The Conundrum of Defining and Prosecuting Terrorism: A Review of United Kingdom and International Responses

Charanjit Singh*

309 Regent Street, London W1B 2HW, UK

Abstract: Terrorism presents one the biggest criminal justice postmodern challenges worldwide. The way criminal justice systems proact and react to mitigate and prevent such criminality raises a plethora of legal, socio-political, and strategic hurdles relating to how terror crime is defined, the human rights of the accused, protecting due process when using secret courts, the use of special advocates, the use of national security courts, civil rights i.e., freedom of association, cross-jurisdictional information sharing, and the requirement or right to prosecute etc. In this article, which is influenced by criminological theory, the definition of terror crime in the United Kingdom and at an International level is examined to ascertain whether common definitional elements exist, and the complex and competing local and International interests that are being balanced in preventing and/or prosecuting such crime.

Keywords: International criminal justice, defining terrorism, novel phenomenon, criminal evidence, secret courts and human rights, cooperation, and jurisdiction.

1. INTRODUCTION

Criminological custom often examines the way in which traditions meet contemporary society to define and control criminality focussing on the 'centrality of meaning and construction of crime as a momentary event, subcultural endeavour and social issue' (Ferrell, 2007). The subject matter crosses traditional, institutional, and social definitions of crime and causation to encumber symbolism for success or failures in law enforcement, social and cultural construction of crime, and the emotion and perception towards the potential threat and responses to it.

The aim, as Hayward and Young (2007), is to 'keep turning the kaleidoscope on the way in which we think about crime … [and] the legal and societal responses to it'. The broad focus highlights, as human activity, criminality and the response to it, lending impetus for contextual analysis of the political underpinnings of crime control activity. Such examination provides an intimate understanding of the challenges faced by criminal justice systems and can reveal potential solutions influencing and informing policy and decision-making.

An examination of terrorism set in an interactionist or criminological framework provides alternative meanings to challenges enriching them with insights from the socio-criminological cause (Carrabine *et al.*, 2014 pp. 66 – 84), and cultural studies emphasizing mediated technologies seeking to control specific forms of criminality and criminal behaviour.

Eradicating terrorism 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 Sanso-Rubert-Pascual, 2014).

Since the 9/11 terror attacks on the United States of America (USA) (Hamm, 2004) combatting terror crime has resulted in the wholesale erosion of civil rights including the right to a fair trial and freedoms such as speech and association, that are protected by the European Convention on Human Rights and Fundamental Freedoms (ECHR) and domestically in the United Kingdom (UK) under the auspices of the Human Rights Act 1998, for perceived increases in security and protection (Brandon, 2004).

Societal polarization has meant that entire identities have been rewritten (Lyon, 2001) and those creating the narrative arguing that this only seeks to preserve democracy and maintain order. An example of this is cross-jurisdictional regimes of covert[1] and open surveillance[2]. Technological advances (Singh, 2013;

*Address correspondence to this author at 309 Regent Street, London W1B 2HW, UK; E-mail: C.Singh1@westminster.ac.uk

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

[2]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

E-ISSN: 1929-4409/23

2021; 2022), political policing, risk-focussed crime control strategy, and security-society have modernised and extended the methods of surveillance[3], also see Brodeur (2002); Foucault (2003); Zedner (2009) and Deflem (2004). The world as societies knew or perceived it has fundamentally changed.

The challenges[4] (Foucault, 1979) created by surveillance, detecting, prosecuting, and preventing terror is an information hungry activity because of the complexities in the challenges its presents for example modern terrorists are not 'foreigners', anyone can be a terrorist, a neighbour or friend and even a family member. This makes surveillance incredibly difficult.

The United Kingdom, France, and Canada, amongst others, have extensive legislative regimes facilitating covert surveillance whilst purportedly trying to safeguard civil liberties through adherence to the rule of law and due process. The Police Act 1997 and Regulation of Investigatory Powers Act 2000 in the United Kingdom and the Canadian National Security Act 2017 (C-59) and Anti-Terrorism Act 2015 (C-51) exemplify this (Daniels *et al*., 2001).

There is a need for an internationally agreed definition of terrorism as International law informs regional (European Union) and domestic (United Kingdom) policy. This is heightened by the potential for abuse of the often-draconian extraordinary powers that are activated in response to terror crime along with 'punishments' meted out whilst individuals are under investigation and after conviction i.e., restrictions on association and movement. It is important to determine any collateral effect such as criminalising swathes of activity that may not be criminal at the time such as support of organisations that may encourage terror or violent action. Needless to state that a unified definition would promote adherence to the rule of law, safeguard civil rights and dur process, it is these that preserve peace, prevent war and descent into totalitarianism.

In this article, the criminological tradition is used to explore common elements that exist in the definition of terror crime in the UK and at an International level, examine the responses to terror crime and highlight the complex and competing local and International interests that need to be balanced in preventing and prosecuting it.

The article is set in two parts; first, examining the phenomenon of defining terrorism and the issues that surround that in the United Kingdom including the use of secret courts and special advocates (Singh, 2020). The exploration is inspired by Foucauldian 'panopticism' which serves as a rich metaphor in the exploration of the social perception of terror crime and International responses[5]. The second part focuses on the International position, examining convention and law; the responses of the European Union (EU), United Nations Security Council (UNSC) and United Nations (UN), with reference to jurisprudence on judicial scrutiny and due process, and concludes the discussion.

The aim of this article is to explore, with a criminological and practical criminal justice focus, how International criminal justice and domestic policies inform and engage with one another, namely that the spheres of policy and law are intimately connected. It is envisaged that this study will encourage discourse between practitioner lawyers, academics, and policymakers during their decision-making and promote effective legal responses to the challenges faced by criminal justice systems and raise public awareness in this regard.

2. PART 1, TERROR(ISM): THE PHENOMENON

Terror attacks and youth radicalization in Western societies, those born or naturalised in Western Europe and North America, have challenged the assumption that terrorists are 'foreign folk' from marginalized countries seeking to destroy western values (Bizina and Gray, 2014). It has promoted the acceptance of a very different narrative, one where there is a risk that an American, British, or French citizen can become a potential terrorist threat and join a terror cell or organisation. It has forced nations to make changes to socio-political traditions and centuries old legal frameworks. Examples of such attacks include the September 11th attacks on the World Trade Centres (USA), the Taj Hotel in Mumbai (India), and the Manchester Arena in 2017 (UK), resulting in policy

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.

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

[4]Jeremy Bentham and Michel Foucault's panopticism is used to describe the all-visual response to terror crime. This accords with Foucauldian reasoning as a solution (panopticism), albeit he originally formulated for prisons, can result in new societies being formed.

[5]The law is discussed as at January 2023.

shifts and legislative regime change. What follows is a discussion of a few of the most notable contemporary issues and criminal justice responses.

2.1. Western Homegrown Terrorists and Local Radicalisation

The causes of radicalization in western youth are often attributed to social isolation, searches for identity, acceptance and/or purpose (Precht, 2007) and disenchantment. Radicalization is accepted as a process that is socio-political and relationally dynamic (Bigo *et al.*, 2014), however there is a lack or data-gap of two decades during which sufficient tracking data has not been collected. Other issues that contribute towards this phenomenon include the global, increasingly complex, and digital societies in which individuals exists which can serve to exacerbate some of the other factors already identified as contributing towards radicalization. As well as social cohesion, integration, and unemployment (Sageman, 2004), singular faith state schools, ghettoization (Baker *et al.*, 2007), religion, state sponsored crime (Christmann, 2012; Al-Lami, 2009), discrimination, political environments that demonise immigrants, and poverty (Al-Lami and O'Loughin, 2009). Furthermore, many communities are unwilling to communicate with the police (Briggs, 2010), the list can be expanded with non-adherence with the rule of law and the demonization of 'western culture' or 'western democracy' that may conflict with religious or cultural ideology. Recent studies show that those falling into a high earning category have great levels of sympathy for acts of terror (Bhui *et al.*, 2014) and thus, this may indicate, anecdotally and amongst other things, a failure in social cohesion, the adoption of western values and education.

To combat radicalization the UK adopted the 'prevent duty' under s.26[6] of the Counter Terrorism and Security Act 2015 (CT&SA 2015). Coming into force in 2016, the duty placed a general requirement on authorities such as the universities and the police and probation services to 'have due regard to the need to prevent people from being drawn into terrorism'. This was designed to be an early-stage intervention in the radicalization process[7]. The criticism with the duty relates to its opacity and the lack of 'authorities' being able to identify people most likely to be radicalized. In addition, the duty has been criticised for being too broad and discriminatory, Liberty argues that it 'embeds discrimination in public services, erod[es] carefully cultivated relationships which rely on trust, and fosters a culture of self-censorship' and that in 'fear of being stigmatised, labelled as extremists or subjected to discrimination' particular communities are changing their normal behaviours (Liberty, 2023). Statistically, there is an issue with the data for 2020 – 2021 which is likely to be due to the coronavirus pandemic and restrictions in place; the level of referrals went down from 6287 to a figure of 4915, a reduction of 22% on the previous year (HMSO, 2022). In 2021 – 2022 this figure stands at 6406. Thus, it is difficult to draw meaningful generalisations from the earlier data and to adequately reconcile it for purposes of more accurate statistical analysis with these later figures, although data modelling is still possible.

2.2. Organised Terrorism

Increases[8] (Didier *et al.*, 2014) in organised and not disorganised terrorism, the latter would be in the form of lone wolf attacks or those that subscribe to a particular ideology[9] but are not part of a terror network, demonstrates a gap in literature on alleviating public fear and promoting understanding of the issues being faced. This includes questioning the reasoned political arguments presented by those in power when they seek to erode civil rights and basic liberties[10] in exchanged for, allegedly, providing greater protection.

2.3. The UK's Response: Defining Terrorism

The ideological struggle in defining legitimate and illegitimate violence is quite apparent in this area of International law (Horgan, 2009; Carrabine, *et al.* 2014; Silke, 2008) as well as justifying actions including enforcement of the law that would otherwise be unlawful (Carrabine *et al.*, 2014 at p.439). There is a lack of a uniform definition of terrorism, and thus it varies between jurisdictions. That said, there are common or universal elements to terrorism that appear across the globe (Schmid, 2020).

[6]Schedule 6 provides a definition of what a 'specified authority' is, this includes faith schools but not religious establishments.

[7]The process consists of pre-radicalization, self-identification, indoctrination and then jihadization. See, Bhui, *et al.* and Christmann.

[8]Crimes against western democracies denotes a change in terror crime complexity, add to this the proliferation of the radicalization of the citizens from those countries and the challenge becomes more arduous.

[9]It is salient to state that the reference to ideology is not one to a particular theological stance even though this may in fact be the case. It is the effectuality of due process and 'why' that is important.

[10]For a discussion on surveillance and privacy see, the UK's draft Investigatory Powers Act 2016 – which sets out the requirements for data retention by Internet Service Providers and for the first time in law authorizes bulk interception.

The Terrorism Act 2000 in the UK defines terrorism 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'[11].

Globally, criminal justice responses to terror crime are varied (Bass, 2000) and include conditional amnesties from prosecution for the commission of past offences, prosecution, and political process engagement. An example of the latter is the Good Friday Peace Agreement[12] which, in 1998, brought an end to Northern Irish sectarian violence. Bass (2000) highlights an interesting challenge for international law but this can be equally applied to domestic UK law; do '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'.

The UK has preferred prosecution over other responses, whilst this may lead the public to focus on the individual(s) it marginalises the management of risk to the public and national security. The benefit is that confidence in the criminal justice is promoted i.e., fairness[13], but also due process is safeguarded.

The UK has some of the world's harshest laws on detention, this currently stands at 14 days without charge, but originally stood at 28 days. There were attempts by the government to extend this to 90 days and 42 days respectively, both failed because of the distinct lack of evidence proving an extended period was needed for what it termed to be 'exceptional' crimes[14]. Lord MacDonald of River Glaven QC (2011, at p.4) in the review of counterterrorism and security powers argued that, in fact, detention of suspects under this legislation in the UK has not exceeded 14 days and therefore there the attempt to extend was illogical. The time limit of 14 days in the UK far exceeds similar provisions across many countries; USA is 2 days, Italy 4 days, France 6 days, Germany 2 days, Russia 5 days and Spain 5 days (Liberty, 2010 pp. 4 – 5). These are countries that have experienced sustained long-term acts of terrorism.

The UK also utilises measures that seek to control and manage the behaviour of vast numbers of people through administrative processes and practical changes. These were measures often designed to facilitate greater social control and often used in youth justice to criminalise otherwise lawful behaviour. These are measures such as curfews etc. Judicial discretion in sentencing has become far more limited, the Sentencing Council issues guidelines in this respect[15]. A practice that sought to promote consistency and transparency in practice but in fact also mandates legislative sentencing. Safeguards are in place via a filter of law officer consent under s.117 of the Terrorism Act 2000, this requires the Director of Public Prosecutions for England and Wales (DPP) (or appropriately the DPP for Northern Ireland) to give consent for prosecution before proceedings can be instituted[16].

Part II of the Terrorism Act 2000 creates the notion of being guilty by association, appropriately titled membership offences, widely referred to in criminal justice as symbolic offences because they target specified behaviour. UK Home Office statistical evidence shows that these offences are inefficacious, not many people have been prosecuted under the relevant provisions[17].

Section 11 and 12 of the Terrorism Act 2000 respectively relate to *professing to belong to* and *supporting* proscribed organisations. The Secretary of State, under s.3(5), can exercise his or her discretion to proscribe an organisation if it (a) commits or participates in acts of terrorism, (b) prepares for terrorism, (c) promotes or encourages it or (d) is otherwise concerned with it. Section 11(2) contains a defence where at the time the organisation was

[11]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).

[12]It is salient to mention the St Andrew's Agreement in 2006 which reinstated the Northern Irish devolved government.

[13]In *Sheldrake v Director of Public Prosecutions, Attorney General's Reference (No 4 of 2002)* [2004] UKHL 43, Lord Bingham stated that 'security concerns *do not* absolve member states from their duty to observe basic standards of fairness', [emphasis added].

[14]See Hansard for the debates on the Terrorism Bill 2006 and the Counter Terrorism Bill 2008.

[15]For the latest sentencing guidelines see: https://www.sentencingcouncil.org.uk.

[16]See also; s.37 of the Terrorism Act 2006 and s.29 of the Counter-Terrorism Act 2008.

[17]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.

proscribed the accused's membership had lapsed. In terms of s.12, support need not be financial but covers the instance in which someone 'addresses a meeting and the purpose of [their] address is to encourage support for a proscribed organisation or to further its activities'. The legislation is complex and therefore it can be argued that this is the reason for the response by the courts being inconsistent. Section 12 is amended by s.1 of the Counter-Terrorism and Border Security Act 2019 (CT&BSA), thus expressions of support can now also be completed through a 'reckless' mens rea[18].

UK courts have been receptive to newer and more novel forms of evidence including body language, cell-site, facial mapping, geographical positioning, voice, physicality, and general crime scene forensics. This approach is appropriate given the fact that often such prosecutions often take place based on circumstantial or mainly patchy evidence. The prosecution of 'Jihadi John'[19], a British Citizen and member of the proscribed terrorist cell Da'esh[20] (also ISIS or ISIL, see: UN Security Council Resolution 2249 (2015)), is a good example of this; he hid his identity in gruesome internet-only released videos beheading civilian hostages. This renders statistical risk prediction defunct (O'Malley, 2008 at p.452; Mythen and Walklate, 2006 on actuarial justice), and positive identification becomes an insurmountable hurdle.

The forerunner offences in ss.57 and 58 of the TA 2000 use reverse burdens of proof. The former prohibits individuals from possessing any 'article in circumstances which give rise to a reasonable suspicion that his [or her] possession is for a purpose connected with the commission, preparation or instigation of an act of terrorism'. Section 57(2) provides the following defence reverse burden

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*'. There is an issue of scope, what exactly is the 'article' for the purposes of the law – unless limited it could well apply to public documents and even Google Maps (Tadros, 2008 at pp.967 – 968).

In 2019 the UK with the CT&BSA 2019 took steps towards closing the gap and modernising the law for fitness for the complex digital age in which crime and society co-exist. The Act also targeted contemporary radicalisation much earlier with interventions at the investigation stage by the Police and Crown Prosecution Service. Section 3 of the CT&BSA 2019 amends s.58 of the TA 2000, the focus is extended from those obtaining information that is likely to be useful for terrorists to include terrorist material that is streamed or viewed over the internet, a move away from a requirement for it to be downloaded to form a permanent record. It is salient to state that records include photographic and electronic records. The defence outlined in section 58(3) still provides an accused must 'prove that he [or she] had a reasonable excuse for his [or her] action or possession'. Section 3A was inserted into s.58 by the CT&BSA 2019, the instances of 'reasonable excuse' include journalistic work, academic research, and where an accused did not know or had no reason to believe that '… the document or record … contained, or was likely to contain, information of a kind likely to be useful to a person committing or preparing an act of terrorism.'

Reverse burdens of proof are questionable in terms of their legality with the right to a fair trial and the presumption of innocence under Article 6(2) of the European Convention on Human Rights and Fundamental Freedoms. In the seminal case of Woolmington v DPP [1935] AC 462, Viscount Sankey LC declared that the presumption is a golden thread that runs through English criminal law, its importance in preventing miscarriages of justice should not be understated. The European Court of Human Rights, whilst extensive in its jurisprudence, is yet to make a direct ruling that provisions containing reverse burdens are incompatible with the convention. In Salabiaku[21] the court stated that: 'Presumptions of fact and law operate in every legal system. Clearly, the Convention does not prohibit such presumptions in principle …

[18]Section 2 of the CT&BSA 2019 also amends s.13 of the TA 2000, it relates to the display of an image in a public place that arouses reasonable suspicion that the person is a member or supporter of a proscribed organisation. This includes online images and photographs even when taken in a private place.

[19]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).

[20]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.

[21] *Salabiaku v France* (1988) 13 EHRR 379 at paragraph 28.

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'. Thus, the requirement for states is to ensure that negative presumptions be contained within reasonable limits.

In the UK the judiciary has sought to reconcile the issue through judicial interpretation, the Law Commission has also been active in this arena (Evidence (General), 1972)[22]. Therefore, a legal burden placed on an accused need only be satisfied to the evidential standard on the balance of probabilities, that is enough to pass the judge to the prosecution who must counter beyond reasonable doubt[23].

2.4. Potential Solution: A National Security Court or Ad Hoc NSC

One notable issue is the use of secret courts and special advocates. Upjohn LJ enunciated that justice should be done in a fair and open manner and where no excuse exists it is a breach of natural justice in *Official Solicitor*[24] as 'a person or other properly interested party must have the right to see all the information put before the judge, to comment on it, to challenge it and if needs be to combat it, and to try to establish by contrary evidence that it is wrong. It cannot be withheld from him in whole or in part.'

The discussion regarding the creation of a National Security Court (NSC) or even Ad Hoc NSC is not new (Vladek, 2009 T PP. 505 – 526; Schmitt, 2010). One solution to dealing with the issues discussed is to create a specialised tribunal to deal with terror crime, an NSC or Ad Hoc NSC. The latter would only be constituted when the need arose. The notion takes the characteristics from the Diplock Trial, but the approach can be considered to be far more radical. The court could be set up with a specified jurisdiction, to deal with disputes that arise out of the detention and restriction of those involved with terror crime and who pose a risk to the public. The development of an NSC has seen proposals that vary in terms of substance and procedure. It would be the forum in which decisions in relation to detention of terror suspects, review of TPIMs and e-TPIMs imposed by the Home Secretary and decisions to detain without charge (s.41 (under Schedule 8) of the Terrorism Act 2000) (Sharpe, 1976 on habeas corpus)[25]. An appeals process would also be required, this is discussed later in relation to European Union (EU) and International law. The factors to consider would be; (i) compatibility with the rule of law i.e., presumption of innocence, due process and judicial scrutiny, (ii) what the rules of procedure would be, (c) the role of judges, (d) appointment of special advocates, whether that should be ad hoc or permanent, (e) burden and standard of proof and (f) the rules of evidence (Singh, 2020 at p.382 – 408).

In England and Wales the current regime of special advocates was set-up in 1997 with the introduction of the Special Immigration Appeals Commission (SIAC). The demand for special advocates has grown with the increase in prosecution of terror crime. In practical reality 'in-camera' proceedings and 'closed material procedures' (CMPs) are commonly used across the justice system in civil matters i.e., employment and family law, but also in investigatory powers tribunals and of course SIAC. In 2012 the United Kingdom's Human Rights Committee highlighted that 'The rule of law requires that decisions about the disclosure of material in legal proceedings be taken by judges not ministers' and that 'the current legal framework of public interest immunity (PII) (Wade, 1980, 55)[26] has not been shown to be inadequate'[27] (UK Parliament,

[22]In 1972 the Criminal Law Revision Committee stated that it was 'strongly of the opinion that … burdens on the defence … be evidential only'..

[23]The standard of proof in criminal cases: 'beyond reasonable doubt' is stated as being synonymous with being 'satisfied so that you are sure' as set out in *R v Folley* [2013] EWCA Crim 396 at [12]. Ordinary language aids the jury's understanding of technical terms. For a discussion on the 'golden thread' in English evidence law, namely who must 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. Note, the terms have been criticized as creating a standard of proof that exists within another standard of proof – for a related discussion see *Hornal v Neuberger Products* [1957] 1 QB 247 and *Re H and Others* [1996] 1 All ER 1.

[24]*Official Solicitor v K* [1963] Ch 381 at 405.

[25]This provision created a special regime for the detention without charge of terror suspects. This can include a restriction on the ability of the suspect to receive legal advice. The original time limit for such detention was 7 days; this was amended by s.306 of the Criminal Justice Act 2003 to 14 days. The government sought to extend this to 90 days following the terror attacks on London (July 7th 2005). Instead a comprise limit of 28 days was reached (s.23 of the Terrorism Act 2006), this temporary increase via the notorious sunset clause lapsed in 2011. The limit currently stands at 14 days. Note: the rationale that underpins a lengthier period of detention relates to the complexity in investigating terrorism cases and arduous task of obtaining admissible evidence or evidence that can be legitimately received by the court and stands little risk of being excluded for breaches of law or abuse of process etc.

[26]Wade argues that 'The war against official secretiveness [rages on] which on other fronts has been won … abuse of so-called crown privilege under which the government used to claim that litigants must be denied access to evidence needed to establish their rights if the evidence was found within very wide classes which were officially confidential'.

[27]Many special advocates themselves reacted strongly to the Green Paper and submitted a memorandum on the Justice and Security Bill stating that '… CMPs are inherently unfair and contrary to the common law tradition; that the

2017; Special Advocates Further Memorandum, 2013). In addition to permanent judges who can develop jurisprudence and expertise in this area, an NSC would also require permanent special advocates[28] who could develop experience in the field.

The factors that would need to be considered in respect of an NSC would be; (i) compatibility with the rule of law i.e., presumption of innocence, due process and judicial scrutiny, (ii) what the rules of procedure would be, (c) the role of judges, (d) appointment of permanent special advocates, whether that should be ad hoc or permanent, (e) burden and standard of proof and (f) the rules of evidence (Singh, 2020).

3. PART 2, INTERNATIONAL CRIMINAL JUSTICE RESPONSES

This part of the article examines the international definition of terrorism and the responses to this crime.

3.1. The European Union

The European Union has attempted to create a harmonized definition of terrorism in all twenty-seven of its member state countries. Council Framework Decision on combatting terrorism 2002/475/JHA (2002: 2) creates a common and quite specific definition of terrorism with two parts to it. The *objective* part sets out a list containing instances of serious criminal conduct that includes commission of attacks, extortion, taking hostages, fabricating weapons, bodily injuries, murder, and the threat to commit any of these acts. The *subjective* part provides that these acts are deemed to be terrorist offences when committed to; compel a government or international organisation to act or refrain from acting; to seriously intimidate a population; or to seriously destabilize or destroy the constitutional, economic, political, or social structure of a country or an international organisation. This has been amended by the Council Framework Decision amending Framework Decision 2002/475/JHA on combating terrorism 2008/919/JHA (2008: 3). Therefore, it concludes a gap extending the definition the public to terrorist activities such as provoking the public to commit terrorist offences, recruitment for terrorism and training people to carry out acts of terrorism.

3.2. The International 'War on Terror'

The League of Nations, dissolved in 1946, argued that an international court to be created to prosecute terrorists. This was an argument that failed. White (2011) suggest that the United Nations began to focus its attention on this issue at the point it was confronted with Palestinian terrorists[29] (Quenivet, 2006; White, 2011 at p.9; Hehir *et al.*, 2011).

The 9/11 attacks led to quite coercive executive-led military, legislative, security and penal approaches in tackling terror crime. These were in addition to the more traditional collective and consensual criminal justice based and human rights centered methods[30]. Paine (1791)[31] suggests that sovereignty delimits collective power because people have the natural right to have their civil rights secured. Therefore, although collective nations determine their governments this act is set within boundaries by the 'end of liberty' because individual rights are protected and secured within the collective. Contrast that with the cold war approach of specifying criminality forms and enforcing the law via international treaties[32] and not war (Bass, 2000 at p.7) except in cases of self-defence[33] or authorised Security Council responses.

The 9/11 terror attacks, effectively, underscored the notion that there was a war on terror, as demonstrated by the political rhetoric at the time. This nomenclature is considered unhelpful from a legal purist sense because in wars the law of war (jus in bello) applies to regulate participant conduct. This stance is problematic because the practical reality is that the state is dealing with terrorists, these are individuals or groups that do

Government would have to show the most compelling reasons to justify their introduction; that no such reasons have been advanced; and that, in our view, none exists'.

[28]Special advocates are lawyers with at least 5 years of legal practice experience. The selection procedure involves a panel of senior government officials and lawyers with the Treasury Solicitor's Department. All special advocates must go through a thorough vetting process in which they must disclose detailed personal and financial information.

[29]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. Chapter VII of the Charter can be accessed here: http://www.un.org/en/sections/un-charter/chapter-vii/. 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.

[30]Compliance with the rule of law requires civilized democracies protect the human rights of those accused of committing crime, even where they are the most heinous, that includes terrorism, due process must be allowed to take its course with those convicted punished.

[31]Paine quotes Lafayette: 'for a nation to be free it is sufficient that she wills it', see also, Part 1 at page 12.

[32]These are treaties that will eventually be superseded by the Draft Comprehensive Convention Against International Terrorism.

[33]United Nations Charter, Article 51 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 to maintain or restore international peace and security.'

not acknowledge or comply with such rules, it is therefore an oxymoron to forward an argument about regulated conduct in the 'war' on terrorism. Rhetorical language imbibed in this way paves the way to create a hybrid form of war that permits 'other' forms of action that may be considered excessive; perhaps through extending the interpretation of existing agreements to include 'novel' action[34] or where legal loopholes are exploited as a result of lack in legal protection. Targeted killing of the enemy i.e., leaders of terrorist groups, is lawful under international law in times of war but unlawful extra-judicial killing violating the right to life and the right to a fair trial in peace time. It is clear that the accepted international position is that terrorism be dealt with through criminal justice and due process and not war in a normative sense. Thus, the rule of law demands that civilized democracies protect the human rights of an accused and allow due process to take its course, even though their societies may disagree with that position.

3.3. Draft Comprehensive Convention Against International Terrorism

International law has developed, rather piecemeal, various counter-terrorism instruments that lack the singularity criminal justice in this field craves[35]. This is an issue that is exaggerated by, as Saul (2006) suggests, unresponsive and cripplingly slow treaty machinery. This is partly because terrorism is considered to be a threat to global peace that the UN Security Council[36] at an international level must deal with rather than a pure criminal justice issue affecting a particular country.

The stagnant and muted response to terrorism, at the international level, is demonstrated by the consistent failure in agreeing a definition of terrorism in the Draft Comprehensive Convention Against International Terrorism[37] (CCIT), this is still a work in progress. The work 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' (Resolution 51/210, 1996) is continuing.

Article 2 of the CCIT sets out 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 … 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' (Saul, 2014; Perera, 2020 at pp.152 – 162). Thus, the offence is committed were a person '…makes a credible and serious threat to commit an offence' or '…attempts to commit an offence.' It is salient to outline that whilst elements have been identified there remains a significant deadlock that must be significantly attributed to the vested interests of various countries that have historical or current unresolved conflicts.

3.4. United Nations, the Security Council and their Responses

The issues with defining and responding to terrorism at a domestic level are replicated on a larger scale at the international level. The lack of international consensus has led to practical variations amongst

[34]In 2002 the 103-year-old American Naval base at Guantanamo Bay was legitimately used in compliance with Article 3 and 5 of the Geneva Conventions to open a detention centre. The National Defense Authorisation Act 2012 (NDAA) set out the roadmap for closing the facility. The centre was set up to avoid some of the following legal issues; the rights of detainees when in the USA for detention or trial to claim asylum and attain lawful immigration status and the limitation of judicial review, see s.1032 of the NDAA 2012 and 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.

[35]There is a failure in international law to criminalize terrorist killings of civilians.

[36]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.

[37]The Draft Comprehensive Convention Against International Terrorism will recall existing international treaties relating to 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.

jurisdictions that only serve to prolong conflict. The responses of the UN Security Council demonstrate the difficulty in seeking consensus whilst protecting civil rights, due process and the rule of law, and promote compliance in the near-term future.

3.4.1. Resolutions and Sanctions Regimes

United Nations Security Council (UNSC) The UNSC Resolution 1456 (2003), the Declaration on Combatting Terrorism, states that members must fight terrorism and comply with their obligations under international law. The same applies when the Security Council issues resolutions that are mandatory i.e., asset seizure.

UNSC Resolution 1373 (2001)[38] states 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 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 (2008) confirms that states must ensure that there is judicial scrutiny and due process available to safeguard the rights of the accused. The European Union (EU) has also had to face balancing its international obligations with the extensive scheme of rights it gives its citizens.

In 2001, the United Nations Al-Qaeda and Taliban Committee, designated Kadi as a terrorist financier following a resolution. The EU, to comply with its international obligations, under EU law required his assets be frozen. Kadi argued that the application of this violated the rights he was guaranteed under the European Convention on Human Rights and Fundamental Freedoms including his right to 'a fair hearing' and to 'respect for property'. The rationale was that neither the UN nor the EU provided any appeal procedure against the action taken against him. There was a failure to provide judicial safeguards; oversight and review, given the excessively punitive nature of the action concerned.

Miguel Poiares Maduro the Advocate General of the Court of Justice of the European Union (2003 – 2009) lent to support to this position, the EU's Court of First Instance held that it did not have the jurisdiction to review measures by the European Community (EC) that had given effect to the resolutions passed by the UNSC and more specifically against Al-Qaeda and Taliban terror networks. Court of Justice of the European Union (CJEU) held that under the United Nations Charter, EU member state courts had jurisdiction to review measures adopted by the EC giving effect to UNSC resolutions.

The result of this decision is that a European Union court judgment that holds an EC measure as incompatible with a higher rule of law in the EC's legal order does not implicate a challenge to the legitimacy of a resolution in international law. The case is of importance as it sets out when the CJEU acknowledged it's jurisdiction to review the legality of an EC giving effect to a UNSC Resolution. It is also the first occasion when the Court quashed a measure that had given effect to a UNSC resolution for being unlawful. Salient to state that the court is not making a determination of the legality of the UNSC resolution itself and is not derogating from its international obligations but is setting out the position that an EC measure accords with international law where due

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

process is facilitated[39]. The UNSC adopted Resolution 1730 (2006) establishing a central office that administers delisting requests[40]. Over the last decade, the UNSC has taken active steps to tackle due process concerns via resolutions including 1904, 1989, 2082 and 2083 (Genser and Ugarte, 2014 at p.200).

UNSC Resolution 1566 (2004) states 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.'

The UNSC has set-up the Counter-Terrorism Committee (CTC) to monitor compliance with Resolution 1373 (2001) and the Counter-Terrorism Committee Executive Directorate (CTED) provides expert advice to the CTC. Thus, the UNSC has acknowledged the need for appropriate policy and regulatory response; this also adds impetus to the argument that there is a need for an international tribunal to prosecute terror crime.

UNSC Resolution 1566 (2004) sets out 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.'

Whilst consensus is building there is a lack of agreement on the definition of terror crime, without which the UN has reached an impasse. This issue will continue to go back and forth between security measures and coercion.

A significant challenge remains in relation to conflicts of interest and the *political need* to differentiate freedom fighters from terrorists (discussed later). There exists a vacuum in holding to account states that control terrorists[41], criminalise state sponsorship and support of terrorists as state crimes. White (2011; see also Hehir *et al.*, 2011 at p.16) highlights that it is difficult to hold states to account given the fact that there is a lack of 'persons' to hold responsible albeit that the Nuremberg Tribunal confirmed the fact that criminality is undertaken by people and not entities (Hehir *et al.*, 2011).

In the alternative to force, the UN has an extensive sanctions regime which includes the listing or proscription of individuals and organisations. A similar regime appears within the UK[42]. The individuals and/or organisations are identified and are subjected to specific restrictive measures. The regime avoids broader economic and trade embargoes against states, and instead targets individuals and/or organisations that breach or threaten international peace and security, thus minimizing the effect on the general population of the state (Biersteker *et al.*, 2000).

The UN introduced a consolidated list of individuals and organisations 'designated' i.e., subject to proscription, with the framework of sanctions against the Taliban under UNSC Resolution 1267 (1999)[43]. This is overseen by the Security Council Committee

[39]Although national laws now tend not to fall into this trap as Part II of the United Kingdom's Terrorism Act 2000 demonstrates.

[40]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 their 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.

[41]International law relating to self-defence is clear on this issue. The victim state can take necessary and proportionate action against the terrorists and the state that controls them.

[42]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.

[43]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.

pursuant to resolutions 1267 (1999), 1989 (2011) and 2253 (2015)[44].

The Global Implementation Survey of Security Council Resolution 1373 (United Nations, 2001; 2016: 8 – 21) states that '…the terrorist environment has changed 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 further to highlight 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.'

SC 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'. UNSC Resolution 2396 (2017) on Foreign Terrorist Fighters (Returnees and Relocators) updated resolution 2178 which now includes returning or relocating foreign terrorists and transnational terror groups. This latest resolution strengthens resolution 2178 by developing matters in relation to border security, information sharing i.e., biometrics to prevent terrorists boarding aeroplanes, requirement for advanced passenger information (API) and passenger name records (PNR). The resolution seeks to promote greater international cooperation, prosecution, rehabilitation and reintegration for former terrorists and their families. It is salient to note that the resolution promotes investigation of foreign terrorists without 'racial profiling on discriminatory grounds prohibited by international law', but it fails to set out how that may be achieved.

There has been a shift from labelling states as terrorists, the categorisation at an international level, of those fighting political regimes to exercise their right to self-determination is very much one of the stumbling blocks where the pursuit for a single definition of terrorism is concerned. These individuals or communities have been defined terrorists or freedom fighters, that label differs between opposing states. There is little appetite or consensus on how to define them, and the law stands against excluding them where a singular definition of terrorism[45] is concerned. The issue needs to be distinguished from the many ideological, trade, political and religious conflicts of interest. Many of the member states of the UN support that position; the UK following the July 7th 2005 (7/7) attacks refused to compromise where an exception for national liberation movements was sought. Islamic states are concerned that a single definition would also include state action against civilians who are fighting for the right of self-determination (White, 2011 at p.19). These are all factors that contributed towards the failure to agree a singular definition of terrorism.

[44]The regime was strengthened with the unanimous adoption of the United Nations Security Council Resolution 1455 (2003) this aimed to improve implementation of measures against the Taliban and Al Qaeda.

[45]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", adopted on December 18, 1972 at the 27th session of the General Assembly. The Assembly also 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.

Definitional singularity would also require the unresponsive and cripplingly slow treaty machinery to be updated. The adoption of a singular (White, 2011 at p.19) definition would be given real impetus if members of the UN agreed to an international tribunal being created to prosecute such crime.

3.5. The International Criminal Court (ICC)

A uniform set of norms must be established without state intervention. Thus, the creation of a specialist international tribunal prosecute acts of terror is given weight by the very fact that the crime is considered to be a real and present threat to international peace and security that must be tackled by the UN[46].

There are a number criminal justice responses ranging from prosecution, conditional amnesties[47] and engagement with the political process, the USA and Taliban agreement[48] is an example of the latter. The public tend not to favour amnesties given they are seen as signs of weakness and generate unwanted political criticism.

The UNSC has been concerned with international terrorism since the Lockerbie (1988) bombing[49]. Member states must take action against terrorists, but the weakness in the legal framework for dealing with non-state actors involved in terrorist activity relies on the domestic legal frameworks of states that criminalise and prosecute treaty crimes. In international law, a state must either prosecute or extradite the individual(s). This prosecutorial discretion creates a need for supervision (White, 2011 at p.17).

Whilst the international legal regime has expanded the matters are not within the jurisdiction for the International Criminal Court (ICC). Such criminality would be prosecuted in the national criminal court of the member state. The general consensus seems to be that the most heinous of terror crimes be tried by a permanent international tribunal, perhaps the ICC, or at the very least an ad-hoc specialist tribunal (Schwebel, 2011 at pp. 125 – 6).

The Rome Statute in 1998 established the ICC without the express jurisdiction to consider these two offences. However, the statute is progressive because it has established a long and enduring relationship between the ICC and UNSC. The latter has shown that it would refer terror crimes to the ICC for prosecution, there are those crimes that indirectly fall within the ICC's jurisdiction as 'war crimes' breaching other treaty conventions and crimes against humanity[50].

There are questions around the ICCs political independence and the court can only investigate and prosecute crimes of the countries that are signatories to the court's jurisdiction, a self-referral or referral from the UNSC. Thus, the jurisdiction of the ICC is limited and is unlikely, without real consensus, to grow. Perhaps this provides greater impetus for the establishment of a National Security Court in the United Kingdom.

4. COMMON ELEMENTS – DEFINITIONAL PROGRESS

The construction of substantive criminal law is negatively impacted upon by the definitional variations

[46]The UNSC has broadened its law-making activity by requiring member states to legislate to combat terrorism; this added to the requirement for a state 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.

[47]Some crimes cannot 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).

[48]A deal was signed by the USA and the Taliban in Doha, Qatar in 29th February 2020 for the withdrawal of American troops from Afghanistan. This was labelled the Afghanistan Peace Deal.

[49]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.

[50]See 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.

of terrorism. A brief literature review highlights that the variation in the definition of terrorism[51] (Honderich, 2002) ranges from 'the threat or [the] use of violence … [to] bring about a political result' (Jenkins, 2000), to 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' (Mclaughlin, 2006). Liberty (2010) responded to Lord Carlile's review of the definition of terrorism in the UK and highlighted the need for the definition of terrorism to be tightly drawn because it would result in the criminalization of non-criminal behaviour such as supporting groups that encourage terrorist action and the because the legislation triggers extraordinary powers. The basic consistent elements from current definitions of terrorism in the UK and Internationally are as follows,

- Conduct that is criminal i.e. violence or threats against people or property, threats to life, murder, extortion, fabrication of weapons and hostage taking,
- Intimidation of the general public or section of the general public,
- Compelling a government or international governmental or non-governmental organisation to act or refrain from acting in a particular manner,
- Destroying a constitutional, economic, political or social structure of a state or international go-vernmental 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.

This has provided, at the very least, some form of consensus upon which to progress.

5. CONCLUSION

The last two decades has demonstrated that the criminal justice response to terrorism must be continually reviewed because this is a constantly evolving phenomenon, and its challenges are new and often novel – and technological advancements, for criminal justice purposes, create as many issues as they resolve. Due regard must be paid to safeguard due process, civil and human rights which requires an approach that is equally disruptive and that departs from the traditional forms of thinking. It is evident that cross-jurisdictional cooperation is a key element to creating a common definition and the consistency required globally in process and practise. Therefore, it is key that an international definition is agreed.

A definition of terrorism must include, at the very least, criminal conduct i.e. threats, violence against person(s) or property, extortion, fabrication of weapons and hostage taking, threats to life and murder, the intimidation of the public or a section of the public, advancing political, religious, racial or ideological causes, 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, 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.

The level of information sharing must also be far greater between states, this would facilitate better investigation, prosecution and offender management. This would also lead to better policy design in the tools required to actively mitigate and prevent terror but also to legislate (specific offences) more effectively.

The responses by the UK, EU and Internationally have raised matters that that have been or need to be reconciled. For example, issues surrounding due process i.e., rights of appeal have been relatively settled, but the jurisdictional issue in international law is still a live issue that must be settled where acts committed by foreign terrorists in another State is concerned. The fact remains that the current use of secret courts and special advocates in the United Kingdom fails to reconcile the natural justice issue discussed earlier because it, amongst other things, lacks judicial scrutiny. There is a demonstrable need for an International tribunal and specialist domestic national security court, to prosecute terror crime. The creation of such a court would allow a cohesive body of jurisprudence and specialist knowledge to be developed given the fact that the jurisdiction of the ICC

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

is unlikely to be extended to cover this type of crime. In that regard an NSC where rights to habeas corpus and appeal etcetera would be a positive step in the right direction. This article highlights that there is a pressing need for reconsideration of the approaches being taken.

AUTHOR BIO

Dr. Charanjit Singh – Tenant and Barrister-at-Law at Holborn Chambers (6 Gate St, London WC2A 3HP) and PhD – University of Southampton.

REFERENCES

Ad Hoc Committee established by General Assembly Resolution 51/210 of 17th December 1996.

Al-Lami. M. (2009). Studies of Radicalisation: State of the Field Report. Department of Politics and International Relations: University of London, ESRC.

Al-Lami, M. and O'Loughlin, B. (2009). Jihadist Try to Make Friends on Facebook. Guardian. Also, Archick, K., Rollins, J. and Woehrel, S. Islamist Extremism in Europe. Congressional Research Service. July 29, 2005.

Baker, K., Mitchell, J. and Tindall, B. Combating Islamic Terrorism in Europe. American Diplomacy. November 2007.

Bass, G. (2000). Stay the Hand of Vengeance: The Politics of War Crimes Tribunals. Princeton: Princeton University Press. https://doi.org/10.1515/9781400851713

Benjamin, D. and Simon, S. (2002). The Age of Sacred Terror. New York: Random House.

Bhui, K., Warfa, N. and Jones, E. Is Violent Radicalisation Associated with Poverty, Migration, Poor Self-Reported Health and Common Mental Disorders? PLOS ONE 5th March 2014. https://doi.org/10.1371/journal.pone.0090718

Biersteker, T. *et al.* (2000). Targeted Financial Sanctions: A Manual for Design and Implementation. USA: Thomas J. Watson Jr. Institute for International Studies.

Bigo, D., Bonelli, L., Guittet, E-P. and Ragazzi, F. Preventing and countering youth radicalisation in the EU. Directorate General For Internal Policies, Policy Department C: Citizens' Rights and Constitutional Affairs, Civil Liberties, Justice and Home Affairs. European Union, Brussels, 2014.

Bizina, M. and Gray, D. H. Radicalization of Youth as a Growing Concern for Counter-Terrorism Policy. Global Security Studies, 2014, Volume 5, Issue 1.

Brandon, B. (2004). Terrorism, Human Rights, and the Rule of Law: 120 years of the UK's Legal Response to Terrorism. Criminal Law Review: 981–97.

Briggs, R. Community engagement for counterterrorism: lessons from the United Kingdom. International Affairs 86, no. 4 (July 2010): 971-981. https://doi.org/10.1111/j.1468-2346.2010.00923.x

Brodeur, J-P. (2002). Undercover Policing in Canada: Wanting What is Wrong. Crime, Law and Social Change. 18 (10 – 12): 105 – 306. In: Loftus, B. and Goold, B. Covert Surveillance and the invisibilities of Policing. Criminology and Criminal Justice. 2012, 12: 275. https://doi.org/10.1177/1748895811432014

Carrabine, E. *et al.* (2014). Criminology: A Sociological Introduction. 3rd Edition. London: Routledge, at p. 66 – 84. https://doi.org/10.4324/9780203082492

Christmann, K. Preventing Religious Radicalisation and Violent Extremism: A Systematic Review of the Research Evidence. 2012. Youth Justice Board for England and Wales Report and the University of Huddersfield.

Daniels, R., Macklem, P. and Roach, K. (2001). The Security of Freedom: Essays on Canada's Anti-Terrorism Bill. Canada: University of Toronto Press. https://doi.org/10.3138/9781442682337

Deflem, M. (Ed.). (2004). Terrorism and counterterrorism: Criminological Perspectives. Amsterdam: Elsevier.

Evidence (General). The Eleventh Report of the Criminal Law Revision Committee. Cmnd 4991.

Ferrell, J. Cultural Criminology. In George Ritzer. (Ed.). (2007). Blackwell Encyclopaedia of Sociology. UK: Blackwell Publishing. Blackwell Reference Online. https://doi.org/10.1002/9781405165518.wbeosc171

Foucault, M. (1979). Discipline and Punish, The Birth of the Prison. New York: Vintage Books at p.216.

Foucault, M. (2003). Power/Knowledge. In Gerard Delanty and Piet Strydom (Eds.). Philosophies of Social Science: The Classic and Contemporary Readings. UK: Open University Press.

Genser, J. and Ugarte, B. S. (2014). The United Nations Security Council in the Age of Human Rights. Cambridge: Cambridge University Press. At pp. 200. https://doi.org/10.1017/CBO9781139626972

Gragera, J. P. and Sanso-Rubert-Pascual, D. A Phenomenological Analysis of Terrorism and Organized Crime from a Comparative Criminological Perspective. Journal of Law and Criminal Justice, Vol. 2(2), December 2014, pp. 113 – 131. https://doi.org/10.15640/jlcj.v2n2a7

Hamm, M. The USA Patriot Act and the Politics of Fear, chapter 24 at p.293. In J. Ferrell. *et al.* (2004). Cultural Criminology Unleashed. UK: OUP.

Hayward, K. and Young, J. Cultural Criminology. In Maguire, M., Morgan, R. and Reiner, R. (Eds.). (2007). The Oxford Handbook of Criminology. Oxford: OUP, at p.102 – 121.

Hehir, A., Kuhrt, N. and Mumford, A. (Eds.). (2011). International Law, Security and Ethics: Policy Challenges in the Post-9/11 World. New York: Routledge.

Honderich, T. (2002). After the Terror. Edinburgh: Edinburgh University Press. https://doi.org/10.1515/9780585443652

Horgan, J. (2009). Walking Away from Terrorism: Accounts of Disengagement from Radical and Extremist Movements. London: Routledge. In Carrabine, E. *et al.* (2014). Criminology: A Sociological Introduction. 3rd Edition. London: Routledge.

Jenkins, J (2000). Terrorism. In Edgar Borgatta, and Rhonda Montgomery (Eds.). Encyclopaedia of Sociology. New York: Macmillan.

Mythen, G. and Walklate, S. (2006). Criminology and Terrorism: Which Thesis? Risk Society or Governmentality. British Journal of Criminology, 46. 379-398. https://doi.org/10.1093/bjc/azi074

Hornal v Neuberger Products [1957] 1 QB 247 and Re H and Others [1996] 1 All ER 1.

Home Office Statistical bulletin. Individuals referred to and supported through the Prevent programme, England and Wales, April 2021 to March 2022. UK: HMSO. See, https://www.gov.uk/government/statistics/individuals-referred-to-and-supported-through-the-prevent-programme-april-2021-to-march-2022.

Investigatory Powers Act 2016. Publications: UK: HMSO. 2016. Available at: https://www.gov.uk/government/collections/investigatory-powers-bill.

Liberty. (2010). Terrorism Pre-charge Detention Comparative Law Study. London: Liberty at pp.4–5.

Liberty. (2010). Liberty's Response to Lord Carlile's review of the Definition of Terrorism. London: Liberty.

Liberty and Human Rights. Prevent. (2023). See, https://www.libertyhumanrights.org.uk/fundamental/prevent/.

Lyon, D. (2001). Surveillance Society: Monitoring Everyday Life. Philadelphia: Open University Press.

Lord. MacDonald. (2011). Review of Counterterrorism and Security Powers. London: HMSO, at p.4.

Official Solicitor v K [1963] Ch 381 at 405.

O'Malley, P. (2008). Experiments in risk and criminal justice. Theoretical Criminology, 12(4), pp.452-469 at p.452. https://doi.org/10.1177/1362480608097152

Mclaughlin, E. (2006). Terrorism. In Mclaughlin, E. and Muncie, J. (Eds.). Sage Dictionary of Criminology. 2nd Edition. London: Sage. In Eammon Carrabine *et al* (2014). Criminology: A Sociological Introduction. 3rd Edition. London: Routledge.

Paine, T. (1791). The Rights of Man. USA: Dover Thrift. Abridged version published in 1999.

Perera, A. In the Research Handbook on International Law and Terrorism. (2020). Draft Comprehensive Convention on International Terrorism, chapter 9, pp.152 – 162. UK: Edward Elgar Publishing.

Precht, T. Home grown terrorism and Islamist radicalization in Europe. Research funded by the Danish Ministry of Justice. December 2007.

Quenivet, N. You are the Weakest Link and We Will Help You! The Comprehensive Strategy of the United Nations to Fight Terrorism. Journal of Conflict and Security Law. 11/317 2006. https://doi.org/10.1093/jcsl/krl020

R v Hunt [1987] AC 352.

R v Folley [2013] EWCA Crim 396

Sageman, M. (2004). Understanding Terror Networks. Philadelphia, PA: University of Pennsylvania Press. https://doi.org/10.9783/9780812206791

Salabiaku v France (1988) 13 EHRR 379 at paragraph 28.

Saul, B. (2006). Defining Terrorism in International Law. Oxford: Oxford University Press.

Saul, B. (Ed.). (2014). Research Handbook on International Law and Terrorism. Edward Elgar Publishing Ltd: Cheltenham. https://doi.org/10.4337/9780857938817

Security Council Resolution 1535 (2004) on Revitalization of the Security Council Committee Established pursuant to Resolution 1373 (2001)

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

Sheldrake v Director of Public Prosecutions, Attorney General's Reference (No 4 of 2002) [2004] UKHL 43

Schmid, A. (2020): Discussion 1 – Revisiting the Wicked Problem of Defining Terrorism. Contemporary Voices, 1 (Terrorism: Its Past, Present & Future Study – A Special Issue to Commemorate CSTPV at 25), 3-11. https://doi.org/10.15664/jtr.1601

Schmitt, G. (2010). Safety, Liberty, and Islamist Terrorism: American and European Approaches to Domestic Counterterrorism. AEI Press: USA.

Schwebel, S. M. (2011). Justice in International Law: Further Selected Writings. Cambridge: Cambridge University Press at pp. 125 – 126. https://doi.org/10.1017/CBO9780511793912

Silke, A. (2008). Research on Terrorism: A Review of the Impact of 9/11 and the Global War on Terrorism. In Chen, H., Reid, E., Sinai, J., Silke, A and Ganor, B. (Eds.). Terrorism Informatics: Knowledge Management and Data Mining for Homeland Security. New York: Springer. In Eammon Carrabine. *et al.* (2014). Criminology: A Sociological Introduction. 3rd Edition. London: Routledge.

Sharpe, R. (1976). Law of Habeas Corpus. Oxford: OUP.

Singh, C. (2013). Quis Custodiet Ipsos Custodies? Should Justice Beware: a Review of Voice Identification Evidence in Light of Advances in Biometric Voice Identification Technology. Vol. 11, 1 – 28. USA: De Gruyter. https://doi.org/10.1515/ice-2014-0009

Singh, C. (2020). Prosecuting Terrorism: Secret Courts, Evidence and Special Advocates. The Panoply of Challenges facing Criminal Justice, the United Kingdom Perspective. 33:3, 382-408. https://doi.org/10.1080/10345329.2020.1850166

Singh, C. (2021). The Panoply of Challenges facing International Criminal Justice: The United Kingdom's Response to Defining and Responding to Terrorism. Global Jurist, De Gruyter. https://doi.org/10.1515/gj-2021-0036

Singh, C. (2022). Can Artificial Intelligence, RegTech and CharityTech provide Effective Solutions for Anti-money Laundering and Counter-terror Financing Initiatives in Charitable Fundraising. Journal of Money Laundering Control, Emerald.

Tadros, V. Crime and security. (2008) 71 Modern Law Review 940 at pp.967 – 968. https://doi.org/10.1111/j.1468-2230.2008.00730.x

Special Advocates Further Memorandum to the joint Committee on Human Rights on the Justice and Security Bill, 2013, https://adam1cor.files.wordpress.com/2013/02/supp-note-for-jchr-final.pdf.

Vladeck, S. 'The Case against National Security Court' (2009). Articles in Law Reviews and Other Academic Journals. Paper 298. Originally published in the Willamette Law Review at pp.505 – 526.

UK Parliament, 2017, Justice and Security Green Paper Report, http://www.parliament.uk/business/committees/committees-a-z/joint-select/human-rights-committee/news/justice-and-security-green-paper-report/).

United Nations. (2016). Global Implementation Survey of Security Council Resolution 1373 (2001). Geneva: United Nations.

U.N. General Assembly Resolution on Measures to Prevent International Terrorism. International Legal Materials Vol. 12, No. 1 (January 1973). https://doi.org/10.1017/S0020782900056291

White, N. (2011). Terrorism, Security and International Law, at p.9.

Woolmington v DPP [1935] AC 462.

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.

Zedner, L. (2009). Security. London: Routledge. https://doi.org/10.4324/9780203871133

Received on 20-02-2023 Accepted on 15-03-2023 Published on 14-04-2023

https://doi.org/10.6000/1929-4409.2023.12.03