

# Understood But Undefined: Why Do Argentina and Brazil Resist Criminalising Terrorism?

Rebecca Welsh\*

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*Abstract:* This article considers why Argentina and Brazil have resisted global trends and pressures towards the adoption and implementation of laws criminalising acts of terror. It is argued that the development of Argentine and Brazilian understandings of 'terrorism', resulting from the considerable experience of each nation with state and insurgent terror, has led to persistent anti-counter-terrorism-law policies. Some lessons are drawn from this discussion to educate the evolution of counter-terrorism law and policy more widely.

*Keywords:* Counter-Terrorism Law, Counter-Terrorism Policy, State Terrorism, Terrorism, Definition of Terrorism, South American Terrorism, Representative Democracy, Resolution 1373 Implementation.

## I. Introduction

The two largest and most populous nations of South America, Argentina and Brazil, have had extensive experience with domestic and international terrorism. However, they remain outliers in the international community by resisting pressures to create and implement laws that criminalise terrorist acts. In this article I argue that it is each nation's experience with terrorism that has led to this reticence to criminalise terrorism as such, and I consider what broader lessons may be drawn from this.

The 9/11 and subsequent terrorist attacks around the globe sparked a keen and unprecedented awareness of the nature of the threat of international terrorism. In the decade since 9/11, counter-terrorism law has been emphasised and consolidated as a key area of national, regional and international concern. At the international level, the UN Security Council's response to 9/11 differed significantly to any of its previous responses to acts of terror.<sup>1</sup> It classified all international terrorism as a threat to international peace and security and ordered all states to implement an extensive list of meas-

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1 Jan Wouters and Frederik Naert, 'Shockwaves through International Law after 11 September: Finding the Right Responses to the Challenges of International Terrorism' in Cyrille Fijnaut, Jan Wouters and Frederik Naert (eds), *Legal Instruments in the Fight against International Terrorism: A Transatlantic Dialogue* (Martinus Nijhoff Publishers 2004) 424–426.

ures to prevent and suppress terrorist acts and their support.<sup>2</sup> This is exemplified in the UN Security Council's Resolution 1373 of 2001,<sup>3</sup> which has been described as Security Council 'legislation' on the basis of its unilateral, mandatory, general and novel nature.<sup>4</sup> Article 2 of Resolution 1373 obliges states to refrain from providing support to terrorists and to prevent terrorist acts by, amongst other steps, prosecuting terrorist acts and punishing perpetrators in a manner that reflects the seriousness of their crimes.<sup>5</sup> By Resolution 1373 the Security Council also created the Counter-Terrorism Committee ('CTC'), charged with monitoring compliance with the Resolution.<sup>6</sup>

Counter-terrorism law has also become a priority for regional organisations. The European Union, for example, formulated its first general anti-terrorism policy on 20 September 2001, a move subsequently consolidated by an extensive array of measures.<sup>7</sup> The Organisation of American States was one of the first groups of nations to adopt an anti-terrorism treaty in the wake of 9/11, namely the Inter-American Convention Against Terrorism, with a stated purpose 'to prevent, punish, and eliminate terrorism'.<sup>8</sup>

In response to the global political and legal climate of counter-terrorism concern, many nations, such as the US, the UK and Australia, incorporated wide-ranging terrorism offences into their domestic legal frameworks, aimed specifically at the prevention and prosecution of terrorist acts, organisations and support.<sup>9</sup> The legislative response of most nations across the globe was built upon an acknowledgment and assumption that acts of terror could, and should, be dealt with through criminal law frameworks and deserved unique treatment within those frameworks. In 2006 Andrea Bianchi observed that 'the international fight against terrorism seems to have triggered an expansion of the criminal law'.<sup>10</sup> In its most recent report the CTC has clarified the need for specific counter-terrorism criminal laws, saying:<sup>11</sup>

2 *Threats to international peace and security caused by terrorist acts*, SC Res 1373, UN SCOR, 4385th mtg UN Doc S/RES/1373 (28 September 2001) ('Resolution 1373'). See also, *Threats to international peace and security*, SC Res 1624, UN SCOR, 5261st mtg UN Doc S/RES/1624 (14 September 2005) ('Resolution 1624').

3 *ibid.*

4 CH Powell, 'The UN, Terrorism and the Rule of Law' in Victor V Ramraj, Michael Hor, Kent Roach and George Williams (eds), *Global Anti-Terrorism Law and Policy* (2nd edn, CUP 2012) 23, 29–30.

5 *Resolution 1373*, UN Doc S/RES/1373, Art 2(e).

6 *ibid* Art 6.

7 Cyrille Fijnaut, 'The Attacks on 11 September 2001, and the Immediate Response of the European Union and the United States' in Fijnaut, Wouters and Naert (n 1) 24–25; Jorg Monar, 'Anti-terrorism Law and Policy: The Case of the European Union' in Victor V Ramraj, Michael Hor and Kent Roach (eds), *Global Anti-Terrorism Law and Policy* (CUP 2005) 425.

8 Enrique Lagos and Timothy D Rudy, 'Preventing, Punishing and Eliminating Terrorism in the Western Hemisphere: A Post-9/11 Inter-American Treaty' (2003) 26 *Fordham Intl LJ* 401; Organization of American States, *Inter-American Convention Against Terrorism*, Inter AG/RES. 1840 (XXXII-O/02), OAS Doc OEA/Ser.P/AG/doc 4143/02 (6 March 2002), Art 1.

9 See eg: *Uniting and Strengthening America by Providing Appropriate Tools required to Intercept and Obstruct Terrorism (USA PATRIOT) Act*, Pub L No 107-56, 115 Stat 272 (2001); *Terrorism Act 2000 (UK)*; *Criminal Code Act 1995 (Cth) Part 5.3*. See also, Kent Roach, *The 9/11 Effect: Comparative Counter-Terrorism Law* (CUP 2011).

10 Andrea Bianchi, 'Security Council's Anti-terror Resolutions and their Implementation by Member States: An Overview' (2006) 4 *JICJ* 1044, 1051.

11 *Letter dated 17 August 2011 from the Chair of the Security Council Committee established pursuant to resolution 1373 (2001) concerning counter-terrorism addressed to the Secretary-General*, UN Security Council, UN Doc S/2011/463 (1 September 2011) annex ('Global survey of the implementation of Security Council resolution 1373 (2001) by Member States') 71, (emphasis added).

'In order to implement Security Council resolution 1373 (2001) effectively, it is essential to establish comprehensive counter-terrorism legislation. The intent of the resolution is that States, by enacting specific counter-terrorism legal provisions, should no longer need to resort to vague legal provisions, ad hoc methods, or customized interpretations in order to prosecute terrorist acts. Instead, States should establish a clear, complete and consistent legal framework *that specifies terrorist acts as serious criminal offences.*'

Some nations attain an outlier status by maintaining that the prevention and prosecution of terrorism can be achieved effectively within existing criminal law frameworks, in the absence of specific terrorism offences.<sup>12</sup> Two such nations – Argentina and Brazil – and their reasons for adopting this stance in the face of clear impetus and global trends towards the definition of terrorism as a crime, form the subject of this paper.

As a region, South America has a prolonged and diverse experience with terrorism, encompassing engagement with 'home-grown' and international terrorists; terror by state and non-state actors; a series of 'wars' on terror; successful and unsuccessful independence, guerrilla and insurrectionist movements; and a diverse and dynamic political arena. Arguably the two most influential nations in South America – Brazil and Argentina – have shared in this breadth of experience. In contrast to global trends, however, the counter-terrorism effort has played out differently in these two nations as compared to more globalised trends of the kind observed by Bianchi. Brazil continues to deny any need for specific counter-terrorism criminal legislation.<sup>13</sup> Argentina, less able to resist the potential consequences of ignoring international pressure,<sup>14</sup> has created a limited association offence of terrorism.<sup>15</sup> Neither country has, or appears likely to, implement those laws it relies upon to constitute its counter-terrorism framework. The outlier status of the region has been recognised by the CTC, whose first recommendation with respect to the South American region in its 2011 report was: the review of criminal laws to ensure the proper criminalisation of terrorism offences, and the enactment of counter-terrorism provisions as necessary.<sup>16</sup>

This article considers why Argentina and Brazil have taken this divergent approach despite internal and external pressures in recent decades, and particularly since 9/11, to take a strong legal stance against terrorism. The ultimate finding of this article is that a key cause of Argentina and Brazil's resistance to criminalising terrorist acts as such is, in

12 For example, Croatia has only made international terrorism a distinct offence: Bianchi (n 10) 1052.

13 See Thomas C Bruneau, 'Intelligence Reforms in Brazil: Contemporary Challenges and the Legacy of the Past' (2007) 6(3) *Strategic Insights* 2, 3, quoting *Correio Brasiliense* (9 March 2002); Financial Action Task Force, *Mutual Evaluation Report: Anti-Money Laundering and Combating the Financing of Terrorism: Brazil* (2010) 43; Antonio de Aguiar, Ambassador of the Republic of Brazil to the United States and Monica Herz, Director of the Institute of International Relations, Pontifical Catholic University, Rio de Janeiro, in Conference proceedings: 'New Directions in Brazilian Foreign Relations' (Washington DC, Woodrow Wilson International Centre for Scholars Brazil Institute 28 September 2007) 11, 16.

14 See 'Argentina under pressure to approve anti money-laundering legislation' *MercoPress* (7 April 2011) <<http://en.mercoPress.com/2011/04/07/argentina-under-pressure-to-approve-anti-money-laundering-legislation>> accessed 7 August 2013; for a detailed analysis of Brazil and Argentina's implementation of Financial Action Task Force recommendations including with respect to criminalising terrorism financing see Maira Machado, 'Similar in Their Differences: Transnational Legal Processes Addressing Money Laundering in Brazil and Argentina' (2011) 37 *L&Soc Inquiry* 330.

15 *Código Penal* Art 213ter.

16 *Global survey of the implementation of Security Council resolution 1373 (2001) by Member States*, UN Doc S/2011/463 annex 56.

fact, each nation's experience with terrorism. This complex issue is addressed in three stages. Firstly, this article considers the multifaceted historical experience of Argentina and Brazil with 'terror' and 'terrorism', from the instalment of ruling military juntas in the 1960s and 70s through to the present terrorist threats facing each nation today. Secondly, the present approach of each nation to criminalising 'terrorism' is described. Against this background, the final sections of this article address how the historical development of the Argentine and Brazilian understandings of 'terrorism' has led to their present policies. In this context I also comment briefly on the extent to which these examples may be representative for the broader South American experience. In conclusion, this article suggests some lessons that may be drawn from this discussion to educate the evolution of counter-terrorism law and policy more widely.

## II. Argentina

Argentina enjoyed a relatively stable constitutional system of government under the Constitution of 1853, until 1930 when a military coup seized power from the elected government.<sup>17</sup> Between 1930 and 1976 Argentina suffered a total of five military coups; a brief replacement Constitution; a political practice of sacking members of the judiciary; and an enduring presence of the military in civilian affairs.<sup>18</sup> A consequence of the militarisation of Argentine politics was the genesis of violent guerrilla organisations in the late 1960s and early 1970s.<sup>19</sup> These groups included the Marxist ERP<sup>20</sup> and the leftist Peronist Montoneros. In 1973, the military junta held elections won by the popular, albeit exiled, leader Juan Peron. To facilitate his success, Peron promoted a more leftist platform than he had previously adopted, capturing the support of the politically active youth by speaking to their desire for a socialist uprising against military rule.<sup>21</sup>

Between 1970 and 1973 the Montoneros kept the violent aspect of their political movement 'well controlled' and focused their efforts on political work, achieving a popular following of over 100,000 people.<sup>22</sup> Following Peron's death in 1974 the Presidency fell to his wife, Vice-President Isabel Martinez de Peron, and divides were magnified between the various factions claiming to represent the 'real' Peronist doctrine.<sup>23</sup> The Montoneros resumed violent warfare against the government, the ERP and other Peronist factions, engaging in bombings, kidnappings and attacks on military bases, a move that has been called their 'fatal mistake'.<sup>24</sup> The government quickly declared a state of siege, suspend-

17 William C Banks and Alejandro Carrio, 'Terrorism in Argentina: Government as its own Worst Enemy' in Ramraj, Hor and Roach (n 7) 610.

18 *ibid.* A succinct summary of the development of the military's place in Argentine security affairs may be found in Argentina's 2007 White Paper: Nestor Carlos Kirchner and Nilda Garre, *Modernisation of the Defense Sector: Principles and Characteristics of the Argentine Model* (Ministry of Defense 2007).

19 Robert D Crassweller, *Peron and the Enigmas of Argentina* (WW Norton & Co 1987) 332; Donald C Hodges, *Argentina 1943-1987: The National Revolution and Resistance* (2nd edn, University of New Mexico Press 1988) 7 and, for detailed description, chs 3 'Development of the resistance' to 5 'Restructuring the revolutionary front'; Conor Gearty, *Terror* (Faber and Faber 1991) 43-44.

20 Ejército Revolucionario del Pueblo (People's Revolutionary Army).

21 Crassweller (n 19) 333-334; Interview with Legal Practitioner, Buenos Aires (23 November 2010).

22 Gearty (n 19) 43.

23 Banks and Carrio (n 17) 611.

24 Gearty (n 19) 43. See also, Banks and Carrio (n 17) 611. For a description of the kinds of attacks undertaken by the *Montoneros* see: Cefarino Reato, *Operacion Primicia* (Sudamericana 2010) describing a violent 1976 attack against a barracks.

ing all constitutional rights until national security could be ensured.<sup>25</sup> In 1975, the military forces were empowered by executive decree to carry out 'operations they deem necessary to annihilate the subversive elements throughout the country'.<sup>26</sup> During this time a group known as the AAA<sup>27</sup> began to employ severe, violent counterinsurgency methods. The AAA was not a government agency, but suffered no government retaliation for its actions, leading many to draw the conclusion that they were acting with government sanction.<sup>28</sup>

By 1976 the military had again seized control of Argentina by coup. The return to military dictatorship signalled the beginning of the 'Dirty War' against 'terrorism' conducted by the ruling junta, and resting its legitimacy in part on the state of siege declared by Martínez de Perón.<sup>29</sup> One retired Argentine General involved in the Dirty War is quoted to have said: 'First we will kill all the subversives; then we will kill their collaborators; then their sympathizers; then those who are indifferent; and finally, we will kill all those who are timid'.<sup>30</sup> The Dirty War was a campaign of horrific state violence involving, for example, violent abductions; the detention of individuals in some 280 secret prison camps; torture by such means as electric prod and psychological and sexual abuse; the illicit adoption of the children of women pregnant when kidnapped; and execution.<sup>31</sup> Human rights organisations have estimated some 30,000 cases of 'disappeared' persons during the period, though this figure has been the subject of dispute.<sup>32</sup> The courts enabled the junta's actions by summarily rejecting habeas corpus applications from the families of the abducted, on the basis that the Ministry of the Interior 'did not know' the whereabouts of the missing persons.<sup>33</sup> The Montoneros were targeted by death squads and the military apparatus and, by the end of the 1970s, the organisation had been 'wiped out'.<sup>34</sup> Indeed, the leftist groups whose existence was used to justify the repressive actions of the junta had already been effectively defeated before the 1976 coup and evidence has been brought to light to suggest the junta subsequently controlled the key guerrilla leaders and instigated their terrorist actions in order to continually justify its rule and repressive tactics.<sup>35</sup>

Argentina adopted several laws to combat terrorism in the period before and during the Dirty War. In 1960, Emergency Law 15.293 'Repression of Terrorism' was enacted. It identified many terrorist activities and established long penal sentences for these crimes.

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25 In the Spanish style, the Argentine Constitution of 1853 established a centralization of powers and, borrowing from the Chilean Constitution of 1833 and the French Revolutionary Law of 1791, allowing the President to suspend all constitutional freedoms as a result of internal unrest threatening the Constitution: Banks and Carrio (n 17) 612.

26 Decree 2772 (6 October 1975), quoted in *ibid* 611.

27 *Alianza Anticomunista Argentina* (Argentine Anticommunist Alliance).

28 Banks and Carrio (n 17) 613.

29 *ibid*.

30 In Mark B Baker, 'The South American Legal Response to Terrorism' (1985) 3 BU Int'l LJ 67, 75.

31 Alison Brysk, 'The Politics of Measurement: The Contested Count of the Disappeared in Argentina' (1994) 16 Hum Rts Q 676, 678; Banks and Carrio (n 17) 619–620; Penny Green and Tony Ward, *State Crime* (Pluto Press 2004) 114–117.

32 Banks and Carrio (n 17) 613. For a valuable discussion of the controversies surrounding this estimation, see, Brysk (n 31) 678.

33 Banks and Carrio (n 17) 619–620.

34 R Gillespie, 'The Urban Geurilla in Latin America' in N O'Sullivan (ed), *Terrorism, Ideology and Revolution* (Wheatsheaf 1986) quoted in, Gearty (n 19) 43–44.

35 Green and Ward (n 31) 113.

In 1971, the President used his state of siege power to adopt Law 19.081, which authorized the military to prevent and combat internal subversion and terrorism. In 1976, the military junta made extensive revisions to the *Código Penal* by decree in Law 21.338, including the reintroduction of capital punishment; increased sanctions for offences such as the creation of common danger by fire or explosion (deleting limits to the duration of imprisonment capable of being imposed and including the death penalty as a potential sentence); and the establishment of 'Councils of War' to try accused 'subversives'. 'Subversives' were defined broadly as 'anyone who wishes to achieve his ideological ends by means other than those contained in the rules governing the country's political, economic, and social life'.<sup>36</sup>

Following Argentina's loss in the Falklands War to the United Kingdom in 1982 and facing mounting criticisms of its human rights record and allegations of corruption, Argentina eventually returned to a democratic government and state of relative stability. The judiciary began to reassert itself, at times relying on international law (even when not incorporated into, or even at odds with, Argentine law) to treat the crimes committed by Argentine armed forces as 'crimes against humanity'.<sup>37</sup> Congress, by a series of retrospective laws, began to grapple with the controversial issue of holding individuals to account for their actions during the Dirty War. President Alfonsín, elected on a human rights platform to lead of the new democracy from 1983, adopted a policy of holding both military and insurgent offenders accountable.<sup>38</sup> This complicated process involved the trials and incarceration of those who had committed significant wrongs on both sides, and led to the prosecution of many high ranking military officials.<sup>39</sup> To address the controversy of holding lower-ranking officers to account, Alfonsín enacted the 'Due Obedience Law' of 1987, stating that officers under a certain rank would be excused from liability for crimes committed during the Dirty War.<sup>40</sup> In 1989, Alfonsín was succeeded by the relatively conservative President Menem. From 1990, in a move that was highly criticized by the legal community, Menem reversed the existing policy and extended unconditional pardons in respect of all human rights violations of the Dirty War period, including to imprisoned military figures.<sup>41</sup> In 2003, Menem was followed by the relatively leftist Peronist Kirchner administration, led by Néstor Kirchner until 2007 when his wife Cristina Fernández de Kirchner was elected to the Presidency. Many members and supporters of the Kirchner administrations were the same youth swayed by Perón's socialist policies that ensured his re-election in 1973. Both Néstor and Cristina were active Peronists during Perón's exile and subsequent re-election in the early 1970s.<sup>42</sup> It has been

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36 Baker (n 30) 77.

37 Banks and Carrio (n 17) 616–618. cf, the approach of the Brazilian government in taking the bold step of offering general amnesty to those on all sides of the conflict.

38 Kathryn Lee Crawford, 'Due Obedience and the Rights of Victims: Argentina's Transition to Democracy' (1990) 12 *Hum Rts Q* 17, 20: 'Alfonsín knew that the legitimacy of his mandate depended on his ability to restore the rule of law.'

39 Bronwyn Anne Leebaw, *Judging State-Sponsored Violence, Imagining Political Change* (CUP 2011) 46.

40 Law No 23521, 4 June 1987, XLVII-B *Anales de Legislación Argentina* 1548. For analysis of the Due Obedience Law see, Crawford (n 38) 20. In 1987, the law withstood a constitutional challenge lodged on human rights grounds: Supreme Court of Argentina, 22 June 1987, 'Causa No 547 incoada en virtud del Decreto No 280/84 del Poder Ejecutivo Nacional', 1987-D *Revista La Ley* 194–266.

41 Banks and Carrio (n 17) 617.

42 Mark P Jones and Juan Pablo Micozzi, 'From Néstor to Cristina: Argentina and the Kirchners' (2010) 10 *Global Dialogue* 90.

reported that key office holders within the Kirchner administrations had links to the Montoneros in the 1970s.<sup>43</sup> In a politically popular move, the Kirchner administration repealed the Due Obedience Law, thus effectively reversing the pardons in respect of the military officers only.<sup>44</sup>

In the midst of this turbulent domestic situation, in recent decades Argentina has been directly affected by actions and threats of international terrorism, particularly Islamic terrorism. The Triborder Area where Brazil, Paraguay and Argentina meet is home to much of Argentina's significant Middle-Eastern immigrant population and has long been a focus of international attention as a potential focal point of terrorist financing activities.<sup>45</sup> Despite extensive and continued attention to the area and the sighting of known terrorist suspects in the region, no actual links to terrorism have been substantiated and concern regarding the region has lessened.<sup>46</sup> Recruitment to international groups such as Hezbollah, HAMAS, Al'Qaeda and Jemmet Attebligh is also a concern in Argentina, where poor and outcast young people of Islamic heritage are targeted by foreign recruiters.<sup>47</sup>

The impact of international terrorism was felt in Argentina in 1992 and 1994 with the fatal bombings of two Israeli locations. On 17 March 1992, an explosion destroyed the Israeli Embassy killing 28 people and injuring more than 300. On 18 July 1994, the AMIA<sup>48</sup> Jewish Community Centre was bombed, killing 86 people and injuring more than 300. The investigation into the AMIA bombing was heard by four separate judges, each of whom required the evidence to be presented afresh, and has suffered police tampering of evidence; corruption; inefficient investigation and a host of other problems and setbacks. The trials of more than 20 people, including 15 police officers, came to a close in September 2004, when a three-judge panel acquitted all Argentine defendants.<sup>49</sup> The three-judge panel attributed the acquittals to the original investigation and called for an investigation of the original judge and prosecutors' handling of the case and trial.<sup>50</sup> The conduct of the AMIA investigation presents a picture of the difficulties that the existing Argentine criminal law, processes and systems have in responding to acts of terrorism. The Iranian leaders believed to be involved in the bombings remain subject to Interpol arrest warrants and the Kirchner administration continues to seek a means by which these individuals may be tried.<sup>51</sup>

43 Mary Anastasia O'Grady, 'The Other Villains in Argentina's Dirty War' *The Wall Street Journal* (New York, 25 March 2005) A9.

44 Steven Levitsky and María Victoria Murillo, 'Argentina: From Kirchner to Kirchner' (2008) 19 *J of Democracy* 16, 17-18; 'Argentina scraps amnesty laws' *BBC News* (London, 21 August 2003); Interview with Legal Practitioner, Buenos Aires (23 November 2010).

45 Mark P Sullivan, 'Latin America: Terrorism Issues' (Congressional Research Service, 5 January 2012) 12-14; US Department of State Office of the Coordinator for Counterterrorism, *Country Reports on Terrorism 2010* (2011) 130.

46 Sullivan (n 45) 12-14. In 2004 the United States State Department concluded that there was 'no credible evidence' that operational Islamic or 'narco' terrorist cells existed in Argentina: US Department of State Office of the Coordinator for Counterterrorism, *Country Reports on Terrorism 2004* (2005) 84.

47 Interview with Federal Police Officers, Buenos Aires (23 November 2010); Jose R Cardenas, 'Opinion: War on Terror - Our Unquiet Southern Front' *Fox News Latino* (23 May 2011) <<http://latino.foxnews.com/latino/news/2011/05/23/opinion-war-terror-unquiet-southern>> accessed 7 August 2013.

48 *Asociación Mutual Israelita Argentina* (Argentine Israelite Mutual Association).

49 US Department of State Office of the Coordinator for Counterterrorism (n 46) 85.

50 *ibid.*

51 *ibid.*

Argentina shares borders with five countries: Chile, Bolivia, Paraguay, Brazil and Uruguay. The political situations of these nations are complex and at times volatile. It is likely that anarchist and Marxist groups have a presence in Argentina, for example twelve bombings in 2010 were attributed to anarchist groups.<sup>52</sup> The Kirchner administrations' policies do not appear as harsh as those in some neighbouring states and may facilitate Argentina's position as a potential refuge for individuals who belong to political and other groups targeted in these states, such as the Chilean Communist 'Manuel Rodríguez Patriotic Front' accused of responsibility for various acts of political violence.<sup>53</sup> The relationships between these groups, other political organisations and ordinary criminals are as complex as the relationship between the groups and governments in the region.<sup>54</sup> Against this demographic and historical background, it is clear that terrorism is a real and complex concern for Argentina.

Since 9/11 Argentina has expressed its cooperation and support of counter-terrorism efforts, offering material support for UN-mandated coalition peacekeeping operations in Afghanistan or elsewhere.<sup>55</sup> Argentina is a party to twelve Conventions and Protocols relating to terrorism. In January 2002, the Government created a new office within the Foreign Ministry to coordinate action and policy on international counter-terrorism issues.<sup>56</sup> Argentina has worked closely with the US, Brazil and Paraguay in a '3+1' scheme to monitor the potential terrorist (or terrorist support) threat posed by the Triborder Area.<sup>57</sup> Despite considerable active international cooperation in the counter-terrorism effort, it took the post-junta civilian governments of Argentina until 2007 to criminalise terrorism. Counter-terrorism legislation was introduced to the Argentine Parliament in 1996 in response to the earlier bombings, but it was not passed.<sup>58</sup>

In Article 213ter of the *Código Penal* Argentina defines the crime of terrorism, which has a penalty of five to twenty years imprisonment, as:

'[A]nyone who be part of a criminal association set up with the aim of, through the commission of crimes, terrorizing the population or compelling a government or

52 US Department of State Office of the Coordinator for Counterterrorism (n 45) 130. The Argentine government refused to extradite accused terrorist Sergio Apablaza Guerra on the basis of Chile's harsh anti-terrorism laws: 'Chile insists on Apablaza Guerra's extradition' *Buenos Aires Herald* (Buenos Aires, 23 January 2011).

53 See, Immigration and Refugee Board of Canada, Chile, Whether the Manuel Rodríguez Patriotic Front (Frente Patriótico Manuel Rodríguez, FPMR) is still active; if so, whether they were involved in recent illegal activities; whether there is any history of forcible recruitment, specifically of women, into this group (2002 – July 2004), (16 July 2004) <<http://www.unhcr.org/refworld/docid/41501bf47.html>> accessed 7 August 2013; *Buenos Aires Herald* (n 52); Interview with Federal Police Officers, Buenos Aires (23 November 2010).

54 See Cofer Black, 'Patterns of Global Terrorism 2003' (US Department of State 2004) 78–79.

55 US Department of State Office of the Coordinator for Counterterrorism, *Patterns of Terrorism 2002* (2003) 71.

56 Law 25,520 (2001).

57 US Department of State Office of the Coordinator for Counterterrorism (n 45). See also, Alberto Angel Fernandez and Albert Juan Bautista Iribarne, Ministry of Justice and Human Rights, Message 1913/06 'Addition of Chapter VI – Illegal Terrorist Organisations and Terrorist Financing, to the Criminal Code', Docket PE-449/06, referred by the President Néstor Kirchner to the Senate (20 December 2006) (official English language translation, <<http://www.jus.gov.ar/media/33331/ProyectoPEN-Mensaje1913.20.12.06ENGLISHVERSION.pdf>> accessed 7 August 2013).

58 Pichetto, Gauna, Rodríguez, Menem, Hernández and Gallo, 'Proyecto de ley antiterrorista' <<http://www.derechos.org/nizkor/arg/ley/te002.html>> accessed 7 August 2013.

an international organization to do or abstain from doing an act, provided that such criminal association has following features:

- a) An action plan aimed at spreading ethnic, religious or political hatred;
- b) Organized in international operative networks;
- c) Availability of war weapons, explosives, bacteriological or chemical agents or any other means capable of endangering the life or integrity of an indefinite number of persons.'

The focus of the Argentine definition of terrorism lies in the nature and aims of the organisation to which the accused individual belongs, rendering terrorism in Argentina an association offence and not an action of specific intent. This was Parliament's aim in drafting the provision. When introducing the Article to the National Congress, Chief Minister Dr Alberto Angel Fernandez and Minister of Justice and Human Rights Dr Albert Juan Bautista Iribarne said: 'What is penalized here, the same as in [the conspiracy offence in] Article 210 of the Criminal Code, is the fact of taking part of an illegal association.'<sup>59</sup>

Article 213ter was drafted in order to comply with international pressure, in particular from the Financial Action Task Force ('FATF').<sup>60</sup> In public reports the FATF made a series of findings that Argentina was not compliant with most of its recommendations, and made specific recommendations pushing Argentina to create a counter-terrorism criminal law framework.<sup>61</sup> Importantly, FATF has sufficient influence to deter foreign investment and could have done so had Argentina failed to comply with its recommendations.<sup>62</sup>

The Article 213ter definition has been criticized as too limited in scope to be substantially effective.<sup>63</sup> It extends only to international organizations.<sup>64</sup> It also has a significantly different focus to general definitions of 'terrorism' around the world.<sup>65</sup> There are familiar aspects of the Argentine definition of terrorism, in particular the fact that the organisation must have an aim of 'terrorizing the population or compelling a government or an international organization to do or abstain from doing an act' and the inclusion of the intention to spread 'ethnic, religious or political' hatred.<sup>66</sup> The penalty, however, is substantially less than life imprisonment found associated with acts of terrorism in, for example, the Australian Criminal Code<sup>67</sup> or the USA PATRIOT Act.<sup>68</sup> The Article 213ter definition also does not contain any requirement of actual harm, such as 'death', 'serious bodily injury', even 'serious risk to the health or safety of a section of the public'.<sup>69</sup> Most

59 Fernandez and Iribarne (n 57).

60 Or Grupo de Acción Financiera Internacional, 'GAFI'. *ibid.*

61 Financial Action Task Force, *Mutual Evaluation Report: Anti-Money Laundering and Combating the Financing of Terrorism: Argentina* (22 October 2010) 8, 40.

62 See, *MercoPress* (n 14); Machado (n 14).

63 Financial Action Task Force (n 61) 38-39; Interview with Federal Police Officers, Buenos Aires (23 November 2010).

64 Financial Action Task Force, *Mutual Evaluation Report: Anti-Money Laundering and Combating the Financing of Terrorism: Argentina* 39.

65 *ibid* 40.

66 See eg, *Threats to International Peace and Security Caused by Terrorist Acts*, SC Res 1566, UN SCOR, 5053rd mtg, UN Doc S/RES/1566 (8 October 2004); International Convention for the Suppression of the Financing of Terrorism, opened for signature 9 December 1999, art 2 (entered into force 10 April 2002); Terrorism Act 2000 (UK) c 11; and the Canadian Criminal Code RSC 1985, c 46, s 83.01.

67 Criminal Code Act 1995 (Cth) s 101.1.

68 s 810; see also, Terrorist Penalties Enhancement Act 2004 (US).

69 cf, eg, the South African definition in *Protection of Constitutional Democracy Against Terrorism and Related Activities Act 2004* ss1(1)(xxv), in addition to the above-cited provisions.

significantly, Article 213ter creates purely an association offence, leaving individual actions and the criminal acts themselves to the regular criminal law. In this way the provision arguably fails to create a crime of terrorism, in terms of terrorist acts, at all.

Moreover, the definition has not supported prosecutions and appears not to be designed for ready implementation.<sup>70</sup> As the legislation has not yet been applied, its ambiguities remain at large. Article 213ter also appears to reflect a refusal to acknowledge domestic or home-grown terrorism, such as the anarchist bombings in 2010,<sup>71</sup> and rather exhibits a compliance with international pressures from the CTC and FATF to prevent and prosecute international terrorist associations. Hence, law enforcement agencies, as well as the legal community, consider the law of very limited substantive use or value in domestic law enforcement or national security protection.<sup>72</sup>

### III. Brazil

The military has traditionally played an active role in Brazilian politics.<sup>73</sup> In 1961, rightist President Janio Quadros resigned, hoping to be bought swiftly back to power.<sup>74</sup> The elevated Vice-President Joao Goulart, however, retained the Presidency and implemented a series of leftist, arguably communist, reforms that consolidated his power and caused significant economic decline.<sup>75</sup> In 1964, Goulart and his government were overthrown in a military coup, marking the beginning of 21 years of rule by military Presidents. Elio Gaspari describes three phases of military rule, characterised by a moderate military government from 1964-1968; a battle between strong government and strong opposition forces to 1974; and the promotion of a return to democracy, to 1985.<sup>76</sup>

Reaching its peak in the period from 1969 to 1974, leftist movements promoting armed insurgencies against the military government engaged in kidnappings and attacks against the military and other targets. The acts of terror included the kidnapping of the US Ambassador in 1969, the Japanese Consul General in 1970 and the West German

70 Financial Action Task Force (n 61), 38–40; Interview with Federal Police Officers, Buenos Aires (23 November 2010); Interview with Legal Practitioner, Buenos Aires (23 November 2010).

71 US Department of State Office of the Coordinator for Counterterrorism (n 45) 130.

72 Financial Action Task Force (n 61) 40; Interview with Federal Police Officers, Buenos Aires (23 November 2010); Interview with Legal Practitioner, Buenos Aires (23 November 2010).

73 As observed by Augusto Zimmerman: 'The armed forces in Brazil have developed over the years an unequivocal tradition of extra-legal, arbitrary interference in the political affairs of the country. They have done so by often assuming for themselves the task of salvadores de patria ("saviours of the fatherland") from "bad" and "corrupt" politicians': Augusto Zimmerman, 'The Politics of Lawlessness in Brazil: How Brazilian Politics overrides the Rule of Law' (2008) 15 E Law 3, 4. See also, Georges-Andre Fiechter, *Brazil Since 1964: Modernisation under a Military Regime* (trns by Alan Braley, The MacMillan Press Ltd 1975) 23.

74 Octavio Amorim Neto and Fabiano Santos, 'The Executive Connection: Presidentially Defined Factions and Party Discipline in Brazil' (2001) 7 Party Politics 213, 222.

75 Maria Helena Moreira Alves, *State and Opposition in Military Brazil* (University of Texas Press 1988) 5–6.

76 Elio Gaspari, *O Sacerdote e o Feiticeiro: A Ditadura Envergonhada* (Companhia das Letras 2002) 178–209. Adriano Nervo Codato describes five phases of military control in Brazil: 'constitution' of the dictatorship from 1964; 'consolidation', from 1969; 'transformation', from 1974; 'decomposition', from 1979, and 'transition' to civilian rule, from 1985: Adriano Nervo Codato, 'Uma história política da transição brasileira: da ditadura militar à democracia' (2006) 25 Revista de Sociologia e Política 83, 87–88 (English text available from <www.nusp.ufpr.br>).

Ambassador also in 1970. In each of these cases, and in others, the (often successful) aim of the leftist guerrillas was the safe release of political prisoners.<sup>77</sup>

In response to the insurgent violence, rightist radicals in the military formed a 'hard line' that engaged in widespread torture, disappearances and killings, often undertaken by 'death squads'.<sup>78</sup> 'National security' rhetoric and legislation played a central role in legitimizing the role of the military and intelligence organisations in extinguishing subversive political forces.<sup>79</sup> The military government enacted a series of 'Institutional Acts' to this end. These Acts were designed to be temporary measures but endured for extended periods. The Institutional Acts enabled the President to, amongst other things, change the Constitution, prohibit political parties, suspend Congress and act without consulting Congress.<sup>80</sup> Institutional Act Number 5 ('AI-5'), signed on 13 December 1968, symbolised the peak of military repression and 'set the seal on the installation of a de facto dictatorship with virtually unlimited powers'.<sup>81</sup> AI-5 closed the National Congress; suspended political mandates; authorised the federal government to intervene in States on national security bases; suspended the right to gather for political meetings; imposed strict censorship on songs, newspapers and general media; suspended the right to habeas corpus for up to 60 days for crimes of political motivation; and enabled political crimes to be judged by a military court.<sup>82</sup> Under AI-5 most activities in support of leftist movements were capable of being characterised as illegal, and thus could be fought on the basis of 'national security'.<sup>83</sup> In this context Carlos Marighella, a key guerrilla leader,<sup>84</sup> said: 'Violence against violence. The only solution is what we are now doing: using violence against those who used it first to attack the people and the nation.'<sup>85</sup>

By 1974 repressive and violent counterinsurgency action by the military government had all but wiped-out the insurgent threat, but politically motivated violence continued.<sup>86</sup> Demonstrating the continuing tensions within and between the government and leftist groups, in April 1981, in the relatively peaceful final stages of the military rule, a bomb exploded in the car of two military officers from the DOI-CODI political police as they drove to the Riocentro arena. 20,000 people were attending pro-democracy May Day celebration at Riocentro, featuring several of the country's most popular musicians. The intention of the perpetrators was to blame the narrowly averted mass casualties and destruction on leftist groups.<sup>87</sup>

Whilst the acts committed by the military dictatorship in Brazil do not rival the horrific experience across the border in Argentina, the period is marred by similar repres-

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77 John Means, 'Latin American Report: Political Kidnappings and Terrorism' (1970) 255(4) *The North American Rev* 16, 16.

78 *ibid* 17–18.

79 Bruneau (n 13) 2; Alves (n 75) 9, 53.

80 On the key Institutional Acts see, Fiechter (n 73) xiii, 85–90, 173–176.

81 *ibid* xiii. See also, Alves (n 75) ch 5.

82 Gaspari (n 76) 333–343.

83 On the role of the ideology of national security in this period see, Alves (n 75) 118, chs 2–3.

84 See, John W Williams, 'Carlos Marighella: The Father of Urban Guerrilla Warfare' (1989) 12 *Terrorism* 1.

85 Carlos Marighella, *For the Liberation of Brazil*, quoted in Alves (n 75) 117.

86 Alves (n 75) 134–137 and ch 6 for a valuable description of the armed struggle and tactics of both government and counter-government forces in this period.

87 RS Rose, *The Unpast: Elite Violence and Social Control in Brazil, 1954–2000* (Ohio University Press 2005) 195; Belisa Ribeiro, *Bomba no Riocentro* (Codecri 1981).

sion, including the common use of torture, executions and the disappearances of hundreds of people.<sup>88</sup> Likewise, the actions of the guerrilla groups were similarly severe.<sup>89</sup>

The gradual transition to democracy was initiated by the final military president, Ernesto Geisel, and in 1985 the presidency was handed to a civilian, Tancredo Neves. The transition from military to civilian rule was designed to be, as the motto of the Geisel government said: 'slow, gradual and safe'.<sup>90</sup> A key event in overcoming the tensions of the past was a law of general amnesty, issued in August 1979, under which both military and civilian persons were entitled to amnesty for political crimes committed from 1961 to 1979.<sup>91</sup> The process of transitioning to, and consolidating, liberal-democratic civilian rule was indeed gradual, continuing to the beginning of the twenty-first century.<sup>92</sup>

In November 2010 Brazilians elected President Dilma Rousseff, the handpicked successor of outgoing and overwhelmingly popular President Luiz Inacio Lula da Silva.<sup>93</sup> Lula da Silva's popularity was buoyed by a decade of stability and growth that have set Brazil on a track towards becoming one of the world's largest economies by the time it hosts the Summer Olympics in 2016. Rousseff was a key player in one of the organisations that resisted Brazil's military dictatorship in the 1960s and was labelled a 'terrorist' at the time.<sup>94</sup> As a young economics student Rousseff instructed comrades in Marxist theory and wrote for an underground newspaper but, she claims, she never engaged in any violent acts against the government. She was captured by government forces in 1970, incarcerated and submitted to torture by electric prod.<sup>95</sup> Now, as President, Rousseff has been quoted as saying her political ideology has shifted from Marxist to pragmatic capitalist, saying that what characterises guerrilla fighters 'is to have dared to want a better country'.<sup>96</sup>

The political agenda of the new republic has been focussed on domestic economic stability, not on defence or national security. This is supported by Brazil's apparent self-image, being that it has no enemies and enjoys internal ethnic and cultural peace. For example, in March 2002, then Minister of Defence Jose Viegas Filho responded to the question 'Is Brazil immune to terrorism?' by saying:

'No one can say that they are immune to terrorism. But if you were to draw up a list of countries that are vulnerable to this problem, Brazil would certainly be in one of the lowest rankings. Brazil has no enemies. There is not one country in the world that hates us or is prejudiced against us.'<sup>97</sup>

88 Zimmerman (n 73) 6–7; see also Alves (n 75) 128–131 for a valuable summary of the military and legal agencies in place at this time to oversee and order the assassinations and torture implemented as 'legitimate' counterinsurgency tactics in the 1964–1974 period.

89 Alves *ibid* 119.

90 Codato (n 76) 94, 99–100.

91 Law No 6683/79.

92 Codato (n 76) 88.

93 In fact, many appear to have the impression that Lula da Silva will continue to rule through Rousseff and perhaps even run for President again in 2014 (which is constitutionally permissible). This may be a popularly backed move as Lula da Silva enjoyed 80% approval ratings: Jorge Saenz, 'Ex-guerrilla to be Brazil's first female president' (*msnbc.com*, 1 November 2010) <[http://www.nbcnews.com/id/39944857/ns/world\\_news-americas/t/ex-guerrilla-be-brazils-first-female-president/#.UgkFS-G34LrE](http://www.nbcnews.com/id/39944857/ns/world_news-americas/t/ex-guerrilla-be-brazils-first-female-president/#.UgkFS-G34LrE)> accessed 7 August 2013.

94 Nina Schneider, 'Breaking the "Silence" of the Military Regime: New Politics of Memory in Brazil' (2011) 30 *Bulletin of Latin American Research* 198, 206.

95 Saenz (n 93).

96 *ibid*.

97 Bruneau (n 13) 3 quoting, *Correio Brasiliense*, 9 March 2002.

This attitude was reported more recently to FATF investigators during their evaluation of Brazil's counter-terrorism-financing systems.<sup>98</sup> There is a growing awareness of the threat of international terrorism in Brazil, prompted in part by the hosting of the Pan American games in Rio de Janeiro in July 2007,<sup>99</sup> and the upcoming Brazilian 2014 FIFA World Cup finals and 2016 Summer Olympics.<sup>100</sup> In late 2011 the head of the federal police in Sao Paulo, Roberto Troncon Filho, was quoted as saying: 'In Brazil, the (threat) level is very low, but an event like the World Cup can provide the opportunity for an attack, not against the Brazilian people, but against an international delegation'.<sup>101</sup>

Brazil faces a range of domestic security threats. The most pressing threat comes from violent drug cartels and organised crime.<sup>102</sup> It is possible that cartels and gangs will form relationships with terrorist groups domestically and abroad.<sup>103</sup> Like Argentina, Brazil has a significant Islamic population, particularly in the Triborder region discussed above and, despite considerable engagement in the area, faces the practical difficulties of investigating terrorist financing and recruiting in this region.<sup>104</sup>

The largest social movement in Latin America, the Brazilian MST,<sup>105</sup> has a support base of 1.5 million people including around 100,000 full-time 'professional militants'.<sup>106</sup> This group calls for Marxist communist revolution, and teaches the ideals of Lenin, Mao Tse Tung, Ho Chi Minh, Che Guevara and other socialists and communists at its schools across Brazil. The MST is politically active and invades private land it considers unutilised, often leading to violent clashes with landholders.<sup>107</sup> The government of Brazil and the MST appear to have a working relationship.<sup>108</sup> The group has a strong human rights basis, but its idealistic parallels with groups such as FARC and its employment of confron-

98 Financial Action Task Force (n 13) 43; see also, de Aguiar and Herz (n 13) 11, 16.

99 Bruneau (n 13) 7.

100 Juliana Barbassa, 'Brazil denies terrorists operate within borders' *The Guardian* (3 September 2011) <<http://www.guardian.co.uk/world/feedarticle/9828976>> accessed 7 August 2013; Sarah Childress, 'Brazil: Terror at the World Cup?' *Global Post* (17 November 2011) <<http://www.globalpost.com/dispatches/globalpost-blogs/que-pasa/brazil-terror-at-the-world-cup>> accessed 7 August 2013.

101 Associated Press, 'Brazil police addresses WCup security' *ESPN* (17 November 2011) <[http://espn.go.com/sports/soccer/news/\\_/id/7246453/brazil-police-chief-roberto-troncon-filho-preparing-2014-world-cup-threats](http://espn.go.com/sports/soccer/news/_/id/7246453/brazil-police-chief-roberto-troncon-filho-preparing-2014-world-cup-threats)> accessed 7 August 2013.

102 Human Rights Watch, *World Report 2011: Brazil* (January 2011) <[http://www.hrw.org/sites/default/files/related\\_material/brazil\\_0.pdf](http://www.hrw.org/sites/default/files/related_material/brazil_0.pdf)> accessed 7 August 2013.

103 Yvon Dandurand and Vivienne Chin, 'Links Between Terrorism and Other Forms of Crime' A report submitted to: Foreign Affairs Canada and The United Nations Office on Drugs and Crime (International Centre for Criminal Law Reform and Criminal Justice Policy Vancouver British Columbia April 2004) 12; Tamara Makarenko, 'The Crime-Terror Continuum: Tracing the Interplay between Transnational Organised Crime and Terrorism' (2004) 6 GC 129, 134.

104 US Department of State Office of the Coordinator for Counterterrorism (n 45) 131–133, 163.

105 Movimento dos Trabalhadores Rurais Sem Terra (Landless Workers Movement).

106 Zimmerman (n 73) 18. The popularity of the group is undeniable. One MST school enjoyed a visit from Hollywood actor Benicio del Toro, who declared his support for the effort: 'Benicio del Toro visits the MST School' (*Friends of the MST*, 2010) <<http://www.mstbrazil.org/?q=node/659>> accessed 7 August 2013.

107 Zimmerman *ibid* 16–21. See also, (*Friends of the MST*) <<http://www.mstbrazil.org>> accessed 7 August 2013.

108 The MST supports the ruling party; in the lead up to the 2010 election its website declared 'Vamos Eleger Dilma Rousseff Presidenta do Brasil' – 'Let's Elect Dilma Rousseff President of Brazil' (*Friends of the MST*, 2010) <<http://www.mst.org.br/Vamos-eleger-Dilma-Rousseff-presidenta-do-Brasil>> accessed 7 August 2013.

tational and unapologetically illegal tactics with an action plan of changing the political situation renders it a terrorist concern.<sup>109</sup>

There is no crime of 'terrorism' in Brazilian law. Terrorism is mentioned in the Constitution of the New Republic in the context of 'repudiation of terrorism and racism' being one of the governing principles for international relations.<sup>110</sup> Terrorist financing is criminalised as a predicate to a money laundering offence, but remains undefined.<sup>111</sup> Brazil maintains that it does not need specific terrorism offences as any acts of terrorism would be covered under its normal criminal law, in particular its national security legislation Law 7170/83.<sup>112</sup> Law 7170/83 defines crimes against national security and political and social order, including offences of: acting with extreme violence against people or property with the aim of acquiring funds for the purpose of maintaining clandestine or subversive political organisations;<sup>113</sup> and of constituting, instituting or maintaining a military-like illegal organisation, of any kind, with a fighting objective.<sup>114</sup> Law 7170/83 creates a variety of offences that may constitute terrorism, but the Act falls short of defining 'terrorism' as such.<sup>115</sup> Law 7170/83 was enacted by the former military regime and was designed to deter a violent overthrow of the government. The provisions have not been relied upon in recent times. This context to the legislation, and their own investigations, led FATF to persuasively conclude that, 'for political reasons, it is doubtful whether the Articles primarily relied upon by Brazilian authorities to constitute "anti-terrorism law" would ever be used in practice'.<sup>116</sup>

There remains considerable impetus for Brazil to enact specific terrorism and terrorist financing offences, not only to satisfy FATF, the CTC and other international organisations, but to reassure the international community as Brazil strengthens its security protections in the lead-up to the 2014 World Cup and 2016 Summer Olympics.<sup>117</sup> The Rousseff administration's policies towards the MST and refusal to classify FARC as a terrorist organisation<sup>118</sup> may become issues in the future as international interest in Brazil grows. Unlike Argentina, Brazil has sufficient economic strength to resist pressure from organizations such as FATF, but nonetheless considers complying with FATF's recommendations a high government priority.<sup>119</sup> Despite these factors and others that may influence Brazil towards defining 'terrorism' as a crime, there is no indication that the nation intends to do so.

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109 Zimmerman (n 73) 19.

110 Constitution of the Federative Republic of Brazil 1988, Art 4 VIII.

111 Law 10.701/2003; US Department of State Office of the Coordinator for Counterterrorism, Country Reports on Terrorism 2009 (2010) ch.2.

112 Financial Action Task Force (n 13) 41.

113 Law 7170/83, Art 20.

114 Law 7170/83, Art 24.

115 Inocencio F Arias, *Letter dated 11 April 2004 from the Chairman of the Security Council Committee established pursuant to resolution 1373 (2001) concerning counter-terrorism addressed to the President of the Security Council*, UN Doc S/2004/286 (14 April 2004) 18.

116 Financial Action Task Force (n 13) 43; also, Interview with Academic, Sao Paulo (29 November 2010).

117 See, Minister of Sport for Brazil's announcement: 'The Brazilian Government will create a Security Bureau for the World Cup 2014' (*Government of Brazil*, 6 May 2011) <<http://www.brasil.gov.br/news/history/2011/05/06/the-brazilian-government-will-create-a-security-bureau-for-the-world-cup-2014/view>> accessed 7 August 2013.

118 US Department of State Office of the Coordinator for Counterterrorism (n 45) 131.

119 *ibid* 132.

## IV. 'Why Not?': The Impact of Terror

There are clear reasons why Argentina and Brazil could be expected to adopt a strong legal stance against terrorism. Each nation faces the threat of domestic or international terrorism; has acknowledged shortfalls in the existing criminal law structures, as recognised by the FATF<sup>120</sup> and demonstrated in the conduct of the AMIA trials in Argentina; and is committed to the global counter-terrorism effort.<sup>121</sup> Moreover, both nations are acutely aware of the horrors of terrorism and the need to prevent its recurrence. So, the question becomes: why have Argentina and Brazil demonstrated such a persistent reticence to enacting laws criminalising terrorism as such? Some key observations suggest that the great depth and breadth of experience with terrorism is exactly why Argentina and Brazil are so resistant to defining the terrorism as a crime. To demonstrate this assertion, one must consider, first, the Argentine and Brazilian understandings of the meaning of terrorism developed as a result of the history described above and, second, how these understandings has resulted in a situation in which the criminalisation of 'terrorism' would not produce a positive political response.

The political histories of Argentina and Brazil are such that acts of terrorism were undertaken by rebellious groups against the state and civilians, and by the state against insurgents and the population. It is impossible to say that one side was always right, or justified, and the other always wrong. It is entirely possible, however, to say that at times terrorism was perpetrated by all sides simultaneously. It is equally clear that each side used the terrorism committed by its opposition to justify escalations in its own violent tactics.<sup>122</sup> Thus, the word 'terrorism' has a multifaceted meaning in the Argentine and Brazilian contexts. It refers as easily to the terror inflicted by the juntas as it does to the political violence of the insurgents.

Further, state terror followed by a shift in power to those who stood against it may have the unintended effect of glorifying former 'terrorists' – exemplified in the 'terrorist', 'freedom fighter' dichotomy.<sup>123</sup> For an individual to say that he or she was labelled a terrorist or insurgent by the military juntas may even show them in a positive light. Rousseff's torture at the hands of the military for her role in supporting a Marxist organisation proved no obstacle to her being elected Brazil's first female President. This does not mean that when Rousseff's government describes an action as 'terrorist' it is condoning it, only that terrorism and its associated rhetoric encompasses a multidimensional, nuanced set of meanings, ranging from the tactics of the freedom fighter, to 9/11, to torture condoned by military dictators – an attribute of terrorism reflected in the range of legal and socio-legal attempts to define it.<sup>124</sup>

120 Financial Action Task Force (n 61) 38-39; Financial Action Task Force (n 13) 43.

121 US Department of State Office of the Coordinator for Counterterrorism (n 45) 130-133.

122 See, Carlos Marighella's statement above (n 85) and the justifications for the Institutional Acts: Alves (n 75) 99.

123 See, Derek S Revron and Jeffrey Stevenson Murer, 'Terrorist or Freedom Fighter? Tyrant or Guardian?' in Jeffrey H Norwitz (ed) *Armed Groups: Studies in National Security, Counterterrorism and Counterinsurgency* (Government Printing Office 2008) 311.

124 See, Geoffrey R Skoll, 'Meanings of Terrorism' (2006) 20 IntJ for the Semiotics of L 107; Reuven Young, 'Defining Terrorism: The Evolution of Terrorism as a Legal Concept in International Law and its Influence on Definitions in Domestic Legislation' (2006) 29 BCInt'l Comp LRev 23, 24-32; Jean-Marc Sorel, 'Some Questions About the Definition of Terrorism and the Fight Against its Financing' (2003) 14 EJIL 365, 366-369; Richard R Baxter, 'A Skeptical Look at the Concept of Terrorism'

Against this backdrop of political change and shifting understandings, in which terror and the counter-terrorism rhetoric has played a central role, the situation today is such that the domestic criminalisation and prosecution of 'terrorism' may not necessarily produce the kind of positive political response as seen in some other regions at the point of enactment. In the wake of 9/11 and the London, Madrid and Bali bombings, the governments of the US, the UK, Australia, Canada and elsewhere responded to public demands for a strong legislative response to meet what was perceived as an urgent, imminent threat.<sup>125</sup> The view in these states and on the international plane was that existing criminal law structures were insufficient to deal with the latest evolutions in the terrorist threat or, as a minimum, terrorism was a crime worthy of specific inclusion in criminal law frameworks.<sup>126</sup> This view now enjoys clear support from the CTC.<sup>127</sup> Despite general support at the point of enactment of counter-terrorism laws, many of these schemes have attracted subsequent criticism on the basis of their failure to retain an appropriate commitment to the rule of law and human rights.<sup>128</sup> Despite this, the stance adopted by nations such as Argentina and Brazil against the introduction or implementation of any specific laws for the prosecution of terrorist acts remains at the extreme end of the spectrum.<sup>129</sup> Whilst the counter-terror laws of some nations are seen in a negative light on the basis of human rights concerns as to their content, I submit that the mere action of prosecuting criminal acts under the banner of 'terrorism' would not be well received in Argentina or Brazil, regardless of the degree to which those prosecutions were weighted in favour of human rights considerations.<sup>130</sup>

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(1974) 7 Akron LRev 380; Rosalyn Higgins, 'The General International Law of Terrorism' in Rosalyn Higgins and Maurice Flory (eds), *Terrorism and International Law* (Routledge 1997) 14, 28.

125 See eg: The Hon Daryl Williams, 'Security Legislation Amendment (Terrorism) Bill 2002, Second Reading Speech' (House of Representatives Official Hansard No 3 2002 12 March 2002) 1040; Andrew Lynch, 'Legislating with Urgency – the Enactment of the Anti-Terrorism Act [No 1] 2005' (2006) 30 MULR 747; Kent Roach, *September 11 – Consequences for Canada* (University of Toronto Press 2003) 66-68.

126 See eg: Robert Cornall AO, 'The Effectiveness of Criminal Laws on Terrorism' in Andrew Lynch, Edwina MacDonald and George Williams (eds), *Law and Liberty in the War on Terror* (The Federation Press 2007) ch 5; Kent Roach, 'The Criminal Law and Terrorism' in Ramraj, Hor and Roach (n 7) ch 7. This view is also implicit in the resolutions of United Nations bodies emphasising the need for specific laws to address the threat of terrorism: *Resolution 1373*, UN Doc S/RES/1373; *The United Nations Global Counter-Terrorism Strategy*, GA Res 60/288, 60th session, A/RES/60/288 (2006).

127 *Global Survey of the Implementation of Security Council resolution 1373 (2001) by Member States*, UN Doc S/2011/463 annex 11.

128 The literature on this is extensive and goes far beyond what may be canvassed in this brief paper, for a sample see eg: Kent Roach, 'The Criminal Law and its Less Restrained Alternatives' in Ramraj, Hor, Roach and Williams (n 4) 91; Clive Walker, *Terrorism and the Law* (OUP 2011); Andrew Lynch and George Williams, *What Price Security?* (UNSW Press 1996). The prime place of human rights and rule of law concerns in reviewing counter-terrorism laws is reflected in the official review mechanisms introduced in this field, see eg: Secretary of State for Justice, *Justice and Security Green Paper*, CM 8194 (London TSO October 2011) xi-xvi; *Report of the Special Rapporteur on the Promotion and Protection of Human Rights while Countering Terrorism*, UN Doc E/CN.4/2006/98; Australian Government Independent National Security Legislation Monitor, *Annual Report: 16 December 2011* (16 December 2011) 4-13.

129 Bianchi (n 10) 1051-1052.

130 cf. the acceptance of the need for counter-terrorism laws in, eg: Ben Golder and George Williams, 'What is "Terrorism"? Problems of Legal Definition' (2004) 27 UNSW LJ 270, 272; Ben Saul, 'Reasons for Defining and Criminalizing Terrorism in International Law' (2006) 6 Mexican YB of Intl L 419; Roach (n 128) 92; Walker (n 128); Lynch and Williams (n 128) 85.

Subject to how an individual state's laws are kept in balance with human rights and the rule of law, counter-terrorism legislation and its inherent widening of the investigatory and prosecutorial powers of government agencies is generally associated with greater public security (at least at the point of enactment). For example, the refocused role of intelligence agencies is associated with the discovery and discouragement of radicalising agents. The introduction of wide-ranging offences, often vesting broad discretions in police and the judiciary and enabling pre-crime detention, interrogation and even prosecution, is associated with greater adaptability and flexibility, necessary to respond to the amorphous and unpredictable threat of terrorist action. Whilst these assertions may not be born out over time,<sup>131</sup> it is on these bases that counter-terrorism laws were enacted quickly and with relative ease by many governments across the developed world.<sup>132</sup>

In Argentina and Brazil too, counter-terrorism laws imply the widening of the investigatory and prosecutorial powers of government agencies; a greater role for intelligence agencies; the potential strengthening of sedition laws; and the introduction of new offences, often vesting broad discretions in police and the judiciary and enabling preventive measures. However, as a result of historical experience, these aspects of counter-terrorism laws are not associated with greater public security or less radicalisation, even in times immediately following terrorist attacks such as the AMIA bombings. Rather, these qualities are more readily associated with a much greater risk of repression and sharper subversion. Moreover, counter-terrorism laws generally widen government powers and create offences with respect to controlling the political lives of the population, another hallmark of the juntas. Experience has taught the people of Argentina and Brazil that an increased involvement of government agencies and the criminal law in the political sphere poses a genuine risk to public security, and increases the likelihood of radicalisation and terror.<sup>133</sup> Thus, generally speaking, the people of Argentina and Brazil do not encourage the introduction or implementation of counter-terrorism laws.

These concerns have been raised in other jurisdictions following the enactment and implementation of counter-terrorism laws, but they have played out differently. In the US, and elsewhere, security and liberty are considered to be best protected not by removing counter-terror laws from the statute books, but by adhering at once to an effective prosecutorial and deterrent terrorism law framework and commitment to human rights.<sup>134</sup>

The elected governments representing the people are also unlikely to champion the introduction of counter-terror laws. The success, in terms of popularity and relationship with the electorate, of the Argentine and Brazilian governments of today has been their distinctions from both the juntas and the insurgent organisations of the past.<sup>135</sup> This is reflected in the fact that one of Rouseff's first actions as President was to establish the 'Truth Commission' to investigate human rights violations during the 1964-1985 military

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131 For general comment, see, International Commission of Jurists (n 127).

132 See, Roach (n 128) 96-98.

133 As observed in: International Commission of Jurists (n 127) 6-8.

134 See, *ibid* rec 1; Lynch and Williams (n 128) 85-93;

135 On the 'crisis of legitimacy' facing the Argentine government, see: Frederick C Turner and Marita Carballo, 'Cycles of Legitimacy and Delegitimation Across Regimes in Argentina, 1900-2008' (2009) 60 *Intl Soc Sci J* 273.

rule.<sup>136</sup> Key distinguishing features of the present governments include: their adherence to representative democracy, commitment to human rights (even in the face of threats to national security) and commitment to vibrant political debate through maintaining rights to protest and express political opinions criticising the government. In this context, the governments of Argentina and Brazil have adhered to an apolitical criminal law model for punishing antisocial actions, thus classifying, for example, the AMIA and anarchist bombings in Argentina and MST violence in Brazil as simple criminal acts, rather than political crimes.

For the present governments, the creation of a crime of 'terrorism' as a crime of counter-state political motivation could be perceived as an approach of suppression and a step in the direction of the juntas of the past.<sup>137</sup> The criminalisation of acts of terror would not only present these political risks, but, considering the important role that amnesties have played in both countries in the decades of transition, a crime of 'terrorism' could risk labelling past actions of the present executive as criminal or, at least, making key members of government appear hypocritical. It also risks alienating and thus inflaming the situation with respect to social movements locally (such as MST and anarchist groups) and regionally (such as FARC and the Shining Path) by moving them from the political to the legal sphere.<sup>138</sup>

The importance of maintaining distinguishing features from the perpetrators of past terror is equally important to the agencies of government that, otherwise, may have been expected to support the creation of terrorism offences. A great deal of trust and legitimacy previously vested in the intelligence, police and military forces was lost when those forces became instrumental in the perpetration of terror. Now, a key aim of government is the consolidation of civilian control of these bodies.<sup>139</sup> Whilst some agencies were disbanded in the transition to democracy, others were not. Thus, many military personnel, for example, continued to serve in their regular posts. Argentina's Due Obedience Law facilitated this continuation, as did the general amnesty and the gradual pace of the transition in Brazil. Whilst trust has been building in these institutions, this is being won by agencies staying strictly within their limited powers and out of the political arena.<sup>140</sup> The implementation of counter-terrorism laws that would increase the powers of those agencies to control and monitor the political actions of the people could impede the positive development of the agencies themselves, which fundamentally rely upon community compliance and assistance in the ideal fulfilment of their roles. Thus, despite investigation and enforcement agencies potentially benefitting from counter-terrorism laws, they are unlikely to strongly call for or hastily implement them.

Finally, the courts of Argentina and Brazil have likewise faced significant criticism,<sup>141</sup> which they have endeavoured to meet with a dedication to improving their reputation

136 Schneider (n 94) 198.

137 International Commission of Jurists (n 127) 7–8.

138 Interview with Academic, Sao Paulo (29 November 2010).

139 Alfred P Montero, *Brazilian Politics* (Polity Press 2005) 133; Kirchner and Garre (n 18) 8.

140 Montero *ibid*.

141 The UN Special Rapporteur on the independence of judges and lawyers noted 'Brazilian justice does not have a positive image in society at large': Leandro Despouy, *Report of the Special Rapporteur on the Independence of Judges and Lawyers* Economic and Social Council, Commission on Human Rights, 61st sess, UN Doc E/CN.4/2005/60/Add.3 (22 February 2005) addendum *Mission to Brazil* 3; Augusto Zimmermann, 'How Brazilian Judges Undermine the Rule of Law: A Critical Appraisal' (2008) 11 *Intl Trade and Business L Rev* 179–217; Banks and Carrio (n 17) 624; Alba M Ruibal,

and building their integrity as apolitical institutions committed to judicial independence and the rule of law.<sup>142</sup> Against this backdrop, it is difficult to predict how the courts of Argentina or Brazil would interpret and apply counter-terrorism laws that criminalised politically motivated acts, even if such laws were enacted and prosecuted.

In summary, the depth of experience with terrorism has created a similar situation in Argentina and Brazil, whereby defining 'terrorism' in a manner that accords with general understandings based on considerable public experience, entails considerable conceptual, political and practical difficulties. The continuum of experience with terrorism in the region has led to a state of affairs in which neither nation has a champion for counter-terrorism laws. The people do not equate counter-terrorism laws with greater public security, but rather their introduction would be easily perceived as a risk to security and an act inviting potential repression.<sup>143</sup> The governments of today risk appearing hypocritical by adopting a hardline against terrorism. The agencies of government responsible for the investigation and prosecution of crimes and the protection of public security are unlikely to champion the introduction or implementation of counter-terrorism laws either, as they, like the elected branches of government, remain in the process of rebuilding their reputation and legitimacy.

To what extent are Argentina and Brazil representative of the broader South American counter-terrorism law and policy situation? State terrorism and insurgent movements proliferated in the Latin American region in the second-half of the 20th century. However it is misleading to insinuate that this historical experience alone is sufficient to produce the kind of reticence to counter-terrorism law seen in Argentina and Brazil. Each nation in the region faces unique internal and external political pressures. Less prosperous nations or those more closely dependent on their ties with the US, for example, cannot afford to ignore international pressures as Brazil and Argentina have. In many states, such as Chile, Bolivia and Columbia, the relationship between the drug trade and political violence forms a key concern for government. The decision of governments to focus on prosecuting violence as organised or drug-related crime instead of following a potential path of terrorism prosecutions may be a consequence of the factors described in this paper, but this is a theory requiring further research. In short, the ranges of international and domestic, financial and political factors at play make broader conclusions as to the potential representativeness of the Argentine and Brazilian experience difficult. It may well be that the region's powerful experience with forms of state and non-state terrorism has created a general suspicion and caution in the electorate towards counter-terrorism legislation. This hypothesis is born out in the case-studies considered in this article, but further in-depth research is required before it may be confirmed in other nations sharing similar politico-legal histories.

## V. Conclusion

In the decade since 9/11, 'counter-terrorism law' has developed as an area of law and legal rhetoric on a global scale. The importance of domestic criminal legal frame-

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'Self-Restraint in Search of Legitimacy: The Reform of the Argentine Supreme Court' (2009) 51 *Latin American Politics and Society* 59, 65, 71; Levitsky and Murillo (n 44) 26, 17–18.

142 Banks and Carrio *ibid* 617–618, 623–624; Ruibal *ibid*.

143 International Commission of Jurists (n 127) 8.

works in facilitating a coordinated response to an international threat has been emphasised by regional and global institutions.<sup>144</sup> Despite considerable experience with the reality of terrorism, Brazil and Argentina have not replicated the adoption and implementation of counter-terrorism law frameworks seen across the developed world. By considering the historical and political context with respect to 'terrorism' within which Argentina and Brazil operate, it is shown that it is precisely this 'considerable experience' that has led to each nation's reticence to enact or implement counter-terrorism laws.

A number of lessons may be drawn from the Argentine and Brazilian case-studies. First and foremost, the discussion reflects the intensely politicised nature of the area of counter-terrorism law. The meaning of terrorism is inescapably dependent upon who is using the term and why. The words 'terrorism' and 'terrorist' carry considerable stigma and great political weight; so great that, as the Latin American experiences of the latter half of the 20th century show, they may glorify counter-state revolutionaries or martyrs, or justify state torture and the suspension of human rights. In these scenarios, the definition of who is a 'terrorist' ceases to be useful and instead risks escalating the political problems that underpin the violence and unrest itself. In this way it can be seen that, despite the introduction of global 'terrorism' norms such as Resolution 1373 and continuing recommendations by the CTC, the meaning of terrorism is country specific; the term is multidimensional, nuanced and ultimately dependent upon its historical-political context.<sup>145</sup> Accordingly, counter-terrorism law and policy is not suitable to a one-size-fits-all approach, but must be allowed to evolve and differ according to national contexts.<sup>146</sup>

A further, related, lesson that may be drawn from the foregoing discussion is that an effective longer-term counter-terrorism strategy is unlikely to be one that disrupts the rule of law or the fundamental relationship between the people and their government.<sup>147</sup> In circumstances in which introducing a highly politicised term such as 'terrorism' into the criminal legal system would be likely to cause discord between the government and the citizenry, criminalising 'terrorism' may not be coextensive with an effective counter-terrorism strategy. Finally, the discussion reveals the importance of an interdisciplinary approach to developing the area of counter-terrorism law.<sup>148</sup> Only through fostering a multidimensional appreciation of the diversity and history of terrorism and counter-terrorism experiences across the world, will an effective and coordinated international counter-terrorism framework become possible. In the context of Argentina and Brazil, acknowledgment of the political obstacles to defining a crime of 'terrorism' suggests that, unlike many other democracies, their contribution to the global counter-terrorism effort may in fact be best achieved through the adaptation of their existing criminal law

144 See, *Uniting Against Terrorism: Recommendations for a Global Counter-Terrorism Strategy*, Report of the Secretary-General UN Doc A/60/825; Resolution 1373, UN Doc S/RES/1373.

145 See, Skoll (n 124); Baxter (n 124); Higgins (n 124).

146 A similar conclusion was reached by Victor V Ramraj in, 'The Impossibility of Global Anti-Terrorism Law?' in Ramraj, Hor, Roach and Williams (n 4) 44, 64–65. See also, Richard English, *Terrorism: How to Respond* (OUP 2009) ch 1.

147 As much was recognised by the UN General Assembly: *The United Nations Global Counter-Terrorism Strategy*, GA Res 60/288, UN GAOR, 60th sess, UN Doc A/RES/60/288 (20 September 2006). See also, *Resolution 1624*, UN Doc S/RES/1624.

148 Ramraj (n 146) 65.

language and frameworks, rather than by introducing – or in fact re-introducing – the language of ‘terrorism’ into their national criminal laws.

**Rebecca Welsh** is PhD Candidate and Sessional Lecturer at the Faculty of Law of the University of New South Wales, Sydney, Australia. Email: [r.welsh@unsw.edu.au](mailto:r.welsh@unsw.edu.au)

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