argument provoked a response in the first edition by David Dyzenhaus.[10] Drawing on common law principles of administrative law, Dyzenhaus proposed a 'Legality Model' according to which, in times of emergency, governments adapt to the new circumstances by creating imaginative institutions with the necessary expertise to review national security decisions. While these institutions might not conform strictly to a formal conception of the separation of powers, the right sort of institution would be able to preserve legality while remaining sensitive to the special circumstances of security agencies. The Gross/Dyzenhaus debate was featured in a second collection of essays[11] and is not included in this volume. Nevertheless, it remains an important touchstone in reminding us of the reality of extra-legal conduct in attempts to stop terrorism and the challenges of accommodating terrorism and emergencies within the rule of law without producing permanent states of emergency and exception. The common assumptions of this debate must also be explored. In some countries, especially in the Middle East, Africa and Asia, extra-legal conduct may be more endemic than assumed by either Gross or Dyzenhaus and reflect underlying issues involving culture and capacity.[12]

Whether and to what extent the judiciary should play a role in imposing normative constraints on the executive and legislative branches in times of crisis is an important issue. Either the judiciary or a specialised, independent administrative tribunal may well have a role to play in compelling the other branches of government to justify normatively and publicly any restrictive measure they seek to impose in the name of risk-prevention. But whether the courts are ready in practice to use their

[9] Oren Gross, 'Stability and flexibility: a Dicey business', in Ramraj, Hor and Roach, *Global Anti-terrorism Law and Policy* pp. 90–106; see also 'Chaos and rules: should responses to violent crises always be constitutional?' (2003) 112 *Yale Law Journal* 1011.

[10] David Dyzenhaus, 'The state of emergency in legal theory', in Ramraj, Hor and Roach, *Global Anti-terrorism Law and Policy* pp. 65–89.

[11] Victor V. Ramraj (ed.), *Emergencies and the Limits of Legality* (Cambridge University Press, 2008).

[12] See generally, in the Asian context, Victor V. Ramraj and Arun K. Thiruvengadam (eds.), *Emergency Powers in Asia* (Cambridge University Press, 2010).

powers to constrain executive power is, however, another matter. In the United Kingdom (Chapter 19), the United States (Chapter 18), Canada (Chapter 20) and Indonesia (Chapter 12), the highest courts have ruled against major parts of the government's anti-terrorism efforts, including indeterminate detention without trial, the denial of habeas corpus to detainees at Guantánamo, the use of unchallenged secret evidence and the retroactive imposition of anti-terrorism laws. At the same time courts in Australia (Chapter 21), Canada (Chapter 20) and India (Chapter 17) have upheld anti-terrorism laws, including laws that were subsequently repealed or allowed to expire by the legislature. In some countries, such as Egypt (Chapter 24), Singapore (Chapter 11) and the United States (Chapter 18), some anti-terrorism laws and practices may be effectively immune from judicial review. Targeted killings, for example, have been immune from judicial review in the United States but not in Israel.

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

5. How effective is the anti-terrorism agenda?

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

Issues of effectiveness often feature in legal debate. The House of Lords' decision that the indeterminate detention of non-citizens who could not be deported because of torture concerns was a disproportionate response

to terrorism[13] was in part premised on the conclusion that a more rational and less discriminatory response to the terrorist threat, including that presented by citizens, could be equally, if not more, effective. The imposition of increased review of detentions at Guantanamo also raises questions about whether a lack of due process produces both false positives, where innocent people are imprisoned, and false negatives, where terrorists are released.

Security Council Resolution 1373 placed much emphasis on laws against the financing of terrorism, and international, regional and domestic jurisdictions have devoted much effort to compiling lists of terrorists who cannot be financially supported and to broad laws against the financing of terrorism (Chapter 8). The effectiveness of these interventions, however, remains an open question. The US 9/11 Commission, for example, found that the cost of mounting those attacks were less than half a million US dollars US, and expressed considerable scepticism about the strategy of stopping terrorists by stopping their financing.[14] This is a particular concern in light of the fact that many informal means of transferring money around the world for legitimate purposes are not easily regulated (Chapter 8). Thus both the effectiveness of terrorism financing (including costs that are often externalised to financial institutions and others with reporting requirements) and the unfairness of listing of terrorists on the basis of secret evidence, should be considered in any evaluation of the almost ubiquitous terrorism financing regimes. Similar concerns could be raised about the use of immigration law as anti-terrorism law and the dangers that such strategies may export terrorism from advantaged to less advantaged states (Chapter 9).

Legislatures often enact criminal laws in response to terrorist acts and threats (Chapter 5). These responses often receive much public and scholarly attention, but it is important not to ignore less visible administrative measures that may be taken to protect sites and substances that can be used for terrorism. The strategies to protect aeroplanes and other vulnerable sites and substances, such as biological, chemical or nuclear substances, often rely on administrative and licensing measures that are softer or less coercive than the use of criminal or immigration law or military force. Technology can play an important role in anti-terrorism law and policy by, for example, increasing the ability to screen material

[13] *A* v. *Secretary of State* [2004] UKHL 56.
[14] *The 9/11 Commission Report* (New York: Norton, 2004), [12.3].

on aeroplanes and ships for hazardous substances. At the same time, the use of technology to facilitate surveillance presents serious risks to privacy.

After initially stressing the use of criminal or immigration law as the prime instruments to be used against terrorism, Canada released a new national security policy in 2004 that takes an all-risk approach seeking to address, not only the threats of terrorism, including bio-terrorism and terrorism directed at critical infrastructures, but also diseases such as SARS and the disruptions of essential services by man-made or natural disasters (Chapter 20). The US 9/11 Commission has recommended two other alternative strategies: the softer 'hearts and minds' approach and a more long-term effort to prevent the emergence of failed states as part of its anti-terrorism recommendations.[15] It remains to be seen whether a comprehensive all-risks approach to human security will result in a more rational allocation of resources and restrain some of the excesses and failures that may be associated with interventions that direct their energies to the narrower task of detecting and detaining suspected terrorists.

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

It is understandable that the many lawyers that have contributed to this volume should focus on the analysis of law and legal institutions. That should not, however, be allowed to tempt us to underestimate the often decisive political and historical forces that are at play. Exclusive attention to legal and institutional design in anti-terrorism efforts will also fail to capture the fascinating, but troubling, experience of countries like India (Chapter 17) and the Philippines (Chapter 13) where the complicity of governmental elements in acts of terrorism reveal far more basic problems, such as the establishment of a sufficiently orderly and corruption-free government. Here it may be more fruitful to talk about 'rule by law', rather than how the 'rule of law' might constrain governmental excesses in the fight against terrorism. At the same time, terrorism laws may in some countries such as Indonesia (Chapter 12) and in reformed regimes in the Middle East (Chapter 24) be instruments that could advance the

[15] *Ibid.*

rule of law and resist traditions of emergency and military rule and human rights abuses.

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

This volume can only scratch the surface of what is really going on with anti-terrorism law and policy around the globe. In the Philippines, where the lack of institutional capacity to deal with terrorism is the most prominent issue, the alternative of importing US troops to do the work has sparked off an intense political controversy stemming from the historical experience of the Philippines being a US colony, and of the subsequent location of major US military bases there. The 2007 enactment of a new terrorism law in that country should be evaluated in that context. Similarly, India's response to terrorism reflects various geopolitical factors and hot spots as much as the formal law (Chapter 17). Calls for Japan to be more pro-active in the 'war against terrorism' are snagged by the nation's professed total and perpetual renunciation of military solutions in international relations, a legacy of Japan's aggression and subsequent defeat in World War II (Chapter 16). Attempts in Hong Kong to enact a new security law in 2003 foundered both because of human rights concerns and because of a desire not to be dictated to by Mainland China (Chapter 15). In many countries, post-9/11 developments in anti-terrorism policy can only be fully understood in the context of past historical concerns and current geopolitical realities.

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

the United States and Canada calls into question any thesis that suggests that Western responses to terrorism will necessarily reflect a more individualistic and libertarian culture than those found in the East and the South. This volume would have served its purpose if it gives some insight into the extent to which we can usefully learn from one other, or simply talk to each other, about the challenges presented by terrorism and counter-terrorism, phenomena which, however defined, are common to all.