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TERRORISM, SECURITY, AND RIGHTS: A NEW DIALOGUE

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This article constitutes a general introduction to this special feature on anti-terrorism legislation, consisting of nine contributions covering developments in Singapore, Malaysia, Australia, South Africa, the United Kingdom, the United States and Canada. It identifies six main themes covered in these contributions: the apparent overbreadth and redundancy of the legislation; the suppression of the financing of terrorists; various criminal law problems, such as the lack of adequate *mens rea* components; tensions between anti-terrorism measures, including internal security legislation, and constitutional safeguards; the concentration of powers in the executive; and the relationship between domestic and international law.

Lawmakers not only in Washington DC but also in Singapore, Canberra, Cape Town, London, and Ottawa, as well as at the United Nations headquarters in New York, responded swiftly to the terrorist attacks on the United States on 11 September 2001, tabling legislation to give governments and law enforcement agencies expanded powers to deal with the threat of terrorism, and revisiting pre-existing and proposed criminal, organized crime, and anti-terrorism legislation. Yet as swift and pervasive as the legislative response to the terrorist attacks has been, so too has been the opposition to these extraordinary measures, focussed largely on the extent to which they derogate from civil and constitutional rights in the name of security. Thus begins a new international dialogue about the cost to liberty that must be paid for security.

What is new about this dialogue is perhaps not the subject-matter itself. Rather it is the environment in which this dialogue now takes place, for an important window has opened between “East” and “West.” Prior to September 11, a considerable amount of rhetorical energy was spent by governments in the West in condemning alleged abuses of human rights in Southeast Asia, including Singapore and Malaysia, while perhaps an equal amount of rhetorical energy was spent in Southeast Asia defending the alleged abuses by invoking the unique cultural context, reified by the notion of “Asian values,” which was supposedly unique in placing the community

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above the individual.¹ The aftermath of September 11 has shattered the credibility of this rhetoric. Critics in the West can scarcely – on pain of hypocrisy – stand in judgment of draconian security legislation in Southeast Asia (most of which, incidentally, finds its origins in the British colonial period) without first taking a hard look at their own governments' legislative response to the threat of terrorism.² Indeed, the United States government has openly backed the use of security legislation to crack down on terrorist groups in Malaysia and Singapore,³ which, ironically, has been criticised in the Singapore press.⁴ Conversely, any argument that seeks to defend security legislation with reference to cultural relativism and the unique significance in Asia of the community would lose much of its force in the face of invasive and even draconian anti-terrorism legislation in the West.

In the context of anti-terrorism legislation, the new debate is not about cultural relativism or about human rights abuses *per se*, but rather about the extent of the actual threat posed and the extent to which the threat justifies departures from human rights norms. This is not to say that context is not

¹ See, for instance, White Paper on *Shared Values* (Singapore: 2 January 1991) Cmd 1 of 1991.

² As one contributor to this volume pointedly asks in response to the warm response by the United States to Singapore's recent use of its Internal Security Act: "Has the rest of the world come to appreciate Singapore's position?" See M Hor, "Terrorism and the Criminal Law: Singapore's Solution" [2002] Sing JLS 30 (in this volume, *infra*).

³ See Tan Tam How, "Suspected terrorists deserve an open trial," *The Sunday Times* (Singapore), January 27, 2002, at 46, where it is reported that "even erstwhile Western critics of the [Internal Security Act], most notably in the United States, have changed tack. Some have given Singapore a pat on the back for moving against the [individuals detained by the Singapore government under the Internal Security Act]." See also "Australia backs Malaysia's security law," *The Straits Times*, 31 May 2002 (online edition at straitstimes.asia1.com.sg), reporting Australian Defence Minister Robert Hill's support for the detention of suspected militants by the Malaysian government.

⁴ *Ibid.* Argues Tan: "Opponents of the [Internal Security Act or "ISA"] argue that it violates fundamental rights because it denies a person the right to defend himself in a fair and open trial. They also criticize the law for going against the principles of justice – because a person detained under it is not presumed innocent until proven guilty. They also reject the stand that the ISA is necessary in cases where no witnesses would be forthcoming or that it will undermine its intelligence operations, and insist that the fundamental rights and principles of justice are of greater importance. If these arguments stand, they should stand in all cases... The average Singaporean, who is not likely to lose sleep over the problems of the ISA, will not be tossing and turning over the justice meted out to the 13 people who have been detained. Thus, pressing to bring them to court may not be popular. But it will certainly be right." (For a more detailed look at the operation of the Internal Security Act in terrorism cases, see M Hor, "Terrorism and the Criminal Law: Singapore's Solution," *supra* note 2.) The use of strict anti-terrorism powers has also been criticized in Indonesia. Consider, for instance, the words of one member of the Indonesian Parliament, Mr. Hamdan Zoelva of the Crescent Star Party (PBB), who was quoted by *The Straits Times* ("Muslims oppose Jakarta anti-terror Bill," 11 May 2002) as saying that the proposed new anti-terrorism bill "is a Bill drafted in times of emergency, like those passed in the United States and Britain following the [September] 11 attacks" and that it "is dangerous as it puts aside human rights conventions in order to prosecute terrorist suspects."

important or that cultural values are irrelevant, but when Americans are increasingly tolerant of limitations on their civil liberties to ensure their security and prosperity, as they now seem to be,⁵ the argument that Asians are unique in being “willing to accept certain curbs on their civil liberties in exchange for a crime-free environment”⁶ – or, for that matter, a terrorist-free one – is unconvincing. It seems, then, that the international dialogue about the response to September 11, of which the contributions to this volume are a part, can take place free from the usual rhetoric (or at least some of it) that hinders a free and frank exchange.

The contributions to this special feature offer perspectives on various aspects of anti-terrorism legislation in Singapore, Malaysia, Australia, South Africa, the United Kingdom the United States, and Canada. The concerns raised by the authors centre around six major themes: (i) the apparent overbreadth and redundancy of the legislation; (ii) the suppression of the financing of terrorists; (iii) various criminal law problems, such as the lack of adequate *mens rea* components; (iv) tensions between anti-terrorism measures, including internal security legislation, and constitutional safeguards; (v) the concentration of powers in the executive; and (vi) the relationship between domestic and international law.

I. OVERBREADTH AND REDUNDANCY

The starting point for much of the anti-terrorism legislation discussed in this special feature is the definition of terrorism.⁷ Some of the definitions discussed refer to the motive behind the act (typically requiring a political, religious, or ideological motive⁸), some require some form of “intimidation” of the government or the public,⁹ and most require some form of violence or danger to persons or property. Several issues arise from these definitions,

⁵ See Mary WS Wong, “Electronic Surveillance and Privacy in the United States After September 11, 2001: The USA PATRIOT Act” [2002] Sing JLS 214 (in this volume, *infra*), especially note 3. Similarly, Christopher Harding observes, in his article “International Terrorism: The British Response” [2002] Sing JLS 16 (in this volume, *infra*), that the terrorist attacks have by their nature produced “a climate of public opinion which favours legal control at the expense of constitutional freedoms” (at 28).

⁶ V Iyer, “Asian Values and Human Rights” in V Iyer, ed, *Democracy, Human Rights and the Rule of Law* (New Delhi: Butterworths, 2000), 155-172, at 170.

⁷ These definitions are too complex to repeat here. Please refer to the contributions in this volume, which set out the relevant provisions in detail.

⁸ See, for instance, s 3(1)(b) of the Security Legislation Amendment (Terrorism) Bill 2002 (Australia); s 83.01(1), paragraph (b)(i)(A) of the definition of “terrorist activity” in the Criminal Code (Canada), as amended by the Anti-Terrorism Act; s 1 of the Anti-Terrorism Bill, 2000 (South Africa).

⁹ See, for instance, sec 802, Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism (USA PATRIOT) Act of 2001 HR 3162; paragraph (b)(i)(B) of the definition of “terrorist activity” in the Criminal Code (Canada), as amended by the Anti-Terrorism Act; regulation 4(1), paragraph (b) of the definition of “terrorist act” in the United Nations (Anti-Terrorism Measures) Regulations 2001 (Singapore).

but three basic concerns can be identified: first, a broad range of legitimate activities might be caught by their broad sweep; second, the range of activities that are caught by the definition, as well as the range of new powers conferred on the authorities, might overlap with pre-existing legislation; third, in light of these problems of overbreadth and redundancy, the legislation may well be ineffective against its intended targets.

The international political community has a difficult time settling on a definition of “terrorism” precisely because it is difficult to distinguish in a non-evaluative way between terrorists and opponents of an unjust regime.¹⁰ As two of the contributors observe, most definitions of terrorism would encompass the violent activities of the political opponents during the Apartheid era in South Africa.¹¹ A similar concern is expressed that the definition of terrorism in the proposed anti-terrorism legislation in Australia is wide enough to be used against “domestic political activists engaged in legitimate non-violent protests and conscientious acts of civil disobedience.”¹² In jurisdictions where political opposition is otherwise minimally restricted, a broadly worded definition of terrorism may well have a chilling effect. Definitional problems also arise in Singapore in relation to the new obligations on Singapore citizens and other persons not to deal in property owned or controlled by terrorists,¹³ since they may not easily be able to determine whether the client in question is a terrorist and the property in question therefore terrorist-linked.¹⁴ Private individuals, to whom the “policing” of terrorist financing is effectively delegated, are likely to err on the side of caution in dealing with property which might possibly be linked to terrorists, particularly since they are granted immunity from civil suits for conduct undertaken pursuant to the objectives of Singapore’s United Nations Act 2001.¹⁵

¹⁰ On the history of the term “terrorism” and the political problems involved in attempting to define it, see Bruce Hoffman, “Defining Terrorism” (ch 1) in *Inside Terrorism* (London: Victor Gollancz, 1998), 13–44.

¹¹ See Hor, *supra* note 2 at 35 (note 29); Kent Roach, “Canada’s New Anti-Terrorism Law” [2002] Sing JLS 122 (in this volume, *infra*) at 133. See also CH Powell, “South Africa’s Legislation Against Terrorism and Organised Crime” [2002] Sing JLS 104 (in this volume, *infra*). As Powell observes, the measures in the Anti-Terrorism Bill have been criticized in South Africa “as a return to Apartheid-era legislation” (at 117).

¹² See Nicole Rogers and Aidan Ricketts, “Fear of Freedom: Anti-Terrorism Laws and the Challenge to Australian Democracy” [2002] Sing JLS 149 (in this volume, *infra*).

¹³ United Nations (Anti-Terrorism Measures) Regulations 2001 (Singapore), regulation 6, set out in Tham Chee Ho, “Terrorist Property Rights in Singapore: What’s Left after the United Nations Act 2001?” [2002] Sing JLS 176 (in this volume, *infra*). As Tham observes, these regulations do not apply to financial institutions; the proposed Terrorism (Suppression of Financing) Bill (Bill 18 of 2002) is intended to fill this gap.

¹⁴ See Tham, *ibid* at 185 *ff*.

¹⁵ United Nations Act 2001 (No 44 of 2001), s 3(1), provides: “No action, suit or other legal proceedings shall lie against – (a) any party to a contract for failing, neglecting or refusing to carry out any act required by the contract; or (b) any person for failing, neglecting or refusing to carry out any act under any written law, – where such failure, neglect or refusal

A second concern relates to the considerable overlap in many jurisdictions between existing legislation and the new anti-terrorism legislation. More than one contributor has identified this overlap and on this basis, questioned the need for such far-reaching the legislation. For instance, Nicole Rogers and Aidan Ricketts, commenting on the proposed Australian legislation, observe that the Senate Committee inquiry could find only “one area in which, arguably, there were deficiencies in the existing criminal law in the context of acts of terrorism.”¹⁶ Kent Roach, commenting on the Canadian legislation, comes to a similar conclusion: “In my view, there is no reason to think that Canadian courts would not have sensibly interpreted existing Canadian criminal law to apply to apprehended acts of violent terrorism.”¹⁷ In Singapore, Michael Hor is quick to recognize that penal provisions contained in the anti-terrorism provisions are relatively weak compared to the draconian powers under the Internal Security Act.¹⁸ And in South Africa, CH Powell points out that both the Prevention of Organised Crime Act¹⁹ and the Anti-Terrorism Bill cover activities already prohibited under South African common law and statutory law.²⁰

What sorts of internal and external political pressures might force governments to go to such extraordinary lengths, when legislation was already in place (subject, perhaps, to some relatively minor “tweaking”) in most jurisdictions to deal with the threat of terrorism? Certainly, the political need to respond to the climate of public fear and the “highly charged” emotional climate²¹ in most developed countries after September 11 must form a significant part of the explanation. External pressure from the Bush administration and the United Nations Security Council might also form part of the story. Whatever the explanation, many of the contributors regard the legislative response as in large measure redundant (save perhaps for provisions relating to financing of terrorist activities).

The overbreadth and redundancy of the legislation leads naturally to questions about its efficacy. In this respect, Christopher Harding’s contribution raises an important question. What is the evidence, he asks, “that more extensive and severe criminalisation and further facilitation of international legal co-operation will reduce the risk of future terrorist activity?”²² The solution, he suggests, is to look beyond short-term prevention and deterrence at larger structural problems “of a political,

is solely attributable to, or occasioned by, the provisions of this Act or any regulations made thereunder.”

¹⁶ *Supra* note 12 at 153.

¹⁷ Roach, *supra* note 11 at 125.

¹⁸ Hor, *supra* note 2, Part IV: “The Anti-Terrorism Regulations and the Internal Security Act Compared.”

¹⁹ Act 121 of 1998.

²⁰ *Supra* note 11.

²¹ Harding, *supra* note 5 at 17.

²² *Ibid.*

ideological and economic nature.”²³ Similarly, Mary Wong observes that it is not clear how the expanded powers given to authorities in the United States “would have allowed the Government to detect and prevent the September 11 (or any other) terrorist attacks.”²⁴ The possibility that much of the legislation enacted after September 11 might have no practical effect on the “war against terror” reinforces the concern, in some jurisdictions, that such legislation might be used to control internal political opponents and other non-terrorist “undesirables.” For example, the use of the War Measures Act against separatists and other political activists in Canada during the FLQ crisis in 1970 and the use of the Internal Security Act against the “Marxist Conspirators” in Singapore in the late 1980s²⁵ demonstrate how security legislation might easily be turned against internal political dissent. It would seem, then, that the onus rests on the shoulders of legislators to justify legislation that appears to be not only overbroad and redundant, but also ineffective against its intended targets.

II. SUPPRESSION OF THE FINANCING OF TERRORISTS

It is perhaps a little easier to fend off arguments based on redundancy when it comes to offences dealing with financing of terrorism. Prior to September 11, many jurisdictions did not have legislation in place aimed at curbing terrorist financing, although some of the international instruments in this area, such as the International Convention for the Suppression of the Financing of Terrorism, pre-date 11 September 2001.²⁶ As Harding points out, “it has become clear in recent years that the tracking and control of terrorist finance represented one of the main lacunae in the national and international efforts at legal control.”²⁷ Many jurisdictions have reacted to the terrorist attacks by enacting new domestic legislation to control the financing of terrorists.

As Harding explains, the Terrorism Act 2002 in the United Kingdom introduces such anti-financing measures as account monitoring orders – through which the authorities can require financial institutions to provide information about accounts – as well as freezing orders and the power to seize cash.²⁸ These powers, while raising obvious concerns about individual rights, such as the right to privacy,²⁹ also demonstrate the extent to which private financial institutions are being recruited by states in their attempts to control terrorist financing. In his contribution, Tham examines the extent to which anti-terrorism legislation in Singapore has imposed new obligations

²³ *Ibid* at 17.

²⁴ *Supra* note 5 at 224.

²⁵ See Hor, *supra* note 2.

²⁶ UN GAOR, 76th Plen Mtg, Annexes, UN Doc A/C6/54/L2, annex I (9 December 1999).

²⁷ *Supra* note 5 at 20.

²⁸ *Ibid*.

²⁹ See section IV, *infra*.

on private entities,³⁰ obligations which, in turn, create problems for the regime of property rights in Singapore.³¹ As becomes clear from Tham's discussion, by granting civil immunity to persons who immobilize property pursuant to the United Nations (Anti-Terrorism Measures) Regulations 2001 and imposing penalties for failing to do so, the new legislation creates incentives for these persons to err on the side of caution and immobilize property where doubts exist as to who ultimately controls it. The immobilization of property in turn gives rise to further questions as to the status of these assets once seized. Does immunity from civil suits merely create a procedural bar to their recovery or does it effectively extinguish the substantive property rights of the original owner? Tham addresses these issues directly in Part V of his contribution.

III. CRIMINAL LAW CONCERNS

The new anti-terrorism legislation also gives rise to a variety of traditional criminal law problems concerning the breadth of the *actus reus* component and the *mens rea* or fault requirements. For some of the new offences, problems arise from the broad definition of terrorism discussed previously, to the extent that the elements of the offence incorporate that definition. For instance, amendments to the Criminal Code in Canada make it an offence to knowingly participate in or contribute to "directly or indirectly, any activity of a *terrorist group* for the purpose of enhancing the ability of any *terrorist group* to carry out a *terrorist activity*."³² The inclusion of the terms "terrorist group" and "terrorist activity" import with them all of the conceptual and definitional problems mentioned earlier, including problems relating to proof of motive, with all of the difficult normative problems that the motive element creates (eg knowing how to distinguish acceptable and unacceptable political, religious, or ideological motives). As Roach observes, the inclusion of a motive element "will make the politics and religion of the accused terrorists a central feature of their criminal trials."³³

Other specific concerns about the *actus reus* components relate to the wide range of peripheral activities that the laws have the potential to prohibit, such as the offence in Canada of "providing or offering to provide a skill or expertise for the benefit of, at the direction of or in association with a terrorist group,"³⁴ or in Singapore of providing funds "to any person

³⁰ But not financial institutions, which are the subject of separate legislation: see *supra* note 13.

³¹ *Supra* note 13.

³² Criminal Code (Canada), s 83.18 (emphasis added).

³³ Roach, *supra* note 11 at 128. Of course, the politics and religion of the accused is likely to arise whether or not a motive element is expressly included in the definition of terrorism, a factor which Hor suggests has contributed to the use of internal security rather than criminal legislation against suspected terrorists in Singapore: *supra* note 2 at 49.

³⁴ Criminal Code (Canada), s 83.18

by any means, directly or indirectly” that the person “knows or has reasonable grounds to believe ... will be used to commit any terrorist act or facilitate the commission of any terrorist act.”³⁵ Without some limitation as to their scope and even apart from the broad definitions of “terrorism,” these sorts of provisions have the potential to criminalize a broad range of legitimate activities and services that might only be rather peripherally related to terrorist activities. As Rogers and Ricketts observe of the proposed Australian legislation, “a number of serious offences are created which impose life sentences on people who may only be remotely connected with activities of organisations defined as terrorist.”³⁶

Given the breadth of the definition of terrorism and the range of conduct that might potentially be caught by the anti-terrorism laws in many jurisdictions, a key safeguard would be a heightened *mens rea* component. There are some instances in which the *mens rea* is pitched at a sufficiently high level of fault. For instance, in the Singapore “funding” provision noted in the previous paragraph³⁷ requires a *mens rea* of knowledge or reasonable grounds to believe that the funds will be used for terrorist activities, which Hor observes “does not appear to have any room for lesser *mens rea* like knowledge of a significant possibility or even a probability that the funds will end up in terrorist hands.”³⁸ Recklessness, he explains, is not enough to convict.³⁹ In Canada, offences under the new s 83.18 of the Criminal Code are subject to the accused person *knowingly* participating in or contributing to, “directly or indirectly, any activity of a terrorist group *for the purpose* of enhancing the ability of any terrorist group to facilitate or carry out a terrorist activity.” These specific offences clearly set the *mens rea* requirement particularly high.

However, for other offences, the *mens rea* is pitched much lower or is not specified at all. For instance, Powell notes that South Africa’s Prevention of Organised Crime Act “lowers the threshold of criminal liability by extending the fault component of the crimes to negligence, rather than intent.”⁴⁰ Similarly, the example from the Australian Senate Committee Inquiry of a business owner who sells fertilizer without asking the buyer about its intended use, and who might therefore be liable in relation to at least five offences even if ignorant of the buyer’s intention to use the fertilizer to make a bomb,⁴¹ indicates that the proposed Australian legislation could well impose criminal liability for negligence. And Roach points us to an anomalous provision in the Canadian legislation which implies that to be liable for knowingly facilitating a terrorist activity, it is

³⁵ United Nations (Anti-Terrorism Measures) Regulations 2001 (Singapore), regulation 5(a).

³⁶ *Supra* note 12 at 160.

³⁷ See text accompanying note 35.

³⁸ Hor, *supra* note 2 at 37.

³⁹ *Ibid.*

⁴⁰ *Supra* note 11 at 107.

⁴¹ Discussed by Rogers and Ricketts, *supra* note 12 at 160.

unnecessary that “any particular terrorist activity was foreseen or planned at the time it was facilitated,” which, Roach suggests, has the effect of obliterating the fault element.⁴² On the Singapore legislation, Hor provides a list of new offences which contain no *mens rea* words and which thus require the courts to interpret the mental element by reference to indeterminate case law.⁴³ It remains to be seen in all of these jurisdictions whether the courts will be able, through the use of common law principles, constitutional safeguards, and statutory interpretation, to preserve some element of fault, particularly where none is specified.

IV. CONSTITUTIONAL SAFEGUARDS AND INTERNAL SECURITY LEGISLATION

Questions of fault aside,⁴⁴ concerns relating to constitutional rights fall into three categories: concerns about violations of specific rights, such as the right to privacy; concerns about the erosion of procedural safeguards in the investigation of terrorism-related offences; and concerns about the use of internal security legislation against suspected terrorists.

As Wong’s contribution explains, the USA PATRIOT Act gives the authorities broad new powers of surveillance and information-sharing⁴⁵ and thus raises concerns that these powers will be abused and the right to privacy undermined, particularly in relation to online and electronic communications,⁴⁶ in respect of which the FBI is using “cutting edge technology to combat crimes utilizing similarly advanced technology.”⁴⁷ But the use of such technology gives rise to concerns about abuse. Wong argues that the authorities cannot simply ask the public to trust them with its use, and that it is natural and reasonable to ask of a democratically elected and stable government “how it intends to safeguard privacy protections and civil liberties.”⁴⁸ This point concerning the use of surveillance technology suggests a broader concern that the climate of fear post-September 11 has emboldened governments to amass a broad range of powers that curtail fundamental freedoms, powers that once institutionally entrenched will be difficult to remove notwithstanding the use of “sunset” provisions in respect of some of them.⁴⁹

⁴² *Supra* note 11 at 138.

⁴³ *Supra* note 2 at 37. See also, Tham, *supra* note 13 at text accompanying note 31, raising similar questions about the *mens rea* in relation to the terrorist financing provisions.

⁴⁴ In some jurisdictions, such as Canada and South Africa, the fault element is subject to constitutional scrutiny: see Victor V Ramraj, “Freedom of the Person and the Principles of Criminal Fault” (2002), 18 *South African Journal on Human Rights* 301 (forthcoming).

⁴⁵ Wong, *supra* note 5 at 223 *ff.*

⁴⁶ *Ibid* at 230.

⁴⁷ *Ibid* at 260.

⁴⁸ *Ibid* at 261.

⁴⁹ See, for instance, s 224 of the USA PATRIOT Act, *supra* note 9 (certain amendments ceasing to have effect on 31 December 2005). In Canada, new provisions relating to investigative hearings and preventive arrests, are subject to a five-year expiry date, which

In some jurisdictions, the legislature has conferred broad new powers to facilitate the investigation and prosecution of terrorism-related offences. For instance, the new Canadian legislation confers new powers of preventive arrest and creates an investigative hearing in which a person may be ordered to disclose information relating to an offence.⁵⁰ In the United Kingdom, the Anti-Terrorism, Crime and Security Act of 2001 has expanded powers of detention of suspected terrorists under the Immigration Act of 1971, apparently permitting an indefinite period of detention.⁵¹ Under the proposed Australian legislation, the authorities will be able to detain suspects for up to 48 hours (and, with further warrants, for another 48 hours), during which time the suspects can be denied legal representation and cannot refuse to answer questions subject to a penalty of five years' imprisonment for refusing to do so.⁵² And under the proposed South African anti-terrorism legislation, detention for the purposes of interrogation for up to 14 days would be allowed.⁵³ Not surprisingly, these new powers fuel concerns about the erosion of procedural safeguards, despite government assurances⁵⁴ that these measures will hold up to constitutional scrutiny.

While the Canadian and proposed Australian anti-terrorism legislation confer new powers of preventive detention subject to judicial authorization, internal security legislation in Singapore and Malaysia has long authorized preventive detention for periods of up to two years at a time by executive order without judicial authorization and subject to limited judicial review.⁵⁵ As Hor explains in his contribution, some three months after the attack in the United States, the Singapore government moved against 13 suspected terrorists by arresting them under the Internal Security Act. And according to Therese Lee's contribution, 43 persons have been arrested for alleged terrorist activity in Malaysia since 11 September 2001.⁵⁶ Under the Internal Security Act in these jurisdictions, the suspected terrorists can be detained without trial for reasons of national security.

The use in Malaysia and Singapore of the Internal Security Act against suspected terrorists attracts its fair share of criticism. For instance, Lee argues that "the potential for a steep decline in the protection of constitutional rights is greater now that there is less scrutiny from an

may be extended: see s 83.32 of the Criminal Code, as amended by the Anti-Terrorism Act. The Anti-Terrorism Act also provides for a comprehensive review of the provisions and operation of the Act within three years of its coming into force: s 145.

⁵⁰ Roach, *supra* note 11 at 143-44.

⁵¹ Harding, *supra* note 5 at 21.

⁵² Rogers and Ricketts, *supra* note 12 at 162-63, referring to s 24 of the Australian Security Intelligence Organisation Amendment (Terrorism) Bill.

⁵³ See Powell, *supra* note 11 at 117, referring to s 16(1) of the Anti-Terrorism Bill.

⁵⁴ See, for example, Wong, *supra* note 5 at 265.

⁵⁵ See Hor, *supra* note 2 at 42-44.

⁵⁶ See Therese Lee, "Malaysia and the Internal Security Act: The Insecurity of Human Rights After September 11" [2002] Sing JLS 56 (in this volume, *infra*) at 61.

international community consumed with the war on terror.”⁵⁷ Based on the information available to him, Hor considers some possible justifications for the use of internal security legislation against the Jemaah Islamiyah group in Singapore, most of which are based on broadly utilitarian grounds, such as deterrence. In trying to understand why the Singapore government chose to proceed against the suspected terrorists under the Internal Security Act rather than charging them formally under the Penal Code, Hor speculates that the government perhaps wanted to avoid a “public spectacle” which might have conferred the “honour of martyrdom” on the terrorists and risked elevating ethnic and religious tensions.⁵⁸ Hor might well be right about these motives, although it remains an open question why, for example, an *in camera* criminal trial could not have achieved the same objectives without invoking internal security legislation, particularly since the evidence against Jemaah Islamiyah appeared to be quite strong.⁵⁹

V. CONCENTRATION OF POWER IN THE EXECUTIVE

Many of the anti-terrorism measures discussed in this volume confer new or expanded powers on the executive: for example, to designate groups as “terrorist groups” thus taking this power away from the judge and jury⁶⁰ or to implement UN Security Council decisions without consulting Parliament.⁶¹ The greater these powers and the wider their scope, the greater are concerns of executive despotism. For instance, by exercising the power to designate groups as “terrorists groups” the executive is effectively usurping what should be a judicial power. Similarly, when legislative powers are delegated to the executive, issues of democratic legitimacy necessarily arise. The broad issue raised by the various reactions to the events of September 11 is whether the threat posed by international terrorism justifies such a concentration of power in the executive, by-passing the ordinary judicial and legislative processes.

In his contribution to this volume, CL Lim examines the broad new powers delegated to the executive by Singapore’s United Nations Act 2001.⁶² These new powers allow, but do not require, the executive to create legislation by executive decree in response to directions from the United Nations Security Council. Lim seeks to defend these executive powers against charges that they are redundant, too extensive, and insufficiently

⁵⁷ *Ibid* at 72.

⁵⁸ Hor, *supra* note 2 at 49.

⁵⁹ See Hor, *supra* note 2 at 45. Hor discusses the possibility of an *in camera* criminal trial at 43 (note 103).

⁶⁰ As in s 83.01 of Canada’s Criminal Code: see Roach, *supra* note 11.

⁶¹ As in s 2(1) of Singapore’s United Nations Act 2001 (No 44 of 2001): see CL Lim, “Executive Lawmaking in Compliance of International Treaty” [2002] Sing JLS 73 (in this volume, *infra*).

⁶² *Ibid*.

certain. His argument focuses on the need to fill in gaps in the existing anti-terrorism scheme and the need to respond quickly to Security Council resolutions.⁶³ One question that arises from Lim's discussion relates to justification of this further devolution of power to the executive. Considered in light of the extraordinary powers already in the hands of the executive in Singapore and Malaysia, such as the Internal Security Act, which can be and have been used against suspected terrorists,⁶⁴ are there any real safeguards against executive decisions ostensibly aimed at controlling or suppressing terrorism?

The effective absence of judicial review of national security decisions in the legislative aftermath of *Chng Suan Tze v Minister of Home Affairs*,⁶⁵ both in Singapore and Malaysia, means that the executive is free to determine both whether a matter pertains to national security as well as the legality of any action it takes on this basis.⁶⁶ According to Lee, since September 11 the executive in Malaysia "can flex its power in much more political space than before."⁶⁷ Where more extensive judicial review is available, however, as in South Africa, it is certainly possible that the new anti-terrorism legislation could lead, as Powell suggests, to "[d]amaging power struggles between the executive and the judiciary."⁶⁸ Whether the judiciary will be bold enough to serve as a check on executive power remains, for the time being, an open question, but at least in Singapore and

⁶³ *Ibid* at 80.

⁶⁴ See Hor, *supra* note 2; Lee, *supra* note 56.

⁶⁵ [1989] 1 MLJ 69 (CA Sing). Following *Chng Suan Tze*, the Singapore Parliament amended (see Constitution of the Republic of Singapore (Amendment) Act 1989, No 1 of 1989) Article 149 of the Constitution, which authorizes national security legislation which might otherwise conflict with fundamental liberties guaranteed elsewhere in the Constitution, by adding the following sub-paragraph: "(3) If, in respect of any proceedings whether instituted before or after 27th January 1989, any question arises in any court as to the validity of any decision made or act done in pursuance of any power conferred upon the President or the Minister by any law referred to in this Article, such question shall be determined in accordance with the provisions of any law as may be enacted by Parliament for this purpose; and nothing in Article 93 shall invalidate any law enacted pursuant to this clause." The effect of this paragraph, it would seem, is to bring judicial review of the validity of national security decisions under the terms of the security legislation itself. The Internal Security Act was also amended (see Internal Security (Amendment) Act, No 2 of 1989), adding s 8B(1), which purports to "freeze" the law governing the scope of judicial review at 13 July 1971, the date of the decision of the Court of Appeal in *Lee Mau Seng v Minister of Home Affairs, Singapore* [1971] 2 MLJ 137 (HC Sing), which had affirmed the subjective (that is, more deferential) test for judicial review of whether the Minister's satisfaction that the detention was in respect of a matter of national security, and s 8B(2) which restrict judicial review to matters of procedural compliance. For an account of the legislative response to similar developments in Malaysia, see Lee, *supra* note 56 at 66-67.

⁶⁶ As the Singapore Court of Appeal itself warns in *Chng Suan Tze*, *supra* note 65, were executive detention orders not subject to judicial review, it "would be in actual fact as arbitrary as if the provisions themselves do not restrict the discretion to any purpose and to suggest otherwise would be naive" (at 82).

⁶⁷ Lee, *supra* note 56 at 71.

⁶⁸ Powell, *supra* note 11 at 120.

Malaysia, the experience in internal security cases leaves little hope that it will.

VI. RELATIONSHIP BETWEEN DOMESTIC AND INTERNATIONAL LAW

The aftermath of the September 11 attacks makes it clear that any attempt to control terrorism, whether through legislative, military, or diplomatic means, requires an unprecedented level of regional⁶⁹ and international⁷⁰ cooperation and coordination. So a final issue that emerges from the contributions to this special feature concerns the incorporation of international law into domestic law, a longstanding legal problem, but one that takes on a new complexion in light of the intense new focus on anti-terrorism measures at both the domestic and international levels. For instance, Lim's discussion raises questions as to whether the need to respond quickly to a Security Council resolution is sufficient justification in itself to by-pass the checks and safeguards of the legislative process at the domestic level. And if, in the domestic sphere, the executive is free to choose which Security Council resolutions it implements without ratification by Parliament or even, in some cases, judicial review,⁷¹ what if anything confers legitimacy on these decisions?

Powell, in her contribution on South African anti-terrorism legislation, expresses concerns about the "executive-minded" nature of the new anti-terrorism norms in the international sphere and about "the effect of the implementation of severe international norms on domestic systems."⁷² As the Canadian example also suggests, in attempting to implement various international conventions relating to terrorism, legislators in Canada may have compromised constitutional due process safeguards.⁷³ Whether other international instruments – human rights instruments, for example – might be able to temper these "severe" new international norms is yet to be seen. There is, as Powell observes, a conflict within international law since "some

⁶⁹ At the regional level, cooperation in combating terrorism has been facilitated by various multilateral agreements, including general agreements with respect to mutual legal assistance in criminal matters such as, in Europe, the 2000 Convention on Mutual Assistance in Criminal Matters (see Harding, *supra* note 5 at 26) and by specific multilateral agreements to coordinate counter-terrorism efforts. In May 2002, Malaysia, Indonesia, and the Philippines signed a trilateral agreement to coordinate their counter-terrorism efforts ("3-way pact to tackle terrorism," *The Straits Times*, 8 May 2002). Thailand said that it would join the pact ("Thailand agrees to join region's anti-terrorism pact," *The Straits Times*, 9 May 2002).

⁷⁰ At a meeting of defence ministers in Singapore organized by the International Institute of Strategic Studies, two US lawmakers openly acknowledged that multilateral cooperation is needed: see "Anti-terror war: US recognises multilateral way," *The Straits Times*, 3 June 2002 (see online edition, *supra* note 3).

⁷¹ Lim, *supra* note 61.

⁷² Powell, *supra* note 11 at 120.

⁷³ See, for example, Roach, *supra* note 11 at 127, referring to the "principles of fundamental justice" in s 7 of the Canadian Charter of Rights and Freedoms.

of the anti-terror measures fall foul of the international human rights system.”⁷⁴ The challenge now is to reconcile anti-terrorism measures with human rights norms, both in the domestic and international spheres.

VII. CONCLUSION

The contributions to this special feature suggest that the sorts of issues faced by individual jurisdictions are by no means unique. Indeed, the international nature of both modern-day terrorism and the effort to suppress it suggests the need for a common approach to the overarching norms – including the human rights norms – that guide the domestic legislative response. Commenting on the possibility of an “unforced consensus on human rights norms,” philosopher Charles Taylor recently observed:

The continued coexistence in a broad consensus that continually generates particular disagreements, which have in turn to be negotiated to renewed consensus, is impossible without mutual respect. If the sense is strong on each side that the spiritual basis of the other is ridiculous, false, inferior, unworthy, these attitudes cannot but sap the will to agree of those who hold these views while engendering anger and resentment among those who are depreciated. The only cure for contempt here is understanding. This alone can replace the too-facile depreciatory stories about others with which groups often tend to shore up their own sense of rightness and superiority.⁷⁵

The recent terrorist attacks on the United States have opened the door to a principled dialogue on the relationship between rights and security, a dialogue that might well be able to go forward on a shared understanding of the guide norms.

This is not to say, however, that the legislative responses discussed in this volume are necessarily defensible or that the terrorist threats that they are anticipating are as real or as serious as lawmakers believe them to be. It may be that, as many of the contributors to this volume argue, governments have over-reacted in the face of both domestic and international pressures. But the contentious issues, then, are clear: first, the normative question as to the extent of a threat that would warrant a derogation from human rights norms (and the extent of the derogation it warrants), and second, the

⁷⁴ Powell, *supra* note 11 at 120. A similar conflict exists at the regional level, where, to use Harding’s example (*supra* note 5 at 26-27), cooperation with the EU on anti-terrorism measures conflicts with the European Convention on Human Rights.

⁷⁵ Charles Taylor, “Conditions of an Unforced Consensus on Human Rights” in Joanne R Bauer and Daniel A Bell eds, *The East Asian Challenge for Human Rights* (Cambridge, UK: Cambridge UP, 1999), 124-44 at 138.

empirical question as to whether such a threat actually exists.⁷⁶ The fact that jurisdictions around the world have turned to tough – even draconian – legislation to deal with suspected terrorists perhaps invites the deeper understanding that Taylor regards as a necessary condition of an unforced consensus around human rights norms more generally. The contributions to this special feature are a small, but important, step in that direction.

⁷⁶ See Victor V Ramraj, “Comparative Constitutional Law in Singapore” (2002) 6 *Singapore Journal of International & Comparative Law* (forthcoming).