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The Panoply of Challenges Facing International Criminal Justice: The United Kingdom's Response to Defining and Responding to Terrorism

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Abstract: Crimes such as terrorism pose some of the biggest postmodern challenges faced by criminal justice systems worldwide. How systems react and prevent such crime raises numerous legal, political and strategic issues i.e. cross-jurisdictional collaboration, policing and the erosion of civil liberties such as privacy. In this article, taking inspiration from criminological theory, two criminal justice challenges that are posed by terrorism are explored from the United Kingdom's perspective: the international definition of terrorism including the factors that impede a common definition from being established and the domestic response to define, prevent and prosecute this crime. The aim of, and originality in, this article is to explore the criminal justice challenge facing the United Kingdom in balancing complex and competing interests when effectively responding to terror crime.

Keywords: international criminal justice, defining terrorism, novel phenomenon, criminal evidence, cooperation and jurisdiction

1 Introduction

The criminological custom explores how various traditions come together with contemporary society and how it defines and controls crime. This school of thought places an emphasis on the 'centrality of meaning and construction of crime as a momentary event, subcultural endeavour and social issue' (Ferrell in Ritzer 2007). From this perspective criminological subject matter surpasses traditional definitions of crime and causation to include symbolism in terms of law enforcement and media representation, the cultural and social construction of

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crime, emotions towards and perceptions of the threat posed by criminality and even the responses to given criminality. Its remit is to 'keep turning the kaleidoscope on the way in which we think about crime … [and] the legal and societal responses to it' (Hayward and Young in Maguire et al. 2007: 103). This broader focus illuminate's crime and the responses to it as meaningful human activity and lends impetus for a contextual analysis of the politics that underpin crime control. Such analysis can aid a better understanding of the problems posed for criminal justice systems, help highlight any possible solutions to them and inform or influence policy makers in the decision making process. An analysis set within a criminological framework or interactionist model provides an alternative meaning to problems, explanations that are informed by the insights of sociological criminology (see generally Carrabine et al. 2014: 66–84) and cultural studies to investigate and emphasize the mediated ideologies that act as a tour de force in controlling particular criminal behaviour.

Eradicating terrorism simply cannot be achieved through shutting out the terrorists or having regimes of security measures that have vaguely defined parameters; both pose significant albeit substantively different dangers to democracy. Terrorism is a dynamic phenomenon – framing this using, what are commonly referred to as, western sensibilities seem naïve (Benjamin and Simon 2002). Researchers, governments and other authorities continually highlight the national and international struggles being faced in combatting this crime (Gragera and Pascual 2014: 114). It would not be unfair to state that since the 9/11 terrorist attacks on the United States of America (Hamm in Ferrell 2004: 293) combatting terrorism has led to societies trading civil rights, such as including the right to a fair trial, freedom of association and speech under the Human Rights Act 1998 (HRA), in return for propounded potential increases in protection and security (Brandon 2004). The polarization of societies has led to entire identities being rewritten (Lyon 2001) – with the authors of the discourse suggesting that this is required by the fight to preserve democracy and maintain order. One of the results of this is panoptical surveillance achieved through cross-jurisdictional regimes of open and covert surveillance.[1] Risk-based crime control strategies and notions such as political policing[2] (Brodeur in Loftus 2012: 275; Foucault in Delanty and Strydom, 2003)

1 The UK authorised a drone airstrike that killed two British men that had radicalized to join the terror group ISIS. The attack was made following evidence obtained from surveillance showing that the two men planned to commit heinous crimes on British soil. The then Prime Minister, David Cameron, stated that the attack was authorised as a 'necessary and proportionate [measure] for the individual self-defence of the UK' and its 'inherent right to self-protection.' See: The Guardian, UK forces kill British Isis fighters in targeted drone strike on Syrian city.

2 Knowledge of crime aids political decision making, measurement of activity and choices made – the Foucauldian notion of discursive regimes can be applied here.

and security-society (Zedner 2009) have provided further impetus to the advancement of the technology and methods used in covert surveillance[3] (Singh 2015, 2020). Thus, the world as ordinary people know or had perceived it has suddenly changed shape.

Such surveillance has led to panoptic challenges[4] (Foucault 1979: 216) – the detection, prevention and prosecution of terror crimes are some of the most information hungry activities we have seen in criminal justice for a long time because of the complexities and challenges that they present[5] (Walker 2008: 275). Parliaments across the world including the United Kingdom, France, USA and Canada, have all laid out legislative regimes to facilitate covert surveillance – systems that purport to bring perpetrators of terror crime to justice whilst safeguarding civil liberties through requirements of due process, some of which will be discussed in this article. The United Kingdom's Police Act 1997 and Regulation of Investigatory Powers Act 2000, Australia's Surveillance Devices Act 2004 (ComLaw) and Canada's National Security Act 2017 (C-59) and its precursor Anti-Terrorism Act 2015 (C-51) are good examples of this (Daniels, Macklem, and Roach 2001).

An internationally accepted definition of terrorism is important because international law moulds domestic policy level responses. In addition, the potential for abuse of the extraordinary and draconian powers that are often triggered in response terror crime and the grave punishments individuals are subjected to when under investigation and pre-and-post conviction for example surveillance and restrictions on movement and/or association etc. It is also important as it has, in no doubt, a collateral effect of criminalising non-criminal activity such as supporting groups that may encourage terrorist or violent action. Therefore, a unified definition therefore acts to safeguard civil rights, due process and the rule of law. It is important to protect these to preserve peace, prevent totalitarianism, and ultimately to maintain peace and prevent war.

In this article the criminological tradition is used to explore the response to two postmodern criminal justice challenges posed by terrorism: establishing a common international definition of such criminality and the United Kingdom's response to appropriately preventing and prosecuting it namely, the successful

3 This article is informed by conference and other discussions from academic conferences and my time as Research Fellow at the Hong Kong University.

4 I borrow Jeremy Bentham and Michel Foucault's notion of panopticism to describe the response to terror crime as requiring a panoptic or all-visual response. This is in line with Foucauldian reasoning that this solution (panopticism), although he discussed it in relation to prisons, leads to an entire 'new' society being formed.

5 For instance, the modern terrorist is often not an alien but a British Citizen, it could be your neighbour and that makes detecting, distinguishing, surveilling and preventing them from perpetrating acts of terror an incredible task.

management and prosecution of perpetrators and safeguarding due process. The article is set out in four parts; first, it is salient to begin by exploring the phenomenon of how terrorism is defined and the potential problems posed by this – Foucault's 'panopticism' and Benjamin's 'crystal constellations' serve as a useful metaphor to examine the social perception of terrorism and the International responses to it with emphasis on current law as at July 2021.[6] The second part focuses on the International position in terms of convention and law; the responses of the United Nations and the United Nations Security Council with reference to case law relating to due process and judicial scrutiny. Part three highlights the United Kingdom's perspective, and finally part four discusses contemporary cross-jurisdictional issues and concludes the discussion. The aim of this article is to explore, using criminology and practical criminal justice, how the United Kingdom's domestic response to terror crime is affected by the approach in international criminal justice. It is hoped that this study will raise discourse between policymakers and practitioners in their decision-making for instance in the appropriate, effective and acceptable legal responses and to raise public awareness of the issues faced by the criminal justice system in the prosecution of terror crime.

2 Part 1, the Phenomenon: Terror(ism)

Major terror attacks and the radicalization of youth born or naturalized in Western Europe and North America have prompted nations across the world to challenge their assumptions in relation to 'who is the modern day terrorist' and make major changes to their social and political traditions, and their respective legal frameworks. Examples include September 11th (2001) attacks on the World Trade Centres (USA) which resulted in the erosion of long standing rights and civil liberties, the Mumbai attack on the Taj Hotel (India), the Boston Marathon bombing in 2013 (USA) and more recently the attack on the Manchester Arena in 2017 (UK) all of which led to policy and legislative responses. The stereotype that terrorists are 'foreigners' who emanate from marginalized countries to damage or destroy Western values is proving untrue given the fact that young men and women from

6 The idea of 'coincidental forensics' that is the potential of bringing together diffused fragments of evidence to prosecute criminality in a National Security Court or Ad Hoc NSC are explored in my article (Singh, 2020). Fragments of evidence refer to anything in the available media that can positively aid an identification of the perpetrator(s) and bring them to justice. The term media is used to denote any available evidence i.e. content from a video, voice recording, photograph or statement etc.

the United Kingdom, France, United States of America and Canada are joining terrorist organisations (Bizina and Gray 2014).

2.1 Radicalisation and/or Homegrown Terrorism

Terrorism caused by the radicalization of western youth is widely attributed to disenchantment, social isolation and the search for acceptance, identity and purpose (Precht 2007). Even though it has not been successfully tracked over the last two decades, radicalization has been accepted as a socio-political and a relationally dynamic process (Bigo et al. 2014). This suggests that an array of issues team into the category, issues including living and finding a role in an ever increasingly digitally complex (Al-Lami and O'Loughlin 2009) and globalized society (dislocated situatedness), social cohesion and integration (Archick, Rollins, and Woehrel 2005), the functioning and provision of education including singular faith schools, unemployment (Sageman 2004), the failure in western countries to avoid ghettoization (Baker, Mitchell, and Tindall 2007), discrimination, poverty[7] although recent research suggests high earners have greater levels of sympathy towards terrorist acts too (Bhui, Warfa, and Jones 2014),[8] religion, being the victim of a state sponsored crime (note Iraqi female suicide bombers) (Al-Lami 2009; Christmann 2012), unwillingness of communities to consensually communicate with the police (Briggs 2010) and the political environment. To these one could add the demonization of the western notion of democracy that stands in opposition to particular cultural, social and religious ideologies and democracy, and a failure of states to adopt the rule of law.

One initiative was launched by the United Kingdom in s.26[9] of the Counter Terrorism and Security Act 2015 (CT&SA 2015). This provision, which came into force in March 2016 and introduced the 'prevent duty' which placed a general

7 Ibid note 11.

8 This research focused on a new method of assessing vulnerability to violent radicalization and public health interventions aimed at preventing the emergence of risk behaviours, preventing and treating new illness events through the identification of foci for preventive intervention. The research is limited because it uses a presupposed 'representative population sample of men and women aged 18–45, of Muslim heritage and recruited by quota sampling by age, gender, working status, in two English cities' namely London and Bradford that affects the ability of researchers to draw meaningful generalizations.

9 Schedule 6 of the Act provides the definition of who is included as a 'specified authority' that clearly includes faith schools but excludes religious establishments.

requirement on specified authorities including the NHS, the police and probation service, schools, colleges and universities, to 'have due regard to the need to prevent people from being drawn into terrorism'. The idea was that this will intervene at an early stage in the process of radicalization; pre-radicalization, self-identification, indoctrination and then jihadization (Bhui 2014; Christmann 2012). The problem with the duty was that it is rather opaque, and majority of the specified authorities had little experience and/or knowledge in dealing with the issue of identifying those most vulnerable to radicalization. This created a momentum for specified authorities to train their respective staff on their 'legal duty' but to many it was no more than an exercise to evidence that the minimum requirement had been met. As of the year ending 31st of March 2019 5,738 individuals were referred to Prevent, this is down from 6,093 in March 2017. Education sector referrals stood at 1,887 or 33% of that total figure. The majority of referrals were male (87% or 4,991) and were aged 20 years or below (58% or 3,343) (HMSO, 2019).[10] This demonstrates effective reporting but not de-radicalization.[11] There is little evidence, other than the above statistics, to suggest that organisations have put in place robust institutional procedures to effectively manage such vulnerable persons. Given the opaqueness of the scheme, if a staff member manages to identify someone that is vulnerable to radicalization then the most, they can do is to report that fear to their line manager or designated person and never directly to the relevant authorities. It is unclear what action this 'institutional filter' would take, if any, and therefore the entire process may result in the person never becoming visible to the state or being availed to schemes to tackle the issues that have led them to be significantly more prone to being radicalized than for example their contemporaries. It is salient to note that the figures for 2020–21 are not presented, the coronavirus pandemic has affected the statistics which require reconciliation with data to be gathered in the years following the pandemic once the opportunity to identify individuals at risk returns.

10 Note also from this bulletin: 'The Channel programme in England and Wales is an initiative that provides a multi-agency approach to support people vulnerable to the risk of radicalization … [and] Of the 561 Channel cases, the most common were cases referred because of concerns about right-wing radicalisation (254, 45%), followed by Islamist radicalisation (210, 37%).' At p. 1–3. [Date Accessed 12/05/2020].

11 Section 36 (2) and (4)(a) – (e) CT&SA 2015 require the local authority panels setup to assess the extent to which particular individual are being drawn into terrorism to prepare a plan of support for the purpose of reducing their vulnerability to being drawn into it.

2.2 Organised Terrorism

The growth[12] of organized terror rather than disorganized terrorism i.e. lone rangers or individuals that are not part of a greater network of terrorists but that may subscribe to a particular cause or ideology[13] provides the impetus for impactful research that can help alleviate general public fear and promote a greater understanding of the issues. This latter point relates not only to the knowledge on how those that commit terror crimes can be caught and successfully prosecuted but also to question and make reasoned choices in relation to the political arguments of those in power when they are seeking to erode long-standing rights and liberties[14] in exchange for promises of increased protection.

Like other offenders' terrorists are not alone in trying to conceal their identities when perpetrating crime as a means of evading justice; the 'common' armed robber or shoplifter may indeed utilize this strategy too. However, the nature and scale of terror crimes perhaps dictate the use of safeguarded means by which to ensure that these particular perpetrators are stopped, caught and prosecuted.

3 Terrorism – Common Definitional Elements

There is an obvious ideological struggle in seeking to define legitimate and illegitimate violence[15] (Horgan 2009; Silke in Chen et al. 2008) and to justify

12 The prevalence in the commission of terror crimes against western or developed democracies lends favour to the argument that there has been a change in the complexity of terror related crime. This is further complicated by a proliferation of radicalization – in terms of second-generation immigrants and religious converts. See: Preventing and countering youth radicalisation in the EU.

13 It is important to note that the reference to ideology is not a reference to a particular theological stance even though this may in fact be the case. It is not the why that is of concern but the effectuality of due process.

14 For an example in relation to surveillance and privacy see the UK's draft Investigatory Powers Bill – which sets out the requirements for data retention by Internet Service Providers and for the first time in law authorizes bulk interception. Draft Investigatory Powers Bill. Publications: UK: HMSO. 2015. Available at: https://www.gov.uk/government/publications/draft-investigatory-powers-bill. [Accessed 11 November 2015].

15 Theorists also disagree on why people become 'terrorists' and why homegrown terrorism has increased in Western nations. This could be explained by the fact that it is difficult to make comparisons for the purposes of identifying trends in such activity because the crime itself is committed in different forms and often inconsistently. For some empirical work that does attempt this, see Horgan 2009. The fact that the research in this area is narrow focused and reliant on non-primary sources does not help the matter, for example see: Silke; Chen 2008. One argument regardless of 'why' people become terrorists is that terror networks have realized that the cost of

law enforcement action that in any other instance would be deemed unlawful (Carrabine et al. 2014: 439). Terrorism does not have a uniform definition and does inevitably vary according to the jurisdiction. There are however universally accepted elements to it (Schmid 2020). The UK's Terrorism Act 2000 defines it as: the use of a threat or action that is designed to influence a government or international governmental organisation or to intimidate the public or a section of the public; made for the purpose of advancing a political, religious, racial or ideological cause and which involves or causes serious violence against person(s), serious damage to property, a threat to life, a serious risk to the health and safety of the general public or serious interference with or a disruption to an electronic system.[16]

A review of the literature shows variation in the definition of terrorism[17] (Honderich 2002) ranging from 'the threat or [the] use of violence … [to] bring about a political result' (Jenkins 2000; see also: Deflem 2004) to McLaughlin (2006) suggesting it to be 'a premeditated political act … [designed] to influence … policy [makers through the creation of] fear or threat … for a political, religious or ideological cause'. Liberty (2006) in their response to Lord Carlile's review of the definition of terrorism in the United Kingdom emphasized the need for the definition of terrorism to be drawn tightly because of the resultant consequences namely criminalization of certain types of non-criminal behaviour for instance supporting groups that encourage terrorist action, graver punishment and the fact that the legislation triggers extraordinary powers – the latter is true across the world.

The European Union has made attempts to harmonize the definition of terrorism in its member states. Council Framework Decision on combatting terrorism 2002/475/JHA (2002: 2) introduces a specific and common definition of terrorism that has two elements. The *objective* element refers to a long list of instances of serious criminal conduct including bodily injuries, commission of attacks, extortion, fabrication of weapons, hostage taking, murder and the threat to commit any of these. The *subjective* element states that these acts are deemed to be terrorist offences when they are committed to seriously intimidate a population, to

financing homegrown terrorist activity is, in at least comparison with other finance related crimes, fairly negligible and therefore much easier to perpetrate because it is difficult to detect. Note also: failed positivist assumptions in relation to the question 'why'.

16 See s.1(1)–(5) of the Terrorism Act 2000 as amended by the Terrorism Act 2006 (note s.34) and the Counter-terrorism Act 2008 (note ss.75(1)(2)(a) and 100(5) with s.101(2)); Statutory Instrument 2009/58).

17 The term terrorism originates from the Latin word Terrere which means to cause tremble or quiver.

compel a government or international organisation to act or refrain from acting and to seriously destabilize or destroy the constitutional, economic, political or social structure of a country or international organisation. The decision has been amended by the Council Framework Decision on amending Framework Decision 2002/475/JHA on combating terrorism 2008/919/JHA (2008: 3) to include offences linked to terrorist activities for instance public provocation to commit a terrorist offence, recruitment for terrorism and training for terrorism.

The common elements of the current definitions are,

- Criminal conduct i.e. threats, violence against person(s) or property, threats to life and murder, extortion, fabrication of weapons and hostage taking,
- Intimidation of the public or a section of the public,
- Compelling governments or international governmental or non-governmental organisations to act or refrain from acting,
- Destroying a constitutional, economic, political or social structure of a country or international governmental or non-governmental organisations,
- Advancing political, religious, racial or ideological causes,
- Risks to health and safety of the general public (biological attacks),
- Interference with or a disruption of electronic systems, aviation or other transport systems.

4 Part 2, Reponses in International Criminal Justice

The League of Nations (dissolved in 1946) argued for the creation of an international court to try terrorists, an argument that did not succeed. White (2011: 9)[18] (Hehir, Kuhrt, and Mumford 2011; Quenivet in White, 2011) suggests that the United Nations only turned its attention to this issue when confronted with Palestinian terrorists. In terms of international law the terrorist attacks that took place on September the 11th 2001 (9/11) led a coercive approach to tackling terror in the form of executive led legislative, military, penal and security action along with the traditional consensual or collective criminal justice based human rights focused

18 The United Nations law making occurs by treaty or Security Council Resolutions (hard law) under Chapter VII of the United Nations Charter, or in the form of soft law via the General Assembly. Thus, the law of treaties applies, note the Vienna Convention on the Law of Treaties as adopted in May 1969 and in-force on the 27th January 1980. [Accessed: 7th June 2016]. Chapter VII of the Charter can be accessed here: http://www.un.org/en/sections/un-charter/chapter-vii/ [Accessed: 7th June 2016]. Note also that the focus of the General Assembly is human rights and initiatives that seek to persuade those at risk of becoming terrorists from doing so.

methods.[19] In Payne 1791 (1999, Part 1 at page 12) Payne suggests that sovereignty itself delimits collective power because people have the natural right require their civil rights to be secured. Thus, whilst collective nations have the right to determine their respective governments this in itself is delimited by the 'end of liberty' by individual rights being protected and assuring that these rights are secure within the collective in accordance with the rule of law. This stands in contrast to the Cold War approach which was to specify particular forms of criminality and enforce the law through international treaties[20] rather than through the use of force or war (Bass 2000 at p. 7)[21] except in self-defence[22] or when authorised by the Security Council.

It is important to acknowledge the increasing political rhetoric in relation to a 'war on terror' especially post-9/11. Many academicians consider this to be rather unhelpful, if it is war then the law on war (jus in bello) should apply to regulate the conduct of both parties which we know does not manifest itself in practical reality given the state is dealing with terrorists – it is simply an oxymoron to talk about regulated conduct in accordance with the law on war and terrorism in the same sentence. The counter argument is that this language creates a hybrid notion of a war that adopts the rhetoric imbibed within this terminology and couples that with permissible forms of action; the latter may be consider excessive where novel interpretations are given to existing agreements (see below) or because of a scarcity in legislative protection or the existence of legal loopholes that can be exploited. For example, action including the opening of a detention centre in 2002 at the 103 year-old American Naval base at Guantanamo Bay was legitimately undertaken in compliance with Article 3 and 5 of the Geneva Conventions albeit through the use of rather novel interpretations of the latter. Such language seems to have been successful, at least socio-politically, in garnering public support for combative action against 'enemies' such as the United Kingdom's airstrikes in

19 It is salient to state that in accordance with the rule of law we as civilized democracies must protect the human rights of those accused of having committed even the most heinous of crimes including terrorism and allow due process to take its course.

20 These are the same treaties that will be recalled by the Draft Comprehensive Convention Against International Terrorism, see ibid note 29.

21 For a discussion of illegal ways of dealing with international terrorists.

22 Article 51 of the United Nations Charter states that 'Nothing in the present Charter shall impair the inherent right of individual or collective self-defence if an armed attack occurs against a Member of the United Nations, until the Security Council has taken measures necessary to maintain international peace and security. Measures taken by Members in the exercise of this right of self-defence shall be immediately reported to the Security Council and shall not in any way affect the authority and responsibility of the Security Council under the present Charter to take at any time such action as it deems necessary in order to maintain or restore international peace and security.' [Accessed: 18th June 2020].

Syria, action against the Al Qaeda and the Taliban – incidentally it should be noted that it is alleged that the latter two organisations have been created by existing UN member states. For instance, it has been suggested that the policy of a particular member state helped create the monster that went on to become the Al Qaeda by indirectly supporting the Mujahedeen against the Soviet Forces in Afghanistan. The allegation is that rich Saudi individuals who could fund the action being taken against Soviet troops gave support to this. The veracity of this argument is not considered here, and readers should avail themselves to notable research in this regard. The National Defense Authorisation Act 2012 (NDAA) mapped the road to closing the Guantanamo Bay facility. In so doing, some of the legal issues that were grappled with included the rights of detainees when transferred to the United States of America for detention or trial in terms of claiming asylum and attaining lawful immigration status, the limitation of judicial review of detainee cases and what to do with these individuals once this 'war' is over – for further details on the law in relation to this; s.1032 of the NDAA 2012), the Third Geneva Convention Relative to the Treatment of Prisoners of War 1949 (Article 5) and Article 51 of the Geneva Protocol I Additional to the Geneva Conventions of the 12th of August 1949 and the 1977 Convention Relating to the Protection of Victims of International Armed Conflicts.

Targeting the enemy i.e. terrorist leaders, is deemed lawful under international law when done during a war but were undertaken during a time of peace these are considered to be extra-judicial killings which violate the right to life and the right to a fair trial. Note that in terms of self-defence pre-emptive strikes after the Iraq War may well be deemed unlawful. This is one of the reasons why the notion of a continuing war on terrorism is so fundamental to continuing action – whether or not that is an accepted logic is debatable. The consensus, internationally, seems to be that terrorism is best tackled through criminal justice and due process rather than through war in a traditional and normative sense – perhaps it would be salient to state that any hybrid notion of war is underpinned exactly by this paradigm. It is therefore salient to state that in accordance with the rule of law we as civilized democracies must protect the human rights of those accused of having committed even the most heinous of crimes including terrorism and allow due process to take its course.

4.1 Draft Comprehensive Convention against International Terrorism

Regardless of this, international law has developed a rather piecemeal set of counter-terrorism instruments that lacks the singularity so badly craved by

criminal justice in this area a problem compounded by unresponsive and cripplingly slow treaty machinery[23] (Saul 2006). The caveat here is that terrorism is not seen purely as a criminal justice issue concerning a particular nation or the international community but as a real and present threat to global peace and that must be tackled at an international level by the UN Security Council.[24] The conflicts facing a response to terrorism at the international level is evidenced further by the failure to agree on an acceptable definition in the Draft Comprehensive Convention Against International Terrorism[25] (CCIT), the work on which is still in progress and the works of the Ad Hoc Committee set up under Resolution 51/210 to 'elaborate an international convention for the suppression of terrorist bombings and, subsequently, an international convention for the suppression of acts of nuclear terrorism, to supplement related existing international instruments, and thereafter to address means of further developing a comprehensive legal framework of conventions dealing with international terrorism'[26] are on-going. This has mean that the international response to terrorism remains stagnant or at best muted.

For present discussion purposes article 2 of the CCIT states that a terrorist offence is committed where a person, by any means, unlawfully and intentionally, causes: '…death or serious bodily injury to any person; … or serious damage to public or private property, including a place of public use, a State or government facility, a public transportation system, an infrastructure facility or to the environment; or … damage to property, places, facilities or systems referred to …

23 There is an obvious gap in international law in the failure to criminalize the terrorist killings of civilians.

24 The UN Security Council has broadened its law-making activity by requiring member states to legislate to combat terrorism; this is coupled with the requirement to either prosecute or extradite for prosecution to the victim state or a safe third country for the commission of treaty crimes under the Montreal Convention of 1971.

25 The Draft Comprehensive Convention Against International Terrorism seeks to recall a number of existing international treaties relating to various aspects of the problem of international terrorism including the Convention on Offences and Certain Other Acts Committed on Board Aircraft which was signed at Tokyo on 14 September 1963, the Convention for the Suppression of Unlawful Seizure of Aircraft that was signed at The Hague on 16 December 1970 and the International Convention against the Taking of Hostages that was adopted in New York on 17 December 1979, and the International Convention for the Suppression of Terrorist Bombings that was adopted in New York on 15 December 1997, the International Convention for the Suppression of the Financing of Terrorism that was adopted in New York on 9 December 1999 and the International Convention for the Suppression of Acts of Nuclear Terrorism that was adopted in New York on 13 April 2005. See also: UN General Assembly. Fight against International Terrorism Impeded by Stalemate on Comprehensive Convention, Sixth Committee Hears as Seventy-Third Session Begins. GA/L/3566 3 OCTOBER 2018.

26 See: Ad Hoc Committee established by General Assembly Resolution 51/210 of 17th December 1996. [Accessed: 27th May 2020].

resulting or likely to result in major economic loss; … when the purpose of the conduct, by its nature or context, is to intimidate a population, or to compel a government or an international organization to do or to abstain from doing any act' (Perera in Saul 2020 at pp.152–162; Saul 2014). An offence is also committed were a person '…makes a credible and serious threat to commit an offence' or '…attempts to commit an offence.' Whilst this includes the elements identified there is still a deadlock, which can only be attributed to the vested interests of a few countries where there is conflict either current or historical and unresolved.

4.2 United Nations, the Security Council and their Responses

The domestic problems faced in defining and responding to terrorism are also present at the international level. These problems can be attributed to the lack of an internationally agreed definition of terrorism, the lack of international consensus leads to practical variations amongst nations which only serve to prolong conflict. The UN Security Council and its responses demonstrate how difficult an exercise it is to seek consensus but also to protect civil rights, due process and the rule of law, and possibly enforce future compliance.

4.2.1 Resolutions and Sanctions Regimes

The UNSC Resolution 1456 (2003), the Declaration on Combatting Terrorism, clearly states that any action that members undertake to fight terrorism must comply with its obligations under international law. This also applies when the Security Council issues mandatory resolutions such as those already discussed relating to the seizure of assets.

Security Council Resolution 1373 (2001)[27] requires that '…all States shall: (a) prevent and suppress the financing of terrorist acts; (b) criminalize the wilful provision or collection, by any means, directly or indirectly, of funds by their nationals or in their territories with the intention that the funds should be used, or in the knowledge that they are to be used, in order to carry out terrorist acts; (c) freeze without delay funds and other financial assets or economic resources of persons who commit, or attempt to commit, terrorist acts or participate in or facilitate the commission of terrorist acts; (d) prohibit their nationals or any persons and entities within their territories from making any funds, financial assets or economic resources or financial or other related services available, directly or

27 See also: Security Council Resolution 1535 (2004) on Revitalization of the Security Council Committee Established pursuant to Resolution 1373 (2001) concerning Counter-Terrorism.

indirectly, for the benefit of persons who commit or attempt to commit or facilitate or participate in the commission of terrorist acts, of entities owned or controlled, directly or indirectly, by such persons and of persons and entities acting on behalf of or at the direction of such persons; declares that acts, methods, and practices of terrorism are contrary to the purposes and principles of the UN and that knowingly financing, planning and inciting terrorist acts are also contrary to the purposes and principles of the UN; decides to establish, in accordance with rule 28 of its provisional rules of procedure, a Committee of the Security Council [the 'CTC' – Counter Terrorism Committee], consisting of all the members of the Council, to monitor implementation of this resolution; directs the Committee to delineate its tasks, submit a work programme within 30 days of the adoption of this resolution, and to consider the support it requires, in consultation with the Secretary-General.'

The decision in *Yassin Abdullah Kadi and Al Barakaat International Foundation v Council of the European Union and Commission of the European Communities European Court Reports 2008 I-06351* highlights that there must be judicial scrutiny and due process available to safeguard the those involved. In this case the European Union has had to grapple with its international obligations and the rights it provides to its citizens. In October 2001 the United Nations Al-Qaeda and Taliban Committee, following a resolution, designated Kadi as a terrorist financier. In compliance with its international obligations European Union law required Kadi's assets be frozen, he claimed that the application of these violated the rights guaranteed to him by the European Convention on Human Rights and Fundamental Freedoms including his right to 'a fair hearing' and to 'respect for property' because both the United Nations and the European Union had failed to provide a procedure for him to 'appeal' the action taken against him – in other words a failure to provide judicial safeguards through oversight and review given the punitive nature of the subsequent action.

The argument was lent support by Miguel Poiares Maduro the Advocate General of the Court of Justice of the European Union (2003–2009). The European Union's Court of First Instance decided that it did not have jurisdiction to review the measures by the European Community (EC) that gave effect to resolutions of the United Nations Security Council and specifically in this case against the Al-Qaeda and Taliban terror networks. Court of Justice of the European Union decided that it was within the jurisdiction of the courts of the European Union's member states to review measures that were adopted by the European Community that gave effect to the resolutions adopted by the United Nations Security Council under the United Nations Charter. The effect of this decision was that a judgment made by a European Union court that a European Community measure is not compatible with a higher rule of law in the Community's legal order would not implicate a challenge to the legitimacy of a resolution in international law. The case is important because

it highlights the point when the Court of Justice of the European Union, or European Court of Justice as it was then known, acknowledged that it had jurisdiction to review the legality of a Community measure that gave effect to a Security Council Resolution and it is the first time that the Court quashed a measure that gave effect to a United Nations Security Council Resolution for being unlawful. It is important to note that the Court is not determining the legality of the resolution nor is it derogating from its international obligations, it is simply stating that a Community measure will accord with international law where it facilitates due process.

In this regard the United Nations Security Council adopted Resolution 1730 (2006), this established the focal point or central office that deals with delisting requests[28] (Genser and Ugarte 2014 at pp.197–200).

UNSC Resolution 1566 (2004) states that terrorism is '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, and all acts which constitute offences within the scope of and as defined in the international conventions and protocols relating to terrorism, are under no circumstances justifiable by consideration of a political, philosophical, ideological, racial, ethnic, religious or other similar nature.'

It can be stated that the UNSC has taken impressive steps to tackle due process concerns over the last 10 years in the form of a number of Resolutions including 1904, 1989, 2082 and 2083 (Genser and Ugarte 2014 at p.200). The UNSC set-up the Counter-Terrorism Committee (CTC) to monitor compliance with Resolution 1373 (2001) and now the Counter-Terrorism Committee Executive Directorate (CTED) provides the CTC with expert advice. These advents evidence that the UNSC's acknowledges the requirement for a suitable policy and regulatory response; it also adds weight to the need for an international tribunal to try such criminality.

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28 Delisting under Resolution 1730 (2006) works by the focal point passing delisting requests from targets to the state in that sought to designate them and the state in which the petitioner is resident and has citizenship, and by informing the target petitioner of the decision made by the Sanctions Committee. Once the petitioner's request has been issued by the focal point, they are not required to take any further action. If the designating state recommends delisting, then that request will be put to the Sanctions Committee and on its agenda. The Committee may also be informed if any state takes issue with delisting the petitioner. If no member of the Committee recommends the petitioner be delisted, then the request is taken as having been rejected. The petitioner is not given an opportunity to present his or her case to the Committee and neither are they permitted to hear the evidence that is presented against them. The greatest issue here is the fact that a state can block delisting, but it does not, under Resolution 1730, have to give any reason for doing so. For an in-depth discussion on this issue.

UN Security Council Resolution 1566 (2004) states that terrorism is '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, and all acts which constitute offences within the scope of and as defined in the international conventions and protocols relating to terrorism, are under no circumstances justifiable by consideration of a political, philosophical, ideological, racial, ethnic, religious or other similar nature.'

Even though consensus may be building on this issue at present there is a lack of agreement on the definition that should be adopted. Without this the United Nations has reached what seems to be an impasse and thus action will, as it has done, continue to flip-flop between coercion and security measures. One of the main issues relates to underlying conflicts of interest or the *politics* that underpins the alleged 'need' to distinguish between the freedom fighter and the terrorist. There is also a need to transparently hold accountable states that control terrorists[29] and criminalise support or sponsorship of terrorists as state crimes. The impetus to hold states accountable is problematic given the apparent lack of a person or person(s) to incarcerate and as White highlights (2011: 16) the Nuremberg Tribunal confirmed that criminality is undertaken by people and not entities (Hehir, Kuhrt, and Mumford 2011).

As an alternative to force the UN utilizes sanctions such as the listing or proscription of individuals and organisations, this appears domestically in UK law[30] and at the international level. The purpose is to identify and list individuals and/or organisations to which specific restrictive measures are applied. The purpose was to prevent sweeping economic and trade embargoes; thus they are 'targeted' against those individuals and/or organisations that breach or threaten international peace and security. The fact that they are targeted prevents a negative effect on trade relations and on those that are not involved i.e. the general population of the state concerned (Biersteker and Eckert 2000).

The United Nations introduced a much needed consolidated list of those 'designated', a form of proscription, with its sanction's framework against the

29 International law relating to self-defence is clear on this matter. The victim state can take necessary and proportionate action against the terrorists and the state that controls them. Note; with regard to this there are also clear rules on human rights and humanitarian law.

30 Proscription of terrorist individuals and organisations is set out in the Terrorism Act 2000. It was originally introduced in the UK in 1974 under the Prevention of Terrorism (Temporary Provisions) Act and targeted at Irish Republican Army (IRA) in Northern Ireland. It should be noted that Australia, Canada, the EU and the USA all have extensive regimes in this respect.

Taliban under United Nations Security Council Resolution 1267 (1999).[31] The Security Council Committee oversees these sanctions pursuant to resolutions 1267 (1999), 1989 (2011) and 2253 (2015).[32] At the International level (European Union and United Nations) one of the criticisms relates to the lack of judicial oversight or democratic scrutiny in the designation or proscription process. Although national laws now tend not to fall into this trap as Part II of the United Kingdom's Terrorism Act 2000 demonstrates,[33] this has caused major concern at the international level.

The Security Council's Resolution 1456 (2003), the Declaration on Combatting Terrorism, clearly states that any action that members undertake to fight terrorism must comply with its obligations under international law. The United Nations Security Council has also taken impressive steps to tackle due process concerns over the last 10 years in the form of Resolutions 1904, 1989, 2082 and 2083 (Genser and Ugarte 2014). The Security Council's Counter-Terrorism Committee (CTC) was set-up to monitor compliance with Resolution 1373 (2001). The Counter-Terrorism Committee Executive Directorate (CTED) provides the CTC with expert advice.

It is fair to state that the UNSC has taken steps to tackle due process concerns over the last 10 years in the form of Resolutions 1904, 1989, 2082 and 2083.[34] The UNSC set-up the Counter-Terrorism Committee (CTC) to monitor compliance with Resolution 1373 (2001) and the Counter-Terrorism Committee Executive Directorate (CTED) provides the CTC with expert advice. In 2019, the UNSC passed Resolution UNSCR 2462 UNSC S/Res/2462(2019), this focuses on terror finance but has been criticized as having an adverse impact on civil and humanitarian actors that operate within fragile conflict environments. The resolution mandates financial regulation of terror financing and support of terror – crimes that are also relatively undefined. The definition of materially supporting terrorism is also extended. It does not provide appropriate protection against human rights violations that may occur as a result given the potential for abuse. These advents evidence that the UNSC's acknowledges the requirement for a suitable policy and regulatory response; it also adds weight to the need for an international tribunal to try such criminality.

The latest Global Implementation Survey of Security Council Resolution 1373 (2001) (2016: 8–21) highlights that '…the terrorist environment has changed

31 Security Council Committee Pursuant to Resolutions 1267 (1999) 1989 (2011) AND 2253 (2015) concerning ISEL (Da'esh) Al-Qaeda and Associated Individuals Groups Undertakings and Entities. This highlights the sanctions measures and the listing criteria etcetera.

32 Note the strengthening of the regime of sanctions as evidence in the unanimous adoption of the United Nations Security Council Resolution 1455 (2003) aimed at improving implementation of measures against the Taliban and Al Qaeda.

33 Sections 4 and 5 of the Terrorism Act 2000 respectively deal with applying for de-proscription and appealing a decision by the Secretary of State in which de-proscription is refused.

34 See ibid page 21.

considerably since the previous survey, in which it was noted that progress made by States in implementing resolution 1373 (2001) had resulted in a weakening of certain terrorist networks … the terrorist threat is evolving rapidly. It has also become more diverse, challenging and complex, partly because of the considerable financial resources flowing to certain terrorist organizations from the proceeds of transnational organized crime … foreign terrorist fighters travelling to Iraq and the Syrian Arab Republic and other regions to join terrorist organizations pose an acute and growing threat … The lack of domestic criminal laws to prosecute foreign terrorist fighters remains a major shortfall, globally.'

It goes on to state that '…few States have introduced comprehensive criminal offences to prosecute foreign terrorist fighter-related preparatory or accessory acts. Many rely on existing legislation to tackle the foreign terrorist fighter phenomenon, and such legislation may not be sufficient to prevent their travel. In most States, prosecutions are undermined by difficulties in collecting admissible evidence abroad, particularly from conflict zones, or in converting intelligence into admissible evidence against foreign terrorist fighters. States have also experienced challenges associated with generating admissible evidence or converting intelligence into admissible evidence from information obtained through ICT, particularly social media … lack of information-sharing and inter-agency cooperation and coordination remains a major impediment to the successful interdiction of foreign terrorist fighters … many States are struggling to cope with the challenges posed by returning foreign terrorist fighters … the transnational nature of the foreign terrorist fighter phenomenon requires enhanced criminal justice cooperation among States aimed at denying safe haven. International judicial cooperation in criminal matters relating to foreign terrorist fighters is an additional challenge because the criminalization of related offences continues to be criminalized in different ways.' It should be noted that Security Council Resolution 2178 (2014) required members to prevent the '…recruiting, organizing, transporting or equipping of individuals who travel to a State other than their States of residence or nationality for the purpose of the perpetration, planning of, or participation in terrorist acts'. UN Security Council Resolution 2396 (2017) on Foreign Terrorist Fighters (Returnees and Relocators) updated resolution 2178 to include greater focus on returning or relocating foreign terrorists and transnational terror groups. The new resolution builds on resolution 2178 by strengthening border security, information sharing i.e. advanced passenger information (API) and passenger name records (PNR) but also biometrics to prevent terrorists boarding aeroplanes. The resolution also seeks to provide stronger international cooperation, and assure prosecution, rehabilitation and reintegration for terrorists and their families. In relation to prosecution, whilst the resolution does promote the investigation of foreign terrorists without 'racial profiling on discriminatory grounds prohibited by

international law', there is no mention of the methods most appropriate to achieve this.

The move away from labelling 'states' as terrorists, has already been discussed, yet another problem at the international level concerns the categorisation of those that are fighting political regimes for the ability to exercise their right to self-determination – an issue still very much on the cards. They can be regarded both as terrorists or as freedom fighters depending on the perspective lent and the state actor concerned. There is very little consensus in the international community in relation to how to define them; the law stands against the exclusion of them where the definition of terrorism[35] is concerned. This issue needs to be disentangled from, amongst other things, the ideological, political, trade and religious conflicts of interest that exist. Many UN members support this stance; the United Kingdom after the July 7th 2005 (7/7) attacks refused to compromise where an exception in the definition was sought for national liberation movements. White (2011: 19) points out that for Islamic states are concerned covering such acts includes state action against civilians that are engaged in struggles to obtain the right of self-determination.

Thus, it is again salient to state that many factors have added to the lack of political will in the adoption of a formal definition of terrorism. Although, it would be fair to note that there has been some progress in this regard, definitional singularity is badly craved in international criminal justice and the problem is only compounded by unresponsive and cripplingly slow treaty machinery (Saul 2006).[36] Such definitional singularity would be needed but would have been given a real push if members had agreed to the creation of an international tribunal to try such criminality as the first step. Thus, those same conflicts of interest add to the lack of political will in the adoption of a uniform[37] and formal definition, these will need to be tackled if this impasse is to be navigated.

35 Note; the General Assembly's Resolution 3034, 18th December 1972 provided "measures to prevent international terrorism which endangers or takes innocent human lives or jeopardizes fundamental freedoms". It was adopted on December 18, 1972 at the 27th session of the General Assembly. It was also at this session that the Assembly formally decided to establish the Ad Hoc Committee on International Terrorism. See: U.N. General Assembly Resolution on Measures to Prevent International Terrorism. International Legal Materials Vol. 12, No. 1 (January 1973), pp. 218–220.

36 There is an obvious gap in international law in the failure to criminalize the terrorist killings of civilians.

37 It is salient to note that universal or uniformity is considered the best option for clarity in the obligations i.e. objectivity but also to avoid states from derogating on rather weak grounds.

4.3 The International Criminal Court

There is a need to establish a uniform set of norms without state intervention. Thus, the creation of a specialist tribunal to prosecute acts of terror is lent further weight by the fact that terrorism is not seen as a purely criminal justice issue that is the concern of a particular nation or the international community but is considered to be a real and present threat to peace that must be tackled by the UN.[38] In this regard, there are a number of different criminal justice responses to the commission of such offences (Bass 2000) including prosecution, a conditional amnesty on prosecution for past offences and of course pushing to engage those concerned in the political process. The general public is rarely in favour of amnesties and this can be a rather toxic subject that generates political criticism. Whilst the amnesty will not prevent investigation it will remove criminal liability for specific offences it will normally be conditional for instance connected to the disposal of weapons or the dispersal of an organisation. The following can never be amnestied; genocide (1948 Convention on the Prevention and Punishment of the Crime of Genocide, see articles I and IV on the obligation to punish), crimes against humanity (Rome Statute of the International Criminal Court, note the preamble and the obligation to punish and prosecute; Human Rights treaties including the International Covenant on Civil and Political Rights and Inter-American Convention on Human Rights which are interpreted to require punishment of crimes against humanity), war crimes (the four Geneva Conventions of 1949 and the Additional Protocol No. 1 of 1977), torture (The 1984 Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, note articles 4.1 and 4.2 which include the obligation to criminalise and punish this act and article 7.1 which provides the obligation to extradite or prosecute said persons), enforced disappearance and gross violations of human rights (The International Convention for the Protection of All Persons from Enforced Disappearance (2006), note articles 6.1 (providing an obligation to hold criminally responsible) article 7.1 (stating an obligation to punish), article 11.1 (requiring an obligation to extradite or prosecute) and finally article 24.4 (gives the victim's the right to obtain reparation but also the right to prompt, fair and adequate compensation). The operation of international law, international humanitarian law and customary law operate to prevent this and ensure the victim a right to a remedy. Thus, amnesties raise interesting but highly complex issues in terms of their legality.

38 The UN Security Council has broadened its law making activity by requiring member states to legislate to combat terrorism; this is coupled with the requirement to either prosecute or extradite for prosecution to the victim state or a safe third country for the commission of treaty crimes under the Montreal Convention of 1971.

The UN Security council has concerned itself with international terrorism since the Lockerbie (1988) bombing,[39] with a focus on organisations such as Al-Qaeda and the Taliban, and individuals. Terrorists are listed and member states are required to take action against them, in ways including, the freezing of their assets. The weakness in the international legal framework for dealing with non-state actors involved in terrorist activity relies on national legal frameworks that criminalise and prosecute those suspected of committing treaty crimes – the state must prosecute or extradite. White (2011: 17) argues, quite rightly, that this prosecutorial discretion is problematic and demonstrates a need for supervision as exemplified by the Lockerbie bombing which resulted in the UK and the USA seeking a sanctions regime against Libya by persuading the UN Security Council to use its powers that already existed under the UN Charter.[40] This meant states would be required to give priority to their obligations under the Charter when in conflict with other treaty obligations and not hide behind 'lackluster' prosecutions where hyper-terrorism (a serious threat to peace) is concerned. It should be noted that Security Council action is discretionary, the fact that permanent members have the right to a veto and novel forms of politically motivated filibustering contribute to its ineffectiveness.

It was highlighted earlier that there exists a quite apparent void in the machinery of International law and criminal justice, even though the legal regime relating to terrorism has massively expanded these matters are not within the jurisdiction for the International Criminal Court. The normal forum for the prosecution of these offences is the relevant national criminal court of the state concerned. There is growing consensus that the worst terror crimes should be tried by a permanent international tribunal, maybe the ICC, or at the very least an ad-hoc tribunal. Salient to state that credit must be given to President Mikhail S. Gorbachev who first put forth the idea that an international tribunal should have jurisdiction to try terrorists and drug traffickers (Schwebel 2011 at pp. 125–126). The Rome Statute 1998 established the International Criminal Court without the express jurisdiction to consider these two offences again because of the lack of an agreed definition of terrorism and ideological, political and religious conflicts of

39 In this case an explosive device on board a PanAm flight destroyed the plane over Scotland. This was a crime under Article 1(1)(a) of the Montreal Convention of 1971. Libya, the UK and the USA all claimed jurisdiction. Libya claimed jurisdiction because the suspects were Libyan nationals, the UK because the offence occurred in UK airspace over Scotland and the USA because PanAm was an American airline. Libya chose to prosecute and not extradite the suspects; this highlighted the weakness of international legal framework.

40 In terms of this the UK and USA utilized the existing rules to further their respective causes: Article 25 of the UN Charter states that 'the Members of the United Nations agree to accept and carry out the decisions of the Security Council in accordance with the present Charter.

interest[41] of United Nations (UN) members and the second is the clear lack at the international level of an agreed definition of the crime. The statute is progressive as it established an enduring relationship between the ICC and the Security Council; the latter has shown willingness to refer terror crimes to the court for prosecution, these crimes will be those that may indirectly come within the court's jurisdiction as war crimes that breach other treaty conventions or crimes against humanity contrary to Article 7 of the Rome Statute.[42]

There is a viable discussion to be had as to whether the ICC has manifested itself in the politically independent form that was envisaged and what that has meant for the advancement of the court. It is equally important to remember that the ICC hands are tied by the fact that it can only investigate and prosecute crimes of those countries that are members of the court, those that self-refer or those that the UNSC refers to it. Thus, the ICC has a limited jurisdiction – at present only 123 countries are members of the court and party to the statute. Given the changing political landscape and with Gambia, Russia, South Africa and Burundi[43] terminating their membership of the ICC there must be some scope to reimagine the ICC with far greater jurisdiction and impartiality than it currently has. Perhaps an opportunity to re-evaluate the ever increasing need for an international tribunal that is not made irrelevant by the very ideological, political and religious conflicts of interest that are stifling the court at present and how this can be overcome.

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41 For further details on the working of the International Criminal Court and its jurisdiction see: Understanding the International Criminal Court at p.13. The Hague: The international Criminal Court. Note: it has been suggested that the United States of America opposed the creation of an independent tribunal for all countries with the jurisdiction to try terror crimes and subsequently did not sign up to the jurisdiction of the International Criminal Court.

42 Article 7 of the Rome Statute of the International Criminal Court 1998 states that 'For the purpose of this Statute, "crime against humanity" means any of the following acts when committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack: (a) Murder; (b) Extermination; (c) Enslavement; (d) Deportation or forcible transfer of population; (e) Imprisonment or other severe deprivation of physical liberty in violation of fundamental rules of international law; (f) Torture; (g) Rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization, or any other form of sexual violence of comparable gravity; (h) Persecution against any identifiable group or collectivity on political, racial, national, ethnic, cultural, religious, gender as defined in paragraph 3, or other grounds that are universally recognized as impermissible under international law, in connection with any act referred to in this paragraph or any crime within the jurisdiction of the Court; (i) Enforced disappearance of persons; (j) The crime of apartheid; (k) Other inhumane acts of a similar character intentionally causing great suffering, or serious injury to body or to mental or physical health.

43 There is also some possibility that the Philippines could follow suit. The Independent Newspaper reports that the Russians have argued that the ICC has not 'become a truly independent and authoritative body', the timing is important given the ICC had just released its report classifying the Russian takeover of the Crimean Peninsula as a consequence of the Ukrainian conflict.

Countries such as the United States of America (USA), China, India and Russia have failed to sign up to the court's jurisdiction even though they are members of the UNSC,[44] this is seen by many nations as a hypocrisy that speaks volumes to the rest of the world and as a result the seat these nations occupy is rather fraught. Thus, these nations can refer cases to the ICC but they themselves are not subject to its investigations. Cooperation is also a major issue – the ICC functions by reason of this and requiring UNSC permanent members to sign up to the statute would certainly strengthen the legitimacy of the court and any successor if there were to be one, perhaps this lends greater impetus in the foreseeable future for the establishment of a National Security Court in the United Kingdom.

The UN Security Council had already shown willingness to set-up ad-hoc tribunals to deal with human suffering such as the International Criminal Tribunal for the Former Yugoslavia (ICTY) post the 1993 conflict. It is suggested that the court has jurisdiction to try terror crime, as outlined above either because the crimes fall foul of international law or the Security Council makes a referral. It has been suggested that this may deal with the instance in which states are unwilling to try terrorists; perhaps this is the best way to remove the ideological, political and religious conflicts of interest that exist and give further strength to the conventions that exist to criminalize, deter and suppress such activity.

5 Part 3, the United Kingdom's Response to the Contemporary Challenges

There are a number of different criminal justice responses to the commission of such offences (Bass 2000) including prosecution, a conditional amnesty on prosecution for past offences and of course pushing to engage those concerned in the political process. The Good Friday Peace Agreement[45] is a good example of the latter and is credited as having helped bring the sectarian violence in Northern Ireland to an end in 1998.

44 India is not yet a permanent member of the UNSC but is forging ahead with the impetus to become one.

45 Note also the St Andrew's Agreement in 2006 that brought devolved government back to Northern Ireland.

5.1 Problems in the Law and Prosecution Issues

In the UK there is a greater trend towards prosecution post-2005 rather than executive action (Walker 2009: 21). This may be an acknowledgment of the individuation of criminality and the requirement to prove criminal intent. This stance may distort, from a public perspective, the hierarchical and primary focus of managing the risk posed by terrorism to the public and to the security of a state. This *submission* does however work to lend greater confidence to the criminal justice process in terms of fairness[46] and due process: two of the most important facets of any democratic criminal justice system.

The focus of criminal justice policy and the definitional variations of terrorism pose significant issues for the construction of the substantive criminal law highlighting a number of interesting advents in criminal justice. The latter have been discussed at some length. The issues discussed in this part of the article, whilst not exhaustive, are some of the most prevalent concerning the law and prosecution issues including; detention, widening of the criminal justice net ('net widening'), guilt by association, jurisdictional extension to foreign activities and from an evidential and human rights perspective the problem of patchy evidence and the imposition and legality of a reverse burden of proof (Walker 2009: 22–25).

The United Kingdom has some of the most archaic laws on detention without charge for up to 14 days, this was reduced down from 28 days, the government at the time tried to extend this to 90 and then 42 days, both attempts failed because there was a distinct lack of evidence to show that an increased time period was required for these 'exceptional' offences (See Hansard for the debates on the Terrorism Bill 2006 and the Counter Terrorism Bill 2008). The UK time limit of 14 days far exceeds the limits set by similar provisions in other European Union countries; Germany has a limit equivalent to that in the United States of America of 2 days, Italy of 4 days and Russia and Spain both set theirs at 5 days, and France has a limit of 6 days (Liberty 2010: 4–5). These are countries that have had long sustained campaigns of terrorism against them. Pre-charge detention remains one the most hotly contested topics in relation to anti-terror legislation because of the impact on the individuals affected by it – a review counter-terrorism and security powers by Lord MacDonald of River Glaven QC (2001: 4) argued that since 2007 pre-charge detention under the relevant legislation had not actually exceeded 14 days in the UK.

46 Note the comments of Lord Bingham 'security concerns do not absolve member states from their duty to observe basic standards of fairness', in Sheldrake v Director of Public Prosecutions; Attorney General's Reference (No 4 of 2002) [2004] UKHL 43.

In relation to *net widening* or *widening the net*. This is a term that is given to the process of controlling or managing the behaviour of a greater number of people through administrative or practical changes. Authorities concerned with youth or juvenile justice historically used this practice for instance through the criminalisation of what was previously lawful behaviour to exercise greater social control for instance through the imposition of curfews. The manifestation of net widening can be seen in relation to criminal offences with the limitation of judicial discretion in sentencing through the introduction of the United Kingdom's Sentencing Council and the sentencing guidelines.[47] Safeguards in relation to net widening exist informally through reticence in police action and in the filter of consent by a law officer as demonstrated by s.117 of the Terrorism Act 2000 that requires consent for prosecution to be obtained from the Director of Public Prosecutions for England and Wales (or appropriately the DPP for Northern Ireland) before proceedings can be instituted.[48]

The next issue lies in the notion of being guilty by association as prescribed in the 'membership offences' under Part II of the Terrorism Act 2000. These are often referred to as *symbolic* offences this is because they denounce specific behaviour. The efficacy of these provisions can be called into question by statistical evidence published by the Home Office that suggests very few people have been prosecuted under them.[49] Section 11 of the Terrorism Act 2000 provides that an offence is committed where a person 'belongs to or professes to belong to a proscribed organisation'. The latter is a proscription of an organisation as a terrorist one is outlined in section 3(5); the individual commits the offence if they 'belong or profess to belong to a proscribed organisation'. The Secretary of State can exercise his or her discretion to proscribe organisations under this provision if they (a) commit or participate in acts of terrorism, (b) prepares for terrorism, (c) promotes or encourages it or (d) is otherwise concerned with it. Section 11(2) provides a defence if at the time the organisation was proscribed the membership of the alleged defendant had lapsed.

Section 12 of the same statute provides that a person commits an offence if he or she invites support for a proscribed organisation, it should be noted that

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47 The Sentencing Council's recent set of sentencing guidelines can be downloaded from: https://www.sentencingcouncil.org.uk. The standardization of sentencing practices intended, amongst other things, to mandate legislative sentencing through the removal of judicial discretion and to promote consistency in practice to promote transparency and deterrence through knowledge in the mind of the potential offender of the likely sentence that they would receive should they be caught and prosecuted.

48 See also these relevant provisions; s.37 of the Terrorism Act 2006 and s.29 of the Counter-Terrorism Act 2008.

49 There were 138 charges levied under Part II of the Terrorism Act 2000 in the years 2001 – 2007. The breakdown of these is as follows: 55 in Britain and 83 in Northern Ireland, see: Walker (2009): 22.

the 'support' does not need to be financial i.e. cash or property. The offence also prohibits the arrangement or management of, or assistance in, arranging or managing a meeting that the person knows to (a) support a proscribed organisation, (b) to further the activities of such an organisation and (c) to be addressed by a person who belongs or professes to belong to a proscribed organisation. Finally the same provision also covers a person who 'addresses a meeting and the purpose of [his or her] address is to encourage support for a proscribed organisation or to further its activities'. The response of the criminal courts has been varied given the complexity of the legislation. Section 1 of the Counter-Terrorism and Border Security Act 2019 (CT&BSA) amends s.12 of the TA 2000, of inviting support for a proscribed organisation, to cover expressions of support that are reckless as to whether they will encourage other people to support that organisation.[50]

In terms of evidence, often only circumstantial or patchy evidence is obtainable. The notorious 'terrorist', a British Citizen referred to as 'Jihadi John',[51] a member of the proscribed terrorist organisation Da'esh[52] (also ISIS or ISIL, see: UN Security Council Resolution 2249 (2015)) demonstrates this. He repeatedly concealed his identity and location in the videos of his crimes which were subsequently released on the Internet. This example shows that often the authorities do not have direct evidence from which to make a positive identification nor does such crime lend itself to statistical risk prediction,[53] thus often a case will rely solely on circumstantial evidence. Such evidence may include video or photographic

50 Section 2 of the CT&BSA 2019 also amends s.13 of the TA 2000 – displaying an image in a public place that arouses reasonable suspicion that the person is a member or supporter of an organisation that is proscribed. This includes images displayed online and photographs that may have been taken in a private place.

51 Jihadi John (Mohammed Emwazi) was killed in Syria by a United States of America drone attack in an act of self-defence to prevent the commission of further murders being committed by him. See also the UN Resolution 2249 (2015), this allows lawful military action to eradicate Da'esh: Security Council 'Unequivocally' Condemns ISIL Terrorist Attacks, Unanimously Adopting Text that Determines Extremist Group Poses 'Unprecedented' Threat. United Nations Security Council. (2015). Resolution 2249 (2015).

52 Da'esh is the Arabic acronym that comes from the phrase 'al Dawlah al-Islameyah fi Iraq wal-Sham'. The literal translation of which is 'Islamic State in Iraq and al-Sham'. The term is also one letter from 'daas' that means to crush something beneath the foot – an act of degradation and humiliation.

53 O'Malley has shown that risks that should worry society are not statistically predictable. O'Malley, P. (2008). Experiments in risk and criminal justice. Theoretical Criminology, 12(4),pp. 452-469 at p.452. See also: Mythen, G. and Walklate, S. (2006). Criminology and Terrorism: Which Thesis? Risk Society or Governmentality. British Journal of Criminology, 46. 379–398. The latter provides a good discussion on actuarial justice.

footage of individuals who have been recorded committing terror crimes but in relation to which a visual identification cannot be made because their identity is obscured in some way either incidentally (religious), by design or otherwise (clothing, quality of recording or otherwise). To overcome this issue, it is important that courts are receptive to new and novel forms of evidence including voice, cell-site, physicality, body language, geographical positioning and general forensics from the crime scene.

In relation to using reverse burdens of proof in particular forerunner offences examples of which are contained in sections 57 and 58 of the Terrorism Act 2000 (Walker, 2009: 22). Section 57 prohibits an individual from the possession of any 'article in circumstances which give rise to a reasonable suspicion that his possession is for a purpose connected with the commission, preparation or instigation of an act of terrorism'. The defence, which imposes the reverse burden of proof is contained in section 57(2) and provides that 'it is a defence for *a person charged* with an offence under this section *to prove that his possession* of the article *was not for a purpose connected with the commission, preparation or instigation of an act of terrorism*'. The problem related to the scope of what amounts to the article and detailed documents publicly available that could potentially fall foul of the provision – maybe even Google Maps (Tadros, 2008 at pp. 967 – 968 in Walker, 2009: 23).

The CT&BSA 2019 tries to close the gaps in the existing legislation and ensure fitness for the digital age, it also attempts to reflect the patterns that have emerged in contemporary radicalisation for instance by facilitating intervention at a much earlier stage in the investigations process by the Crown Prosecution Service and the police.

Similarly section 58 of the TA 2000 provides that a person commits an offence if he or she 'collects or makes a record of information of a kind likely to be useful to a person committing or preparing an act of terrorism' or that he or she 'possesses a document or record containing information of this kind'. The definition of a record includes photographic and other electronic records. The defence outlined in section 58(3) provides that the person accused must 'prove that he had a reasonable excuse for his action or possession'. Section 3 of the CT&BSA 2019 amends s.58 of the TA 2000 so that obtaining information that is likely to be useful to a terrorist now also covers terrorist material that is just viewed or streamed over the Internet rather than requiring it to be downloaded so as to form a permanent record.

The main issues surrounding reverse burdens of proof involve their legality in terms of the right to a fair trial and presumption of innocence under Article 6(2) of the European Convention on Human Rights and Fundamental Freedoms. This same

presumption was highlighted by Viscount Sankey LC as being the golden thread that runs through the English criminal law in the notable Woolmington v DPP [1935] AC 462. There is a plethora of jurisprudence emanating from the European Court of Human Rights that I do not intent to rearticulate here save in the fact that the Court has never made a direct ruling that a provision containing a reverse burden will inevitably lead to the conclusion that the provision concerned is incompatible with the convention. The approach of the court is set out clearly in Salabiaku v France (1988) 13 EHRR 379 at paragraph 28 of the judgement which states: 'Presumptions of fact and law operate in every legal system. Clearly, the Convention does not prohibit such presumptions in principle … contracting states [must] remain within certain limits in this respect as regards criminal law. […] Article 6(2) does not therefore regard presumptions of fact or of law provided for in the criminal law with indifference. It requires States to confine them within reasonable limits [that] take into account the importance of what is at stake and maintain the rights of the defence. This test depends upon the circumstances of the individual case'. Therefore, the law requires such presumptions be contained within reasonable limits.

In the United Kingdom, note that similar reasoning is deployed in other jurisdictions such as Singapore, the issue has been somewhat reconciled through judicial interpretation and the Law Commission.[54] The reasoning suggests that such burdens of proof place only an evidential burden on the accused. Such a burden is discharged on the balance of probabilities before the judge is passed to the prosecution. Thus, the requirement is far less onerous than the proof of guilt that must be evidenced by the prosecution – namely to the criminal standard of proof that is beyond a reasonable doubt which in legal terms means that the trier of fact, this would be the jury members in serious cases tried on indictment, are satisfied so that they are sure[55] that the accused is guilty as charged.

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54 The Criminal Law Revision Committee in 1972 stated that it was 'strongly of the opinion that, both on principle and for the sake of clarity and convenience in practice, burdens on the defence should be evidential only'. See: Evidence (General). The Eleventh Report of the Criminal Law Revision Committee. Cmnd 4991.

55 The standard of proof in criminal cases: 'beyond reasonable doubt' has been accepted to be synonymous with 'satisfied so that you are sure' in R v Folley [2013] EWCA Crim 396 at [12]. The point is that this is ordinary language that aids the jury's understanding of these technical terms. For a discussion on the 'golden thread' in English evidence law, namely who has to prove a particular issue in contention and to what standard, see the Right Honourable Lord Sankey in Woolmington v DPP [1935] AC 462; see also R v Hunt [1987] AC 352. However, the above terms have been criticized as creating a standard of proof that exists within another standard of proof – for a related discussion on this subject see Hornal v Neuberger Products [1957] 1 QB 247 and Re H and Others [1996] 1 All ER 1.

Bass (2000 at p. 7) argues that bona fide trials are often fraught with the danger that the accused will be acquitted on the basis of a lack of evidence or a vigorous defence and even being thrown out because of particular technicalities. He also poses the question; why give up state control to independent lawyers, perhaps therein lies his answer – independence is of utmost importance for the preservation of the integrity of due process and the rule of law including curtailing the arbitrary exercise or abuse of power without proper juridical intervention. Bass poses two interesting points for discussion from the view of international law when he suggests that 'war crimes tribunals risk the acquittals of history's bloodiest killers in order to *apply legal norms that were, after all, designed for lesser crimes* … [giving] those charged with international terrorism with an *unprecedented propaganda forum*'.[56] One could pose that same question in relation to the prosecution of terrorism at a domestic level.

5.2 Jurisdictional Extension of Prosecution for Foreign Activities

Prosecuting terrorists for the commission of relative offences within the United Kingdom's territory is clearly the intended purpose of the Terrorism Acts 2000 and 2006 but such statutes could create interesting jurisdictional issues. Walker argues that a general terrorism offence could be used to create an extended jurisdiction that allows the authorities to prosecute foreign terrorists that are found on domestic soil i.e. the terrorists from Paris found in London, but in which the United Kingdom itself was not technically a victim (2009: 23). I am sure many would agree that this could be considered to be a positive indication of nations working together to rid the world terrorism. However, the clear lack of a universal offence of terrorism in international law, as discussed, means that collaboration between prosecuting states to facilitate this renders it highly unlikely and that too is exacerbated by a conflict of assumed jurisdiction by reason of victimhood; the French authorities would no doubt wish to prosecute those perpetrators in France using the French legal system – so that justice can be seen to be done by those most affected by the crime, a justice meted out by the French authorities in France which will serve to promote confidence in the French criminal justice system and its due process.

56 I have added emphasis here so as to highlight the two issues at play.

6 Part 4, Contemporary and Cross-jurisdictional Issues

Earlier in the discussion it was highlighted that Resolutions 1373 (2001), 2178 (2014) and 2462 (2017)[57] require United Nations member states to introduce comprehensive counter-terrorism legislation; note the European Union approach here too.[58] The adoption of resolution 1373 (2001) resulted in a number of countries having taken active steps to criminalize terrorism in line with these international counter-terrorism instruments. But there are problems with this approach, issues that become quite obvious when the phenomenon of the foreign terrorist presents itself through a number of complex criminal justice challenges.

Terrorism is an evolving and unique crime; a state's ability to prosecute is key to preventing and suppressing it. The term 'foreign terrorist fighter' is defined by the resolution as 'individuals who travel to a state other than their state of residence or nationality for the purpose of the perpetration, planning, or preparation of, or participation in, terrorist acts or the providing or receiving of terrorist training, including in connection with armed conflict'. The term has become notorious within domestic public debates and has taken increasing prominence in global politics leading to the adoption of Security Council Resolution 2178 (2014) and 2462 (2017)[59] helping bring all foreign terrorist fighters to justice. These individuals pose a multifaceted risk, they have helped make domestic conflicts international issues because of the mixture of those involved and (b) the response to returning trained or hardened post-combat or combat-ready individuals.[60]

Like lone-wolf terrorists i.e. those that act alone, the activities of foreign terrorist fighters have shown to be facilitated by globalization and the Internet. For instance, the recruitment of individuals is carried out via online chat rooms and

57 See also, Resolution 2396 S/RES/2396(2017) that 'Urges [UN] Member States to strengthen their efforts to stem the threat posed by foreign terrorist fighters … through measures on border control, criminal justice and information-sharing and counter-extremism'.

58 The European Union has developed regional counter-terrorism strategy that is based on four pillars; prevent, protect, pursue and respond.

59 The resolution was supported by 104 member states and passed unanimously by the Security Council on the 24th of September 2014.

60 The British government, like others, has pursued a policy of stripping the individual of his or her citizenship so that they cannot return; the logic is that they have through their actions declared allegiance to another state. The other response is to stop them in-transit or that these individuals should be killed. Note; states cannot render individuals stateless, see: The 1954 Convention Relating to the Status of Stateless Persons and the 1961 Convention on the Reduction of Statelessness.

popular social networking and messaging sites [UNDOC, 2012, pp.3–8]. There is a particular issue in terms of user-to-user encryption services – notably the United Kingdom's government has sought to force organisations such as Facebook, Tinder, Google and WhatsApp to unlock their services and for Apple to unlock the hardware. The Investigatory Powers Act 2016 or the so-called 'snoopers charter' allows the United Kingdom's government unprecedented access to private information. In 2019, the United Kingdom's High Court in Liberty v the Secretary of State for the Home Department and Secretary of State for Foreign and Commonwealth Affairs [2019] EWHC 2057 (Admin), rejected that the Act breach European Human Rights Law and in short, these concerns were addressed through the provision of safeguards.

Users, namely those vulnerable to radicalization, learn or develop on that path by being drawn or directed to certain websites where they will engage with and obtain the information, methods and necessary tools. The Internet increases the risk of radicalization as terror groups groom those must vulnerable [UNDOC, 2012, pp.3–8]. The risk of terror crime being committed is also increased because information relating to faking identities, buying the component materials[61] (Horgan 2008 at pp. 80–93) and instructions on making bombs and the organisation of travel is readily available. Furthermore, the notion that only other individuals' or groups radicalize individuals is flawed – the problem of self-radicalization is a growing phenomenon and therefore a broader focus should be deployed to prevent limitation to investigations and responses.[62] Albeit, some notorious instances of terror crimes, such as the Madrid bombings in 2004, committed individuals thought to be self-radicalized were then discovered to have had been affiliated to terror organisations (Reinares 2009 at pp. 16–19). The Chair of the United Nations Security Council highlights that the world of the foreign terrorist fighter is 'personal and immediate, globalized and multidimensional. It attracts numbers beyond the ability of intelligence agencies to physically track … the journey from initial

61 Most recently Amazon.co.uk was criticized as the United Kingdom's broadcaster Channel 4 showed how the software algorithm the web-retailer uses to generate recommendations for 'frequently bought together items' resulted in bomb-making components being linked together for purchase thereby making obtaining the components much easier. Available at: http://www.independent.co.uk/news/uk/home-news/amazon-algorithm-bomb-making-components-mother-of-satan-channel-4-investigation-a7954461.html [Accessed: 31st October 2017].

62 Often authorities may seek to allay public fears through early declarations that individuals acted alone even though further enquiries may subsequently prove the opposite. This does not necessarily mean that they were wrong – which such heinous events take place there is a pressing issue in managing public perception so as to not cause mass panic.

interest to radicalization, to commitment, to action and, ultimately, to joining a foreign terrorist group has rapidly accelerated.'[63]

The notion of the 'lone wolf' may serve to hinder the willingness of states to allocate resources to assure adequate investigation, interception and prosecution of those actor's that may end up committing an offence but do not meet the threshold for intervention such as a Terrorism Prevention and Investigation Measure or Enhanced version of the same. What would be interesting is to see the extent to which the recent attacks are attributable to individuals that were on the 'radar' of the authorities but not subject to TPIM, E-TPIM or prosecution under the relevant law (discussed earlier).

There are some novel problems now facing states; the recruitment of individuals by terror organisations has sped up and the age of those recruited has become increasingly younger with notable cases of 15–16-year-olds committing the offences along with a decreasing disparity in gender distribution. The question that arises relates to the appropriate socio-legal and criminal justice response to -:

- Young people involved in terror crime;
- Entire families that move abroad;
- Family and non-family members may send money abroad;
- Women that travel abroad to seek a partner or support family.

Can it be legitimately argued that alternatives to traditional criminal justice responses are appropriate given these entire families may (a) be complicit in the crimes and (b) have been exposed to the horrors that often accompany them. In terms of the latter women often cite traumatic physical and sexual abuse, exposure to weaponry, brutality and killing, watching video footage of terror crimes being committed (Park et al. 2013). This leads to the question of whether or not it is possible to rehabilitate resulting indoctrination and/or trauma again 'etcetera'.

The statistics[64] demonstrate how this phenomenon has spread revealing some quite interesting trends. As at October 2014 72 cases related to terrorism in France were linked to the conflict in Syria – an increase of 200% when compared to the previous year. Out of the 100 terrorists that were prosecuted, two thirds were convicted and were sentenced to imprisonment. In Bosnia and Herzegovina 150 terrorists had travelled to Iraq and Syria; 30 of whom have been killed and 30 have returned. From the Netherlands around 160 terrorists

63 In a Letter dated 18 February 2015 from the Chair (Raimonda Murmokaitė) of the Security Council Committee established pursuant to resolution 1373 (2001) concerning counter-terrorism addressed to the President of the Security Council, at para.13–14 p.5/16.

64 These statistics are set out by Raimonda Murmokaitė; ibid note 63.

travelled to Iraq and Syria with 30 returning. In Finland 52 terrorists travelled Syria, this is an unusually high number given the small size of the Finnish population – highlighting varying degrees of radicalization and susceptibility to radicalization. What is interesting is the profiles of these individuals; what makes them so susceptible to radicalization and more so than their compatriots. During that same period, from the United Kingdom and Northern Ireland, around 500 terrorists travelled to conflict areas with 250 returning. This presents a substantial issue as to how to manage the risk that returnees pose and how to help them adjust back into normal life.

There are a number of measures that can be taken against terrorists attempting to travel to conflict zones. In the United States of America legislation permits the interception of any individual who plans to travel across borders to join a terror group once they have passed through the security gates at the airport. This is considered to be a threshold act that is charged under material support offence as set out in United States Code 18 §2339B.[65] The offence allowed intention to be inferred where an organisation has been publicly designated as a terror group – the Intelligence Reform and Prevention of Terrorism Act 2004 has amended the provision. Section 4 of the Counter-Terrorism and Border Security Act 2019 (CT&BSA)

65 U.S.C 18 2339B prohibits 'providing material support or resources' to an organization that the Secretary of State has designated as being a 'foreign terrorist organization.' The ban on material support was first introduced as part of the Anti-terrorism and Effective Death Penalty Act 1996 (AEDPA). The aim is to terror groups with the support required to plan and execute terror attacks. Research showed that terror organizations had created 'charitable' or 'humanitarian' arms to raise funds with which to fund their activities. Therefore, the provision applies regardless of whether or not the support provided to the designated organisation was for charitable or humanitarian purposes. The definition of 'material support or resources' in the 1996 Act included providing goods, money and materials, but also personnel or training. The definition was broadened by s.805 of the Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act 2001 (PATRIOT Act) to include expert advice and assistance. All these terms have had their fair share of controversy with many courts in the USA finding them to be too constitutionally vague and in potential conflict with protected speech under the First Amendment of the US Constitution – in regard to its unconstitutionality see: Humanitarian Law Project v Ashcroft (HLP), 309 F. Supp.2d 1185, 1200 (C.D. Cal. 2004). See also: the Congressional Record at pp.21–24: 147 Cong. Rec. S10990-02, *S11013 (2001) available at: https://www.congress.gov/crec/2001/10/25/CREC-2001-10-25-pt1-PgS10990-2.pdf [Date Accessed: 17/11/2017]. For reading on the First Amendment see: Schenck v United States 249 US 47 (1919) and Brandenburg v Ohio 395 US 444 (1969) – the Brandenburg Test. The issues were resolved by detailed definitions of the terms in s6603(b) of the Intelligence Reform and Terrorism Prevention Act 2004. Another step taken under the 2004 Act in relation to the material support or resources offence was the introduction of the 'knowledge' requirement, set out in 6603(c)(2) this requires those charged with that offence to have 'knowledge that the organization is a designated terrorist organization [and] that [it] has engaged or engages in terrorist activity … or that [it] has engaged or engages in terrorism'.

creates a new offence of entering or remaining in an area, designated in regulation by the Secretary of State to protect the public from a risk of terrorism, that is outside of the United Kingdom. Section 6 of the same statute confers extra-territorial jurisdiction on a series of other offences to ensure that people that have gone abroad can be prosecuted for encouraging or carrying out acts of terrorism overseas.

In France, legislation relating to *association de malfaiteurs* (criminal organisations) gives the authorities power to arrest, investigate and prosecute foreign terrorist fighters who are in the earliest of stages in the commission of an offence including prior to the point at which the offence of attempting to commit an act of terrorism is committed[66] (Saul 2014). The French civil law and common law offences of conspiracy are a good example of this; convictions under the common law offence carry a maximum sentence of 20 years. It is also salient to point out that under French law a French citizen can be prevented from leaving the country on reasonable grounds that they are involved in or travelling to participate in terrorist or terror related activity. The ban has duration of six months renewable for a period of up to two years. To support this the Committee of Experts on Terrorism of the Council of Europe developed the additional protocol to the Council of Europe Convention on the Prevention of Terrorism of 2005. The purpose is to criminalize acts the acts not already in the Convention as contained in Resolution 2178 (2014).[67]

France has specifically legislated on lone-wolf terrorists (enterprise terroriste individuelle). This offence allows the authorities to intervene at the preparatory stage and there is no requirement to establish a criminal association etc. The French Senate established this offence by adopting Law no. 2014–1353 of 13th November 2014, called the *loi Cazeneuve* (Gateau and Faron 2015). Most notably, the law added the requirement for providers to create accessible and visible measures to allow anyone to report the 'incitement to commit acts of terrorism and their glorification'. The law requires providers to contribute towards the fight against terrorism by making the means by which they are doing so available to the public and to take prompt action informing the authorities of any unlawful activities reported via that means. The authorities can require the provider or host to

66 The Beijing Convention of 2010 on the Suppression of Unlawful Acts Relating to International Civil Aviation. For an interesting discussion see: Abeyratne, R. The Beijing Convention of 2010 on the suppression of unlawful acts relating to international civil aviation – an interpretative study. Journal of Transportation Security (2011) 4: 131.

67 The texts of the Council of Europe Convention on the Prevention of Terrorism and the Additional Protocol to the Council of Europe Convention on the Prevention of Terrorism are available to download here: https://rm.coe.int/168008371c (Council of Europe Treaty Series No. 196) and https://rm.coe.int/168047c5ea (Council of Europe Treaty Series No. 217). [Accessed: 27th Jan 2018].

remove the offending material when 'the requirements of the fight against incitement to commit acts of terrorism or [the] glorification of [them] … [justify] it'. Where the content is not withdrawn within 24 h the authorities can request the Internet service provider block access to the websites concerned without having to request the editors or hosts remove unlawful content beforehand. In addition, the authorities can request that search engines and electronic directories to remove references to these websites so that they do not appear in search results etc.

Article (6–1) the law for trust in the digital economy did not require the authorities to obtain a court order when seeking to block a website but instead provides for a procedure where a 'qualified person' named by France's data protection authority the *Commission Nationale de l'informatique et des Libertés* (CNIL) may recommend that the authority stop blocking websites where he or she finds irregularities following which referral to an administrative court may be made. This law acts as an explicit reminder to host providers that they are responsible for the removal of unlawful material and should so immediately where a report is made by its service users or a relevant authority. The law does not affect the current level of liability of a host provider but does highlight the need for them to take responsibility and aid the fight against terror crime. Unlike the United States of America, Freedom of Speech in France more restrictive than that guaranteed under the First Amendment of the American Constitution. For some, this begs the question whether, given the impact the Internet has had on the complication and sophistication of society, Freedom of Speech really is a paramount core value of the Internet.

The global argument in relation to 'crypto wars'[68] and 'going dark'[69] with the aim of finding a middle-ground between freedom of Internet and the curtailment of rights, access to information stored on hardware and the encryption-decryption[70]

68 Crypto wars refer to the limitation of attempts by governments to back door a cryptographic system. The term back door means to weaken or undermine an encryption tool so as to facilitate access.

69 Going dark was originally a term used by law enforcement officials in the USA. It has become more common and is used to describe the reduced capability of agencies engaged in law enforcement to access communications content because of the increased use of encryption in modern technology and service provision.

70 Encryption is the mathematical process by which data is converted into an unreadable form so that no one other than the intended recipient can read it. There are three types of encryption typically used in technology and consumer service provision; end-to-end encryption, device or disk encryption and transport layer encryption or transport encryption (i.e. HTTPS, Secure Socket Layer (SSL) or Transport Layer Security (TLS)). In the first exclusively the sender and recipient hold the key(s) for decryption; this means that a service provider, any one or any organisation or entity trying to intercept the data or any other device through which the data is transmitted cannot read the contents. In the second the data stored on a device whether a computer or smart phone/tablet is encrypted when stored on it. This means that only those with the password or pin that unlocks the

of messages etcetera continues (Amnesty International 2016). Persuading providers of Internet services from companies that provide connection to the Internet and global search engine and social media behemoths such as Apple, Google, YouTube, WhatsApp, Instagram, Facebook, Twitter and Microsoft to contribute to surveillance and control continues to be a hard task. This is made even more difficult by the need for modern technology and services to protect consumers and service user data from interference or unlawful misuse by criminals.[71] The other factor that needs to be highlighted is that people all over the world are showing signs of disengagement with politics and there is reduced confidence in politicians following notable scandals i.e. the British MPs expenses scandals in 2009 and in 2013 (Guardian Newspaper, 2013). Notably, recent research by the National Centre for Social Research (Park et al. 2013 at p.79 para.2) in the United Kingdom show that long-term trends show a significant shift towards increasing levels of mistrust and cynicism in relation to government and politicians. There is little doubt that this would contribute towards an unwillingness for business and the public to entrust an erosion of civil liberties would not be open to abuse for those in power and for reasons that are contrary to the intentions set out in the arguments relative to this point. The factor that requires much further consideration is anonymity.

The response to foreign terrorist fighters by most criminal justice systems has been two-fold; that is to either use existing legislation or to create bespoke offences to deal with them and manage the risk. In Turkey, authorities placed heavy reliance on legislation targeted at organised crime. The Chinese authorities focused on using immigration law to stop individuals from travelling. In Egypt the authorities engaged offences relating to national security. The Indonesian authorities utilized their criminal code offences that prohibit the change of the constitutional system by means other than those accepted as being democratic.

Reliance on existing legislation i.e. non-terror specific offences, acts as an impediment to international cooperation. At the very basic level this relates with

device can access the data. This issue is particularly acute in relation to smartphones – for a notable example concerning the Apple iPhone see: Guardian Newspaper. Tim Cook says Apple's refusal to unlock iPhone for FBI is a 'civil liberties' issue. 22nd Feb 2016. The latter method of encryption relates to the encryption of data and information as it travels through a network for instance when an email travels from person A to person B or when accessing a website through a website browser (Google Chrome or Internet Explorer etcetera). Data, when in possession of the service provider, is unencrypted which means it can be disclosed in a legible manner to the authorities with the relevant permissions under the appropriate law.

71 The requirements under the new General Data Protection Regulation issued by the European Union and the requirements to report breaches. See: https://www.eugdpr.org/the-regulation.html.

definitional differences and thus the problem of dual criminality, and variances in the type of conduct that is criminalized. Furthermore, the commission of such offences often falls outside of the scope of extradition treaties etc. In addition, existing offences often carry sentences that may not fit the severity of the criminality concerned.[72] The reliance by Chinese authorities on immigration law offences is a notable example of this.

7 Conclusion

The last few decades have been especially good at showing that a continually reviewed criminal justice response to terrorism, at a domestic level, is both welcomed and required. Terrorism is a constantly evolving threat, given the dynamics involved in facing threat from organised terror groups and lone-wolfs, evidential difficulties, protecting civil rights and safeguarding due process a different approach is needed. It is clear that the cross-jurisdictional nature of this criminality requires greater international cooperation. Therefore, it is key that an international definition is agreed.

Such definition should include, at the very least, criminal conduct i.e. threats, violence against person(s) or property, threats to life and murder, extortion, fabrication of weapons and hostage taking, the intimidation of the public or a section of the public, compelling governments or international governmental or non-governmental organisations to act or refrain from acting, destroying a constitutional, cultural, economic, political or social structure of a country or international governmental or non-governmental organisations, advancing political, religious, racial or ideological causes, risks to health and safety of the general public (biological attacks) and interference with or a disruption of electronic systems, aviation or other transport systems.

Greater information sharing between countries would allow better investigation, prosecution and offender management. It would also provide clarity so that states could design effective policy tools to fight this phenomenon and legislate (specific offences) more effectively. Furthermore, safeguarding civil liberties and protecting the rights of those accused through judicial scrutiny and access to due

72 The CT&BSA 2019 attempts to rebalance this to ensure sentences reflect the severity of terrorism offences and facilitate more effective offender management post-release. For example s.7 increases the maximum penalty for some preparatory offences from 7 to 15 years; s.18 amends the TA 2000 so that the pre-charge detention time stops running when a person detained is transferred from police custody to hospital.

process must be of central to criminal justice responses so as to delimit the potential for abuse.

Whilst there are many examples of specific anti-terror legislation in the United Kingdom and in other jurisdictions, what is required is a consistent approach to controlling or restricting the activities of suspects for instance preventing them leaving a country to take up arms elsewhere. Legislation controlling the 'dark-web', balancing freedom of the Internet, smartphone application encryption, freedom of expression and privacy and how the law and criminal justice engages with people to prevent radicalisation is inadequate and needs to be explored further.

The jurisdictional issue is settled in international law, at least in its relationship with acts committed by foreign terrorists. However, there is a gap in the machinery. There is a demonstrable need for an International tribunal and specialist domestic national security court, to prosecute terror crime. This would allow a cohesive body of jurisprudence and specialist practitioners to be developed to face a constantly evolving phenomenon. The fact remains that it is highly unlikely that the jurisdiction of the International Criminal Court would be extended to cover this type of crime; even though many agree that this would be the most appropriate forum. In addition, it is equally unlikely that states would set up specialist national security courts in this regard given, amongst other factors, the cost implications. Finally, from a domestic United Kingdom perspective, a novel approach to receiving evidence is also required given the form in which such criminality often manifests itself – this would also require policy change.

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