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# What is Distinctive about Terrorism and Anti-Terrorism Law?

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Tena koutou katoa and gidday.

In an earlier incarnation I was a senior official of the New Zealand Ministry of Justice. However, as my fellow panellists are all government officials, I propose to take the role of token academic today and offer some conceptual thoughts.

How should a democracy respond to domestic terror threats? I propose to approach this question through examining two, apparently simple, questions:

- What is the nature of anti-terrorism law?
- What is new about it?

I will conclude with observations about what the future might hold for this area of law on a global basis.

My primary theme is to doubt the existence of sharp distinctions – in particular the distinctions between the “mischiefs” of crime, terrorism and war, and correspondingly, to doubt that sharp distinctions should exist in the principles that underlie criminal law, anti-terrorism law and the law of armed conflict. These different forms of conflictual behaviour all lie on a continuum that is converging through the development of modern technology. Our challenge is to examine carefully the policy principles underlying each corresponding area of law, the appropriate balance between the legitimate use of force and civil liberties, and the nature of the organizations that have to strike that balance.

I suggest that these policy principles should be the same in each area of law, that the balance will have to be struck, in the future, by a global form of government, and that the key imperatives will be to ensure that that form of government is democratically accountable to the citizens of the world. This is constitutional design writ large.

## **What is the nature of anti-terrorism law?**

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We are familiar with the difficulties of defining terrorism and the over-used maxim that one person's terrorist is another person's freedom fighter. Justice Albie Sachs reminded us vividly at this Symposium of the dangers of giving too long a leash to state coercive power.

As an aside, I was reflecting on the link that Albie drew between the peaceful birth of the new South Africa and its current cultural values in terms of the use of state coercive power. It would be interesting to draw similar links between the nature of the births of other nations and their cultural views of the use of state coercive power. Would we find that those states which are currently most keen to use coercive force to suppress terrorism were, themselves, born of violent revolutionary struggle? If so, what exactly is it that those states see reflected in the terrorism they seek to suppress?

### *Terrorism v Crime*

My main questions here, however, are what is the distinction between terrorism and crime? And what should be the corresponding distinction between laws combating each?

To approach answers to these questions I start with the prior question: why, in criminal law, do we balance the state's use of force to fight crime, with protection of citizens' civil liberties? If a criminal acts inconsistently with the public order that we all demand our governments maintain, why do we not simply punish the offender?

The answer is: the existence of uncertainty. The determination of "truth" in the messy reality of human behaviour is subject to uncertainty. To enforce punishment a civilized society needs a reasonable degree of certainty that its agents have got the right person, that that person really engaged in certain behaviour, and that that behaviour really constituted a crime. Criminals blend in to the rest of society. So we need the machinery and processes of the criminal law to achieve, and demonstrate the achievement, of some reasonable degree of certainty on which punishment can be based. Otherwise, we are haunted by the possibility that the punished could be innocent – and could be us.

I believe that the suppression of terrorism requires the same certainty. Terrorists also blend in to society. When we seek to suppress terrorism, like crime, we should investigate it, we should pursue terrorists (preferably before commission of a terrorist act) and when we catch them, before they are executed summarily on the London underground, we should demonstrate reasonable certainty that we have the right person. If we don't trust governments to catch the right criminals, why should we trust them to catch the right terrorists?

To this, it can be objected that terrorism is different. It is more systematic, more organized, more international, and better funded than ordinary crime. But transnational organized crime shares these same features, as those combating the triads and the mafia know.

More significantly, it can be objected that there must be something different about terrorism now, because most nations in the world have been busily engaged in changing their legal definitions of terrorist offences. This objection can be overstated.

There is constant updating of criminal law to cope with new crime patterns in response to influences of developments such as globalisation and technological change. The interesting, noticeably distinctive, aspect of the way in which new terrorist offences tend to be drawn lies in the inclusion in their definition of motivation.

“Ordinary” criminals commit crime for some reason – whether money, revenge or sadistic pleasure. By so doing, they incidentally imperil the maintenance of public order. However, terrorists commit crime with that very purpose in mind. Not only do they commit crimes that imperil the maintenance of public order, but they intend to do so precisely *in order* to imperil the maintenance of public order. The threat to public order is not incidental to the purposes of terrorists, it is instrumental to them. Perhaps this lies behind any extra sense of moral outrage we may have at terrorist, compared to criminal, offending. If so – naturally – the temptation is to draw the definition of terrorist offences to include that sense of motivation.

But motivation can be hard to prove in practice. And in criminal law, motivation is most easily taken into account in deciding the appropriate penalty that should be imposed, rather than deciding whether a criminal act has taken place at all. So here is my point: the nature of the terrorist acts that we seek to deter, prevent and suppress are, qualitatively the same as criminal acts. The uncertainty that attaches to their detection and punishment is qualitatively the same.

So I can find no principled distinction between the balance that should be struck in suppressing terrorism and protecting civil liberties and that that is struck in suppressing crime and protecting civil liberties. If the balance is wrong for terrorism, then surely it is wrong in the criminal law. And if we hesitate to reform criminal law to reflect the balance struck in anti-terrorism law, then perhaps we didn't hesitate enough in striking that balance, and it is wrong.

### *Suppression v Prevention*

There is one other point that needs to be made at this point. So far I have discussed the *suppression* of terrorism, as have most contributors to the Symposium. This is important.

As former colonials in both Canada and New Zealand know, “peace, order and good government” are enduring and fundamental functions of government. Individuals in any society require the maintenance of public order – of stable expectations of stable social behaviour. In a large modern western society where social norms are inadequate to achieve this effectively, we traditionally look to our government, and government's ultimate monopoly over the use of force within a society, to maintain basic public order. In challenging the maintenance of public order, and of expectations of public order, terrorism represents an explicit attack on this core function of governments. Governments do and should respond with the use of force to suppress the manifestation of terrorism.

But suppression is not the same as *prevention*. In the longer term, the prevention of crime requires careful and complicated analysis of the relationships between

underlying social, economic and cultural conditions and crime. So does the prevention of terrorism.

Terrorism can be the result of crazed irrational extremism, like crime. But it can also signal the existence of deep-seated division in a society, which is susceptible to more than one legitimate perspective. History provides too many examples of terrorist causes declared by governments in absolute terms to be unacceptable but that are subsequently settled, or should have subsequently been settled, for us to automatically accept such declarations at face value.

### **What is New about Terrorism?**

I have posed, so far, a relatively simple answer to the question about what is distinctive about terrorism: nothing much. Lord Walker of Gestingthorpe reminds us that terrorism has always existed in some form. Yet somehow people don't seem to think it is that simple. Since 9/11, in particular, terrorism has aroused strong emotions – in favour or against its particular causes or incidents or responses. Nations around the world have legislated quickly and strongly. In the wake of 9/11 the United Nations Security Council issued an unprecedented resolution, 1373, binding member states under Chapter VII of its Charter, to adopt a package of counter-terrorism measures. Such measures have been rapidly enacted in domestic jurisdictions around the world.

What is it that has changed? I suggest that we are seeing a concrete indication that the nature of sovereign government itself has changed. The era of Westphalian nation state sovereignty is coming to a close.

The distinctive feature of the Westphalian system is that nation states possess a natural monopoly over coercive force within the geographical boundaries of their territorial jurisdiction.<sup>2</sup> Their citizens demand such coercion – in the interests of stability in their expectations of stable public order. The level of coercion they demand is that level able to dominate other sources of coercive force in society. They control its exercise through “ownership” of the machinery of the natural monopoly – i.e. through democracy in government.

Now, from economic theory, what do we know about what happens to natural monopolies over time? Technology. Technology changes the boundaries of the natural monopoly; what was once efficient, in telecommunications or electricity networks, is no longer efficient. The same is true for the natural monopoly of coercion that is government. The current state of international terrorism is an indicator of that change; and its implications are massive.

We are used to having to deal with two sorts of conflict – dealt with in law by criminal law and the law of armed conflict. Criminal law, traditionally, has been the domestic law by which nation states have regulated conflicts between citizens within a society by a nation state in order to maintain order. The law of armed conflict has, traditionally, been the international law by which nation states have regulated

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<sup>2</sup> Matthew S. R. Palmer, *Constitutional Design and Law: The Political Economy of Cabinet and Congressional Government* (1993) (unpublished JSD dissertation, Yale Law School)

conflicts between nation states. These two conceptual spheres have been distinct. The nation state has maintained order, has suppressed crime, within its boundaries through its natural monopoly over coercive force. It has gone to war with other nation states to protect or advance its national interests.

Technology has changed that equation. Individuals and small groups of individuals can now, potentially, have access to weapons of mass destruction – whether they are airplanes, or nuclear or chemical weapons. They can threaten and achieve destruction on a scale previously only attainable by nation states at war. Yet they act like criminals. Those who wage war, warriors, are identifiable. We suffer no lack of certainty as to who to shoot at in war – they wear uniforms to help make that calculation efficiently. But terrorists hide, merging with the civilian populations of which they are truly a part. As I noted above we do suffer uncertainty, in identifying them and suppressing their actions, to a similar extent as in identifying criminals and suppressing their actions.

The suppression of such crime requires significant resources – even our one remaining super-power is vulnerable. It also requires international cooperation – economies of scope as well as scale. And this is the point. Terrorism in today's world of modern technology, unlike in the past, has taken a place in the middle of the continuum of conflict, between crime and war.

Most importantly, this suggests that the scale and scope of the natural monopoly over coercion that is required to be exercised in order to produce stability in social behaviour has increased significantly – and is now beyond the reach of most single nation states alone. Government, in the sense of its primary function of the maintenance of public order, must now be global.

There are indications that other functions of government have similarly expanded in scale. The changing technology of communication and transportation have made it efficient to trade goods on a scale and at distances previously unheard of. Regulation of such trade on the scale of previous national boundaries has become inefficient. The economic rise of the USA in the twentieth century demonstrated the efficiency of government on a new geographical scale – a demonstration now being followed, and exceeded, by the rise of the EU and of China and India, and potentially by multi-national regional economic trading blocks.

The nation state is on the way out. In the words of a famous New Zealander, Rachel Hunter: it won't happen overnight, but it will happen.

### **What does the Future Hold for this Area of Law?**

I have suggested above that criminal offending and terrorist offending are similar in quality – that the acts which constitute such offending are similar, and should be subject to similar levels of protection of civil and political rights. This is how a democracy should respond to domestic terror threats. To the extent that we are particularly concerned about the motivation of terrorists in challenging the very maintenance of public order by a state, we should reflect that concern in the penalties we impose on such proven offending, not in giving in to the temptation of lower burdens of proof of the existence of the offending or the identity of the offender.

I have also suggested, though, that our horror at terrorism since 9/11 – and the ongoing international and academic activity concerned with analysing and combating terrorism, including the successful existence of conferences such as this, is occasioned by a deeper change. Crime, terrorism and war are now all on the same continuum of conflict. They are at different points, to be sure, but they are qualitatively related. The implications for their suppression and prevention are huge. Technological changes have changed the efficient scale of the nation state. We are slowly but surely leaving the Westphalian era of national sovereignty and entering the era of global government – federated initially perhaps, but eventually global in scale, scope and resources. We can expect, at some point in the future, national police and military forces to be integrated or federated into a global coercive force that reinforces the authority of our recently established International Criminal Court.

I want to leave you with a warning. The question of how a democracy should respond to domestic terror threats is both the wrong question to ask and the right question to ask. It is wrong because we no longer face simply domestic terror threats. We face a continuum of conflict which requires a natural monopoly of coercion that is global in nature.

And this is why it is also the right question to ask. In the era of national sovereignty, the individual geographical monopolies of coercion that are and were nation states competed, slowly, inefficiently – and struck an equilibrium in their organisational form and rules that most effectively protected their citizens from exploitation of the monopolistic power of coercion: that protection is democracy and human rights and multi-cultural tolerance. Democracy and human rights are the most efficient means of controlling the coercive power of the state. In economic terms this constitutes “club” ownership by the citizen-consumers of the monopoly.

In the era of global government there will be no competing organisations to show us the most efficient way of controlling the global monopoly of coercive force. We must hold to democracy and human rights multi-cultural tolerance as the primary elements of constitutional design of our future global government. We must insist on preventing the causes of terrorism, on protecting civil liberties in exerting all forms of coercion, and we must insist on electing and holding to account the ultimate wielders of such global force.