

The Criminal Law Quarterly

Volume 58, Number 1

December 2011

Editorial

The UN's Failed Response to Terrorism

Criminal justice reforms and changes have traditionally been driven by domestic factors. Although this is still true in most cases, the role of international law and international institutions is increasingly important. A significant example is the role played by the United Nations, most especially its Security Council, with respect to global counter-terrorism policy in the wake of 9/11.

The 9/11 attacks provided the U.N. with an unparalleled opportunity to forge international agreement on a definition of terrorism. Whatever previous disagreements there were about freedom fighting and state terrorism, it was clear to all reasonable persons that the 9/11 attacks constituted terrorism. The killing of innocent people not engaged in hostilities in an armed conflict was terrorism; it did not matter whether they were in the planes, the World Trade Centre or the Pentagon.

On September 28, 2001, the Security Council demanded in Security Council Resolution 1373 that all states enact tough counter-terrorism measures under its mandatory powers to enforce international peace and security. The Security Council offered no guidance on the definition of terrorism. It failed to do so even though a 1999 Convention on the Suppression of Terrorism Financing included a restrained but principled definition: the intentional killing or injuring of those not engaged in armed conflict in order to intimidate a population or to compel governments to act.

The Security Council's failure to promote a definition of terrorism left states free to create their own definitions. Some defined terrorism very broadly so it could cover non-violent civil disobedience or even peaceful dissent; others selectively defined terrorism so that it would not include attacks on the civilians of an occupying power. A few countries, like Syria, managed both feats. Following an Arab Convention, it defined terrorism in an overbroad manner that included dissent while excluding "freedom fighting", so long as it was not directed at an Arab state.

Many countries including Canada looked to the broad definition of terrorism found in the U.K.'s *Terrorism Act* as the starting point. Although the Canadian definition is narrower than the British definition, it is still much broader than the 1999 Convention's general definition which the Supreme Court used in *Suresh v. Canada (Minister of Citizenship and Immigration)*, [2002] 1 S.C.R. 3 to define an undefined reference to terrorism in Canada's immigration laws. Thus Canada has a more restrained definition of terrorism in its immigration law as opposed to its criminal law. The constitutionality of the broader criminal law definition, including its requirement of proof of political or religious motive, will be decided by the Supreme Court in the Khawaja case to be heard early in 2012.

Given its eagerness to promote counter-terrorism, the U.N. Security Council through its new Counter-Terrorism Committee essentially ignored human rights for three years after 9/11. This provided many countries with plenty of time to enact broad new laws. The Security Council, like the General Assembly, now claims it recognizes that respect for human rights is part of a sustainable security strategy, but the stains of the first few years after 9/11 have lingered. The failure of both bodies to agree on a definition of terrorism presents a danger that domestic repression, especially in non-democratic countries, can be laundered as counter-terrorism law. China is one country that is proposing for example to dramatically expand its terrorism laws including listing terrorist organizations and individual terrorists.

The U.N. Security Council's initial approach not only neglected human rights, but made strategic errors in counter-terrorism strategy. Responding to bin Laden's exaggerated reputation as a financier of terrorism and its desire to promote the 1999 Financing Convention, the Security Council focused on terrorism financing.

Many countries made it a priority to enact terrorism financing and money laundering laws despite the small amounts required to finance deadly terrorism. One such country was Indonesia, which enacted a terrorism financing/money laundering law in 2002 when it should have been reforming its criminal law and policing to better deal with acts of terrorism such as the 2002 Bali bombings that killed 202 people.

The 9/11 commission concluded that stronger terrorism financing laws could not have stopped what was most likely the most expensive act of terrorism in history, but the U.N. continues to make such laws a policy priority. The Air India Commission in Canada reached similar conclusions, but also concluded that Canada must maintain its terrorism financing laws because of its international obligations.

Another problem with terrorism financing law is that it depends on lists of suspected terrorists compiled on the basis of secret intelligence. In the

Abdelrazick case, Justice Zinn joined the chorus who denounced this process as Kafkaesque, and the Security Council to its credit has responded to this and many other cases throughout the world by creating an Ombudsperson to consider delisting requests, and more recently in Security Council Resolution 1989 by giving her recommendations some presumptive force. Nevertheless, the Ombudsperson cannot force a country such as the U.S. to share secret intelligence with her.

The Security Council also encouraged states to focus on refugee applicants as potential terrorists, thus encouraging states to use immigration law as a shortcut around criminal laws. This allowed democracies to rely on secret evidence against non-citizens even as the threat of homegrown terrorism grew. The security certificates that are still winding their way through Canadian courts are a testament to the difficulties and dangers of using immigration law as counter-terrorism law.

The Security Council followed Prime Minister Blair's lead after the 2005 London bombings in focusing on extremist speech. This approach was potentially divisive and downplayed the differences between extremist beliefs and acting on such beliefs in a violent manner. Canada has told the U.N. that its existing hate speech laws and laws against the incitement of murder and terrorist crimes are adequate, but rumours are surfacing that the government may include a speech-based offence in new legislation designed to restore post 9/11 preventive arrest and investigative hearing powers that were allowed to lapse in 2007.

Similar stories about international influences on criminal law can undoubtedly be told in other areas such as drugs, corruption and sex trafficking. We cannot assume that criminal justice policy is exclusively a domestic matter. The U.N.'s flawed counter-terrorism strategy demonstrates that even if the domestic house is reasonably in order, strong demands for crime control can come at the international level and compliance with international mandates can be used as an excuse throughout the world for unrestrained criminal laws.

K.R.