

CHAPTER SIXTEEN: CRIMES AGAINST THE STATE

INTRODUCTION

On September 17, 2001, Governor George Pataki signed the Anti-terrorism Act of 2001 (“the Act”). The Act created new crimes in the Penal Law (under a new Article 490) and enhanced penalties for existing offenses when the offense is deemed related to terrorism. The Act also created the Office of Public Security, a cabinet level office which reports directly to the Governor.

Interestingly, the Act was proposed by the Legislature prior to the September 11th terrorist attacks. New York had already been experiencing domestic terrorism prior to 2001. According to Governor Pataki, “Terrorism is a cowardly and despicable crime. From the World Trade Center bombing [in 1993], to the ruthless murder of Dr. Barnett Slepian, to the attack on a van carrying Hasidic students on the Brooklyn Bridge that took the life of Ari Halberstam, New York has witnessed the horrible effects of terrorism and we will not tolerate it.”¹ The Legislature added additional offenses when it enacted the Antiterrorism Preparedness Act of 2004.

The following cases involve two examples of terroristic acts in New York. In October 1981, members of the revolutionary group, the Weather Underground, robbed a Brink’s armored truck outside of the Nanuet Mall in Rockland County. During the robbery, two Brink’s guards were shot, one fatally. The perpetrators fled, and when they attempted to enter the New York State Thruway, they were stopped by the state police. They opened fire on the police and killed two of them.² For the crimes of murder and robbery, Samuel Brown was sentenced 75 years to life and Kathy Boudin was sentenced 20 years to life. Other defendants, Sekuo Odinga, Silvia Baraldini, Cecil Ferguson, and Edward Joseph, were sentenced 12 ½ to 40 years for conspiracy, racketeering, and robberies.³

In another case of terrorism, defendant James Kopp, with a single shot from a high-powered rifle, shot and killed Dr. Barnett Slepian while he was in his kitchen after coming home from a memorial service for his father. Dr. Slepian was the seventh abortionist killed in attacks on doctors and abortion clinics in the United States. According to the deputy district attorney in Erie County, this attack “amounted to an assassination for religious reasons. That’s terrorism.” Kopp was convicted of murder in the second degree.⁴

Had these offenses occurred after the enactment of the Act, the defendants would likely have been charged under the new provisions or received enhanced penalties for acting with terroristic ends.

This chapter will focus exclusively on the provisions of the Anti-terrorism acts enacted by New York State both in 2001 and 2004 as they concern the provisions of Article 490.

In 2001, the Act created a definition of terrorism in the Penal Law. Under §490.05(1), an “Act of terrorism” is:

- (a) for purposes of this article means an act or acts constituting a specified offense as defined in subdivision three of this section for which a person may be convicted in the criminal courts of this state pursuant to article twenty of the criminal procedure law, or an act or acts constituting an offense in any other jurisdiction within or outside the territorial boundaries of the United States which contains all of the essential elements of a specified offense, that is intended to:
 - (i) intimidate or coerce a civilian population;

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- (ii) influence the policy of a unit of government by intimidation or coercion;
or
 - (iii) affect the conduct of a unit of government by murder, assassination or kidnapping; or
- (b) for purposes of subparagraph (xiii) of paragraph (a) of subdivision one of section 125.27 of this chapter means activities that involve a violent act or acts dangerous to human life that are in violation of the criminal laws of this state and are intended to:
- (i) intimidate or coerce a civilian population;
 - (ii) influence the policy of a unit of government by intimidation or coercion;
or
 - (iii) affect the conduct of a unit of government by murder, assassination or kidnapping.

Additionally, the Act created six new offenses: soliciting or providing support for an act of terrorism in the second (§490.10) and first (§490.15) degrees, making a terroristic threat (§490.20), hindering prosecution of terrorism in the second (§490.30) and first (§490.35) degrees, and commission of terrorism in regard to specified offenses (§490.25).⁵ The Act further enhanced the penalty for a person who intentionally murders another in furtherance of a terroristic act. Under the former Penal Law, commission of a murder was not a sufficient basis for the death penalty. Rather, the murder was an aggravating factor that the jury could weigh against mitigating evidence when deciding whether to impose the death penalty at the sentencing phase of a trial and only when the murder was committed with an aggravating factor defined in §§125.27(1)(a) or 125.25(3). Under the “crime of terrorism” (§490.25(2)(d)), an offender automatically becomes eligible for the death penalty when accused of committing murder in the first degree pursuant to a terrorist act.

RESOURCES

The website to New York State Office of Homeland Security is found at: http://www.security.state.ny.us/new_york_terr_legislation.html which contains a link to the provisions of the Anti-terrorism Act of 2001. The following link provides a clearer version of the Anti-terrorism Act of 2001: <http://biotech.law.lsu.edu/blaw/bt/S70002.htm>

The following link is a bill containing the proposed language of the Antiterrorism Preparedness Act of 2004: <http://www.security.state.ny.us/STATE%20OF%20NEW%20YORK%20Legislation.pdf>

Article 490 in its entirety is found at this link: <http://ypdcrime.com/penal.law/article490.htm>

Article 490 contains the following 15 sections (490.00 through 490.70).

490.00, Legislative findings;

The devastating consequences of the recent barbaric attack on the World Trade Center and the Pentagon underscore the compelling need for legislation that is specifically designed to combat the evils of terrorism. Indeed, the bombings of American embassies in Kenya and Tanzania in 1998, the federal building in Oklahoma City in 1995, Pan Am Flight number 103

in Lockerbie in 1988, the 1997 shooting atop the Empire State Building, the 1994 murder of Ari Halberstam on the Brooklyn Bridge and the 1993 bombing of the World Trade Center, will forever serve to remind us that terrorism is a serious and deadly problem that disrupts public order and threatens individual safety both at home and around the world. Terrorism is inconsistent with civilized society and cannot be tolerated. Although certain federal laws seek to curb the incidence of terrorism, there are no corresponding state laws that facilitate the prosecution and punishment of terrorists in state courts. Inexplicably, there is also no criminal penalty in this state for a person who solicits or raises funds for, or provides other material support or resources to, those who commit or encourage the commission of horrific and cowardly acts of terrorism. Nor do our criminal laws proscribe the making of terrorist threats or punish with appropriate severity those who hinder the prosecution of terrorists. Finally, our death penalty statute must be strengthened so that the cold-blooded execution of an individual for terrorist purposes is a capital offense. A comprehensive state law is urgently needed to complement federal laws in the fight against terrorism and to better protect all citizens against terrorist acts. Accordingly, the legislature finds that our laws must be strengthened to ensure that terrorists, as well as those who solicit or provide financial and other support to terrorists, are prosecuted and punished in state courts with appropriate severity.

In addition to the “Act of terrorism” definition, the new legislation includes the following definitions.

- **490.05, Definitions;**
 1. (Defined earlier in this chapter)
 2. “Material support or resources” means currency or other financial securities, financial services, lodging, training, safe houses, false documentation or identification, communications equipment, facilities, weapons, lethal substances, explosives, personnel, transportation, and other physical assets, except medicine or religious materials.

“Specified offense” was enhanced with the passage of the Antiterrorism Preparedness Act of 2004. The 2004 provision added the money laundering offenses in this section. Attempt and conspiracy were included in the original Act of 2001.

3. (a) “Specified offense” for purposes of this article means a class A felony offense other than an offense as defined in article two hundred twenty [Controlled substances offenses], a violent felony offense as defined in section 70.02, manslaughter in the second degree as defined in section 125.15, criminal tampering in the first degree as defined in section 145.20, identity theft in the second degree as defined in section 190.79, identity theft in the first degree as defined in section 190.80, unlawful possession of personal identification information in the second degree as defined in section 190.82, unlawful possession of personal identification information in the first degree as defined in section 190.83, money laundering in support of terrorism in the fourth degree as defined in section 470.21, money laundering in support of terrorism in the third degree as defined in section 470.22, money laundering in support of terrorism in the second degree as defined in section 470.23, money laundering in support of terrorism in the first degree as defined

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in section 470.24 of this chapter, and includes an attempt or conspiracy to commit any such offense.

4. "Renders criminal assistance" for purposes of sections 490.30 and 490.35 of this article shall have the same meaning as in section 205.50 of this chapter.

Section 205.50 defines terms associated with any acts of hindering a prosecution.

Under §§490.10 and 490.15, a person is guilty of soliciting or providing support when he gives material support, conceals, or helps a terrorist escape. When the value of material support or resources exceeds \$1,000, solicitation becomes a first degree offense. "Material support or resources" does not include medicine or religious materials.

- **490.10**, Soliciting or providing support for an act of terrorism in the second degree;
A person commits soliciting or providing support for an act of terrorism in the second degree when, with intent that material support or resources will be used, in whole or in part, to plan, prepare, carry out or aid in either an act of terrorism or the concealment of, or an escape from, an act of terrorism, he or she raises, solicits, collects or provides material support or resources.
Soliciting or providing support for an act of terrorism in the second degree is a class D felony punishable by up to seven years in prison.
- **490.15**, Soliciting or providing support for an act of terrorism in the first degree;
A person commits soliciting or providing support for an act of terrorism in the first degree when he or she commits the crime of soliciting or providing support for an act of terrorism in the second degree and the total value of material support or resources exceeds one thousand dollars.
Soliciting or providing support for an act of terrorism in the first degree is a class C felony punishable by up to 15 years in prison.

A person is guilty under §490.20 when he threatens to commit a crime of terrorism and causes a reasonable expectation that the offense will be committed imminently. This section also applies to false reports of a current or pending fire, explosion, or release of a hazardous substance at a sports stadium, mass transportation facility, enclosed shopping mall, or public place.⁶

- **490.20**, Making a terroristic threat;
 1. A person is guilty of making a terroristic threat when with intent to intimidate or coerce a civilian population, influence the policy of a unit of government by intimidation or coercion, or affect the conduct of a unit of government by murder, assassination or kidnapping, he or she threatens to commit or cause to be committed a specified offense and thereby causes a reasonable expectation or fear of the imminent commission of such offense.

2. It shall be no defense to a prosecution pursuant to this section that the defendant did not have the intent or capability of committing the specified offense or that the threat was not made to a person who was a subject thereof.
Making a terroristic threat is a class D felony punishable by up to seven years in prison.
- **490.25, Crime of terrorism;**
 1. A person is guilty of a crime of terrorism when, with intent to intimidate or coerce a civilian population, influence the policy of a unit of government by intimidation or coercion, or affect the conduct of a unit of government by murder, assassination or kidnapping, he or she commits a specified offense.
2. Sentencing
 - (a) When a person is convicted of a crime of terrorism pursuant to this section, and the specified offense is a class B, C, D or E felony offense, the crime of terrorism shall be deemed a violent felony offense.
 - (b) When a person is convicted of a crime of terrorism pursuant to this section, and the specified offense is a class C, D or E felony offense, the crime of terrorism shall be deemed to be one category higher than the specified offense the defendant committed, or one category higher than the offense level applicable to the defendant's conviction for an attempt or conspiracy to commit the offense, whichever is applicable.
 - (c) When a person is convicted of a crime of terrorism pursuant to this section, and the specified offense is a class B felony offense, the crime of terrorism shall be deemed a class A-I felony offense and the sentence imposed upon conviction of such offense shall be in accordance with section 70.00 of this chapter.
 - (d) Notwithstanding any other provision of law, when a person is convicted of a crime of terrorism pursuant to this section, and the specified offense is a class A-I felony offense, the sentence upon conviction of such offense shall be life imprisonment without parole; provided, however, that nothing herein shall preclude or prevent a sentence of death when the specified offense is murder in the first degree as defined in section 125.27 of this chapter.

Under §§490.30 and 490.35, a person “renders criminal assistance” when he harbors or conceals a terrorist, provides a terrorist with money, transportation or a weapon, or suppresses physical evidence to a crime. Hindering prosecution of terrorism in the second degree is aggravated to first degree when the underlying act of terrorism resulted in death and the person hindering prosecution knows that the underlying act resulted in death.

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- **490.30**, Hindering prosecution of terrorism in the second degree;
A person is guilty of hindering prosecution of terrorism in the second degree when he or she renders criminal assistance to a person who has committed an act of terrorism, knowing or believing that such person engaged in conduct constituting an act of terrorism.
Hindering prosecution of terrorism in the second degree is a class C felony.
- **490.35**, Hindering prosecution of terrorism in the first degree;
A person is guilty of hindering prosecution of terrorism in the first degree when he or she renders criminal assistance to a person who has committed an act of terrorism that resulted in the death of a person other than one of the participants, knowing or believing that such person engaged in conduct constituting an act of terrorism.
Hindering prosecution of terrorism in the first degree is a class B felony punishable by up to 25 years in prison.

On July 23, 2004, Governor Pataki signed the Antiterrorism Preparedness Act of 2004 which, among other provisions, provided law enforcement with additional tools to detect and prevent terrorism, toughen penalties for those who provide support for terrorists, and renamed the Office of Public Security as the State Office of Homeland Security. This act also created new security requirements for chemical and nuclear plants and airports, and additional offenses for terroristic acts. The new act creates a new class of A-1 felonies for the criminal possession and use of chemical or biological weapons which are punishable by life imprisonment without parole and up to seven years for causing alarm by sending a person any substance designed to appear to look like a hazardous substance.

The new act also added new definitions to §490.05. The newly created definitions, by subsection, are: (5) Biological agent; (6) Toxin; (7) Delivery system; (8) Vector; (9) Biological weapon; (10) Chemical weapon; (11) Precursor; (12) Key component of a binary or multicomponent chemical system; (13) Toxic chemical; (14) compounds that do not comprise (5), (6) and (13); (15) Select chemical agent; (16) Select biological agent; and (17) Chemical weapons convention.

- **490.37**, Criminal possession of a chemical weapon or biological weapon in the third degree;
- **490.40**, Criminal possession of a chemical weapon or biological weapon in the second degree;
- **490.45**, Criminal possession of a chemical weapon or biological weapon in the first degree;
- **490.47**, Criminal use of a chemical weapon or biological weapon in the third degree;
- **490.50**, Criminal use of a chemical weapon or biological weapon in the second degree;
- **490.55**, Criminal use of a chemical weapon or biological weapon in the first degree;

The Legislature was concerned that the original bill which defined a “biological agent” as “something that could cause death, disease or ruin food, water or the environment” was too broad and would classify some common items (such as pepper spray or Clorox) as chemical weapons. Thus, the following limitations on Sections 490.37 through 490.55 were written in the Penal Law.

- **490.70, Limitations;**
 1. The provisions of sections 490.37, 490.40, 490.45, 490.47, 490.50, and 490.55 of this article shall not apply where the defendant possessed or used:
 - (a) any household product generally available for sale to consumers in this state in the quantity and concentration available for such sale;
 - (b) a self-defense spray device in accordance with the provisions of paragraph fourteen of subdivision a of section 265.20 of this chapter;
 - (c) a chemical weapon solely for a purpose not prohibited under this chapter, as long as the type and quantity is consistent with such a purpose; or
 - (d) a biological agent, toxin, or delivery system solely for prophylactic, protective, bona fide research, or other peaceful purposes.
 2. For the purposes of this section, the phrase "purposes not prohibited by this chapter" means the following:
 - (a) any peaceful purpose related to an industrial, agricultural, research, medical, or pharmaceutical activity or other peaceful activity;
 - (b) any purpose directly related to protection against toxic chemicals and to protection against chemical weapons;
 - (c) any military purpose of the United States that is not connected with the use of a chemical weapon or that is not dependent on the use of the toxic or poisonous properties of the chemical weapon to cause death or other harm; and
 - (d) any law enforcement purpose, including any domestic riot control purpose and including imposition of capital punishment.

There have been very few cases to test the provisions of Article 490. One case where defendant was charged under 490.20 involved threats he made to the district attorney of Madison County.

PEOPLE V. VANPATTEN
County Court of New York, Madison County
792 N.Y.S. 2d 859 (2005)

Opinion By: McDermott, J.

The issue in this case concerns whether the evidence presented was sufficient to support the indictment. Defendant was indicted for making a terroristic threat under §490.20(1).

The defendant's father, Donald Jenner, was a sex offender who was living with a woman. The woman's children were taken from her custody due to neglect. Caseworkers from Onandaga County (where her children were removed) and Madison County (where she currently lives with Jenner) told her that she could not have her children back as long as she was living with an untreated sex offender. When Jenner learned of this, he threatened to kill the Madison County caseworker and her supervisor. He was charged with making a terroristic threat and was jailed. At that time, defendant, who was also incarcerated, wrote a letter to the Madison County district attorney in which he named the caseworkers from Onandaga and Madison Counties, the Onandaga County district attorney and one of his investigators, the Madison County commissioner of Social Services, police officers, and one of Jenner's attorneys. In the letter, he stated, "All of the above named n*** (text omitted) are going to be killed by the end of the year...If you want your death sentence commuted, then drop any associated cases that fit the above description, you cracker. Madison County Courthouse, along with the Department of Social Services, is going to look like the Oklahoma City Federal Building. I am also going to personally slit your wife and your kids' throats." A New York State police investigator visited defendant a day after the district attorney received the letter, and defendant, who acknowledged writing the letter, stated, "Cerio (the district attorney) would be the first to go."

The judge in this case analyzed the elements of the case, *actus reus*, *mens rea*, and result, one at a time. According to the court, the offender must threaten "to commit or cause to be committed a specified offense," including any class A felony other than the one defined in Article 220 ("Controlled Substances Offenses"). Thus, a threat to commit a murder would satisfy this element of the crime. "It is not necessary that the defendant threaten to commit the specified offense personally. A threat to cause the specified offense to be committed by another is sufficient." Regarding the *mens rea*, the threat must be made with the intent to intimidate or coerce a civilian population, influence the policy of a unit of government, or affect the conduct of a unit of government by murder, assassination or kidnapping. The result must cause "a reasonable expectation or fear of the imminent commission of such offense." The reasonable expectation indicates an "objective standard to be applied in the analysis."

Section 490.20(2) provides that it is not a defense that the defendant did not have the intent or capability of actually carrying out the threat, nor is it a defense that the threat was made to someone other than the person who was the subject of the threat.

"Given the defendant's incarceration at the time, it would be highly unlikely that he could have committed the murders himself, but the only acts he specifically threatened to commit personally were in reference to the District Attorney's wife and children...Threatening that the specifically named persons 'are going to be killed by the end of the year' is enough to satisfy the requirement that he threaten to cause the murder to be committed." Further, "[t]he defendant's intent is equally clear...[T]he defendant's manifest intent is to affect the conduct of a unit of government...by threat of murder."

The court also considered whether the threat could be carried out imminently as the statute requires. Since 490.20(2) provides that it is no defense that the defendant was not actually capable of making good on the threat, the statute “allows for an interval of time and space between the utterance of the threat and the communication of that threat to the victim. Necessarily, the threat need not be ‘imminent’ in the strict sense, but such that the victim reasonably perceived him- or herself to be in real danger that the threatened conduct could be carried out anywhere, anytime without warning.”

“There was sufficient proof presented that would allow the Grand Jury to conclude that the District Attorney was reasonable in his fear or expectation that the threatened murders might be imminent.”

The court denied the defendant’s motion to dismiss or reduce the charges in the indictment.

REVIEW QUESTION

1. The Antiterrorism Preparedness Act of 2004 added what prohibitions to Article 490?
 - A. possession and use of chemical and biological weapons
 - B. assembly of person to discuss the overthrow of the government
 - C. hindering the prosecution of terrorism
 - D. lying to the police in the course of a terrorism investigation

2. Which of the following is **not** a *mens rea* in terrorism?
 - A. intent to intimidate a civilian population
 - B. intent to influence the policy of a unit of government
 - C. intent to affect a unit of government by assassination
 - D. criminal negligence in the death of a kidnapped politician

3. Which of the following is considered material support for terrorists?
 - A. offering a safe house
 - B. providing religious material
 - C. removing an injured known terrorist to a hospital
 - D. rendering first aid to a suspected terrorist

4. Terrorism is an enhanced charge with a punishment level:
 - A. one category higher than the specified offense had it been committed without terroristic ends.
 - B. of death by hanging.
 - C. the same as the specified offense had it been committed without terroristic ends.
 - D. Terrorism is not an enhanced level charge.

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5. Soliciting or providing support for an act of terrorism is a first level offense when which aggravating factor is present?
- A. the material support is used to prepare an act of terrorism
 - B. the offender aids in the escape of a terrorist
 - C. the offender collects resources for the terrorist
 - D. the level of support for terrorism exceeds \$1,000

REFERENCES

¹ Office of the Governor. (2001, June 14). Governor Pataki proposes “Anti-Terrorism Act of 2001.” Retrieved July 30, 2006 from http://www.ny.gov/governor/press/01/june14_01.htm

²People v. Brown (525 N.Y.S. 2d 618 (1988))

³ Feron, J. (1984, June 27). Last defendant in Brink’s trials given 75 years to life in prison. *The New York Times*.

⁴ Polgreen, L. (2003, March 19). Guilty verdict in killing of abortion provider. *The New York Times*.

⁵ Office of the Governor. (2001, June 14). Governor Pataki proposes “Anti-Terrorism Act of 2001.” Retrieved July 30, 2006 from http://www.ny.gov/governor/press/01/june14_01.htm

⁶ New York State Office of Homeland Security. Retrieved from http://www.security.state.ny.us/new_york_terr_legislation.html

ANSWERS

1. A; 2. D; 3. A; 4. A; 5. D