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# A Critical Evaluation of China's Legal Responses to Cyberterrorism

Dr Xingxing Wei

## Abstract

Cyberterrorism has become an increasing threat to stability and security in China. However, China does not have a special counter-cyberterrorism law, instead relying on existing anti-terrorism laws to deal with cyberterrorism. This approach raises a number of problems insofar as it may lead to legislative uncertainty and unpredictability, as well as impacting on carrying risks of over-criminalisation, a lack of counterbalance and violation of proportionality. In light of these problems, this article aims to offer a critical evaluation of China's legal responses to cyberterrorism, mainly focusing on the broad and vague definition of terrorism, the tendency to criminalise a wide range of terrorism precursor offences, and the country's preventive counterterrorism strategy. This approach also reflects the legal reality of 'rule by law' in China, through which the Chinese Communist Party (CCP) expands state power by broadening counterterrorism legislation to achieve its political goals, prioritising national security and ensuring social stability.

**Keywords:** Evaluation; legal response; cyberterrorism; China

## 1. Introduction

Cyberterrorism has become a particular threat to the stability, security and peace of countries around of the world, and is a problem from which China is not immune.<sup>1</sup> China does not have a special counter-cyberterrorism law, but relies instead on existing Criminal Law (CL), Counter-Terrorism Law (CTL) and Cybersecurity Law (CSL)

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<sup>1</sup> E Li, 'China's New Counterterrorism Legal Framework in the Post-2001 Era: Legal Development, Penal Change, and Political Legitimacy' (2016) 19(3) NCLR 344, 345; C Walker, 'Cyber-Terrorism: Legal Principle and Law in the United Kingdom' (2006) 111(3) PSLR 625, 626; K Hardy and G Williams, 'What is 'Cyberterrorism'? Computer and Internet Technology in Legal Definitions of Terrorism' in TM Chen, L Jarvis and S Macdonald (eds), *Cyberterrorism: Understanding, Assessment, and Response* (Springer Science and Business Media 2014) 1–24. For an overview of this research paradigm, see TM Chen, L Jarvis and S Macdonald (eds), *Cyberterrorism: Understanding, Assessment and Response* (Springer 2014); S Macdonald, L Jarvis and SM Lavis, 'Cyberterrorism Today? Findings From a Follow-on Survey of Researchers' (2019) 37(1) SCT 1, 1–26; L Jarvis and S Macdonald, 'What is Cyberterrorism? Findings From a Survey of Researchers' (2015) 37(1) TPV 68, 68–90; L Jarvis and S Macdonald, 'Locating Cyberterrorism: How Terrorism Researchers Use and View the Cyber Lexicon' (2014) 8(2)PT 52, 52–65; L Jarvis, S Macdonald and L Nouri, 'The Cyberterrorism Threat: Findings From a Survey of Researchers' (2015) 37(1) SCT 68, 68–90; L Jarvis, S Macdonald and L Nouri, 'State Cyberterrorism? A Contradiction in Terms?' (2015) 6(3) JTR 62, 62–75.

to deal with cyberterrorism. However, using existing anti-terrorism legislation to counter the emerging threat of cyberterrorism has presented a series of problems for the Chinese government. Meanwhile, the distinctive characteristics of China's legal system based on 'the rule of law with Chinese characteristics' contrast sharply with the 'Western version' of the rule of law, to the point where it would be better to characterise the Chinese system rather as 'rule by law'.<sup>2</sup> There is a lack of any separation of power between the judiciary, the legislature and the executive, a related lack of supremacy of law and substantive judicial independence, and a consequent concentration of power in the hands of the CCP. This also means that the law is used as a tool to achieve the CCP's goals and to restrict civic behaviour, rather than state power. These distinctive characteristics continue to determine the country's legal response to cyberterrorism. In light of this, applying existing anti-terrorism legislation to combat cyberterrorism in China also reflects the characteristics of the 'rule by law', whereby China prioritises the protection of national security, social stability and collective rights. This will be illustrated below.

Moreover, for many years law, particularly CL, has been deeply embedded in the CCP's political ethos in China's one-party state, and has largely served as a manifestation of political will and a lever of social control.<sup>3</sup> Despite calls for the rule of law and judicial fairness during Hu's and Xi's administrations, law in the Chinese criminal justice system has never been able to distance itself from political influence and interference.<sup>4</sup> Counter-terrorism laws are no exception; at the point when terrorism is perceived as a tenacious impediment to state sovereignty and national security, the CCP will most likely reform China's terrorism laws without restraint or regard for norms in the State's actions to fight terrorist threats.<sup>5</sup> Legislative modifications are relied upon as 'lawful' vehicles to carry and deliver the CCP's paradigm shifts in counter-terrorism. This may explain the absence of due process considerations in the Chinese criminalisation process related to terrorist acts.

This article aims to comprehensively analyse and critically evaluate these laws in the light of internationally recognised human rights principles including proportionality, certainty, legality and minimal criminalisation. The principle of proportionality is stipulated in Art. 5 of Chinese CL,<sup>6</sup> which requires fair punishment and means that

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<sup>2</sup> 'Rule by law' means that the law is used as tool by the CCP to achieve its political goals, and there is no supremacy of law. See Zheng Yongnian, 'The Rule by Law versus the Rule of Law' in Wang Gungwu and Zheng Yongnian (eds), *Reform, Legitimacy and Dilemmas: China's Politics and Society* (Singapore University Press 2000) 140–143.

<sup>3</sup> S Trevaskes and E Nesossi, 'Control By Law' in J Golley, L Jaivin and L Tomba (eds), *Control: China Story Yearbook 2016* (ANU Press 2017).

<sup>4</sup> *Ibid.*

<sup>5</sup> M Tanner and J Bellacqua, 'China's Response to Terrorism' (*Defence Technical Information Center*, 1 June 2016) 78–79 < <https://apps.dtic.mil/sti/citations/AD1016645> > accessed 13 August 2020.

<sup>6</sup> '[T]he severity or leniency of punishment shall be proportionate to the crime committed by the criminal

criminal punishment and criminal responsibility should fit the crime. In China the Constitution has not explicitly introduced the certainty of law as a basic principle; instead, it is mainly discussed by scholars within the realm of criminal law.<sup>7</sup> The principle of certainty requires that parliamentary laws and administrative regulations must be sufficiently clear and certain. In terms of criminal law, the principle serves two main functions: first, everyone can predict what conduct is prohibited and punishable; and second, criminal responsibility is pre-specified by the legislature. The principle of legality is stipulated in Art. 3 of Chinese CL,<sup>8</sup> and is also known as *nullum crimen sine lege* ('no crime without law') and *nulla poena sine lege* ('no punishment without law'). The core of this principle is that a person should never be convicted of or punished for any criminal offence unless there are previously declared offences governing the conduct in question.<sup>9</sup> Finally, the principle of minimal criminalisation requires that criminal proceedings should be used as a last resort.<sup>10</sup> According to Andrew Ashworth, when deciding whether to criminalise new offences, states should consider whether the 'behavior in question is sufficiently serious to warrant intervention by criminal law and the proposed penalty is commensurate with the seriousness of the offence'.<sup>11</sup> In the context of combating cyberterrorism, even though a state can adopt various measures to ensure national security and social stability, a criminal penalty should be applied when only necessary.

The article begins by interrogating definitions of cyberterrorism, which may be characterised as either 'broad' or 'narrow'. The 'narrow' definition refers to cyberattacks conducted via or against the internet and/or national infrastructure (target-oriented cyberterrorism), while the 'broad' definition also concerns any cyber behaviours on the internet by terrorists (tool-oriented cyberterrorism). China's official position is based on the 'broad' definition, which reflects an authoritarian approach and means that any auxiliary cyberterrorism activities could fall into the category of cyberterrorism. Furthermore, China's anti-terrorism legislation and policies do not actually distinguish

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and the consequent criminal liability [prescribed by law]'; see Chen Jianfu, *Chinese Law: Context and Transformation* (Martinus Nijhoff Publishers 2008) 272.

<sup>7</sup> Zhang Mingkai, 'Implementation of the principle of Certainty in Criminal Justice (明确性原则在刑事司法中的贯彻)' (2015) 55(4) *Journal of Jilin University* 25-42; Fu Liqing, 'Study on the certainty and generality of wording of Criminal Law: From the perspective of Criminal Legislation technology (论刑法用语的明确性与概括性——从刑事立法技术角度切入)' (2013) 2 *Journal of Northwest University of Political Science and Law* 93-101.

<sup>8</sup> Art.3 of Criminal Law of PRC: 'For acts that are explicitly defined as criminal acts in law, the offenders shall be convicted and punished in accordance with the law; otherwise, they shall not be convicted or punished.'

<sup>9</sup> The non-retroactivity principle does not affect the creation of defences to crimes, although the courts have sometimes deferred to the legislature on this matter. For theoretical discussion of this point, see PH Robinson, 'Rule of Conduct and Principles of Adjudication' (1990) 57 *UCLR* 729, and P Alldridge, 'Rules for Courts and Rules for Citizens' (1990) 10 *OJLS* 487.

<sup>10</sup> D Husak 'The Criminal Law as Last Resort' (2004) 24(2) *OJLS* 207-235.

<sup>11</sup> A Ashworth, 'Is the Criminal Law a Lost Cause?' (2000) 116 *LQR* 225.

between online and offline terrorism, nor do they clearly distinguish between target-oriented cyberterrorism (i.e. 'pure' cyberterrorist attacks) and auxiliary cyberterrorism activities. For example, the legislation criminalises the 'terrorism proposition' online, which implies that those who express their sympathy for acts of cyberterrorism may potentially be designated as engaging in terrorism and be subject to prosecution and sanction accordingly. This broad definition may cause arbitrariness and is left open to broad interpretation, which could potentially be used to criminalise political opponents and ethnic minorities. Furthermore, based on its (overly) broad definition of terrorism, China has also criminalised a wide range of terrorism precursor offences both online and offline, which may raise concerns about possible violations of the principles of proportionality, certainty, legality and minimal criminalisation.

This article also critiques China's counterterrorism strategy. At the time of writing the Chinese government has yet to publicly release a comprehensive national official document that outlines China's counterterrorism strategy, similar to the 'CONTEST' strategy in the UK. However, we can explore China's overall policy related to combating terrorism by examining the main documents of the CCP and the Chinese government in the field of combating terrorism in the public domain, as well as President Xi Jinping's speech on terrorism. By drawing on these sources, this article seeks to identify the guiding principle of counterterrorism in China, highlighting the state's concern with collective interests, social stability and the emphasis on national unity. Overall China has adopted a preventive and pre-emptive strategy to fight cyberterrorism, which may contravene the principles of proportionality, certainty, legality and minimal criminalisation, and this article also inspects this issue. Moreover, the authoritarian characteristics of China's legal response to cyberterrorism limit the CCP's ability to strike a proper balance between pursuing an effective counterterrorism strategy and protecting citizens' rights contained within the Chinese Constitution. In addition, this article also reflects upon China's role and challenges in anti-cyberterrorism cooperation at the international and regional levels.

## **2. The definition of 'cyberterrorism'**

Weimann noted that 'if we want to clearly understand the threat posed by cyberterrorism, we must define it precisely'.<sup>12</sup> It is generally accepted that the term 'cyberterrorism' was first coined by Barry C. Collin in 1997, referring to the convergence of terrorism and cyberspace.<sup>13</sup> Although scholars have studied the

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<sup>12</sup> G Weimann, 'Cyberterrorism, How Real is the Threat?' (2004) 119 SRUSIP, 4.

<sup>13</sup> B Collin, 'The Future of Cyber Terrorism: Where the Physical and Virtual Worlds Converge' (1997)

subject for more than two decades, there is still no universally accepted definition of cyberterrorism due to its complexity, dynamics and multi-faceted nature, and there is no official definition of cyberterrorism in China. According to Brunst, definitions of cyberterrorism can be generally categorised as either 'narrow' or 'broad'.<sup>14</sup> Narrow definitions seem to focus solely on cyberattacks (also referred to as target-oriented cyberterrorism) conducted via or against the internet and seeking to damage national critical infrastructures. Broad definitions not only include cyberattacks, but also encompass any cyber behaviours on the internet carried out by terrorists (tool-oriented cyberterrorism).<sup>15</sup> These ancillary cyber activities may include fundraising, training, propaganda, incitement, reconnaissance and communications via a website, social media platform or forum.

However, some scholars have however acknowledged that only cyberattacks themselves should constitute cyberterrorism.<sup>16</sup> For example, while acknowledging the increasing level of threat posed by terrorists' other uses of the internet,<sup>17</sup> Weimann argues that terrorists' use of computers as facilitators of their activities, whether for propaganda, recruitment, data-mining, communication or other purposes, is not cyberterrorism.<sup>18</sup> Perhaps the most famous and familiar example of the narrow approach was proposed by Dorothy Denning in 2000.<sup>19</sup> Denning's definition argued that disrupting nonessential services does not count as cyberterrorism;<sup>20</sup> to cross this

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13(2) CJL, 15–18.

<sup>14</sup> PW Brunst, 'Terrorism and the Internet: New Threats Posed by Cyberterrorism and Terrorist Use of the Internet' in M Wade and A Maljevic (eds), *A War on Terror?: The European Stance on a New Threat, Changing Laws and Human Rights Implications* (Springer 2010) 51–78. Taliärm also classified the definition of cyberterrorism in a similar way; see AM Taliärm, 'Cyberterrorism: In Theory or in Practice?' (2010) 3(2) DATR 59, 63–64.

<sup>15</sup> PM Tehrani, *Cyberterrorism: The Legal and Enforcement Issues* (World Scientific Press 2017) 69; A Whiting, S Macdonald and L Jarvis, 'Cyberterrorism: Understandings, Debates and Representations' in C Dietze and C Verhoeven (eds), *The Oxford Handbook of History of Terrorism* (OUP 2020). For an overview of the findings, see S Macdonald, L Jarvis, T Chen and S Lavis, 'Cyberterrorism: A Survey of Researchers' (*Cyberterrorism Project Research Report No. 1*, 2013) < [www.cyberterrorism-project.org/](http://www.cyberterrorism-project.org/) > accessed 20 August 2020.

<sup>16</sup> D Denning, 'Activism, Hactivism, and Cyberterrorism: The Internet as a Tool for Influencing Foreign Policy' in J Arquilla and D Ronfeldt (eds), *Networks and Netwars: The Future of Terror, Crime, and Militancy* (RAND Corporation 2001) 239–288; S Krasavin, 'What is cyber-terrorism?' (*Computer Crime Research Center*, 2002) < <http://www.crime-research.org/library/Cyber-terrorism.htm> > accessed 13 September 2020; JA Lewis, 'Assessing the risks of cyber terrorism, cyber war and other cyber threats' (2002) CSIS 1–12; WL Tafoya, 'Cyber terror' (2011) 80 (1) FBILEB; see also JJ Prichard and LE MacDonald, 'Cyberterrorism: A Study of the Extent of Coverage in Computer Security Textbooks' (2004) 3 JITE 279, 280; F Cassim, 'Addressing the Spectre of Cyber Terrorism: A Comparative Perspective' (2012) 15 (2) PELJ 381, 381.

<sup>17</sup> G Weimann, 'How Modern Terrorism Uses the Internet, Special Report of United States Institute of Peace' (*usip.org*, 13 March 2004) < <https://www.usip.org/publications/2004/03/wwwterrornet-how-modern-terrorism-uses-internet> > accessed 24 Oct 2020.

<sup>18</sup> G Weimann, 'Cyberterrorism: The Sum of All Fears?' (2005) 28 SCT 129, 132–133.

<sup>19</sup> DE Denning, 'Cyberterrorism: Testimony before the Special Oversight Panel on Terrorism Committee on Armed Services US House Representatives' (*Georgetown University*, 10 October 2003) < <http://www.cs.georgetown.edu/~denning/infosec/cyberterror.html> > accessed 21 May 2020; see also M Conway, 'Cyberterrorism: Media Myth or Clear and Present Danger?' in J Irwin (ed), *War and Virtual War: The Challenges to Communities* (Rodopi 2004) 81–82.

<sup>20</sup> DE Denning, 'Cyberterrorism Testimony before the Special Oversight Panel on Terrorism Committee

threshold an attack should bring a certain level of physical harm against people, property or critical infrastructures.<sup>21</sup>

By contrast, Weimann and Lewis define cyberterrorism as ‘the use of computer network tools to harm or shut down critical national infrastructures’,<sup>22</sup> while Conway adopts a similar definition, with the additional requirement that offline damage has to be caused, as in Denning’s definition.<sup>23</sup> Similarly, Hua and Bapna,<sup>24</sup> Pollitt,<sup>25</sup> Hardy and Williams<sup>26</sup> and some other scholars<sup>27</sup> have defined the term in the narrower way. In light of this, they generally accept a narrower definition of cyberterrorism.

Given the focus of this article, it is also trite to review how Chinese scholars define ‘cyberterrorism’ given the relatively close connection between Chinese academia and the State. In large part, scholars in China refrain from carrying out critical analysis that may be considered hostile by government officials, instead tending to replicate the state discourse on terrorism.<sup>28</sup> Scholars have avoided critically exploring some key issues related to the negative impacts of current counter-terrorism approaches, and tend to avoid challenging anti-terrorism legislation. In a similar vein, Chinese scholars seldom challenge the state definition of terrorism.<sup>29</sup>

Chinese scholars took longer to engage in cyberterrorism research compared with their Western peers. This is largely because the rise of cyberterrorism in China and its emergence as a threat to the public and the Chinese government originated as recently as 2014,<sup>30</sup> whereas in the West it was identified as a problem as far back as 1997.

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on Armed Services U.S. House of Representatives’ in EV Linden (ed), *Focus on Terrorism* (Nova Publishers 2007) 71–76.

<sup>21</sup> D Denning, ‘Activism, Hacktivism, and Cyberterrorism: The Internet as a Tool for Influencing Foreign Policy’ in J Arquilla and D Ronfeldt (eds), *Networks and Netwars: The Future of Terror, Crime, and Militancy* (RAND Corporation 2001) 241.

<sup>22</sup> G Weimann, ‘Cyberterrorism: The Sum of all Fears?’ (2005) 28(2) SCT 129, 130; see also JA Lewis, ‘Assessing the risks of cyber terrorism, cyber war and other cyber threats’ (2002) CSIS 1.

<sup>23</sup> On the contestability of the term ‘cyberterrorism’, see M Conway, ‘Reality bytes: Cyberterrorism and terrorist ‘use’ of the Internet’ (*First Monday*, 2002) <<https://firstmonday.org/article/view/1001/922>> accessed 14 Aug 2020. Among many references to the contestability of the concept ‘terrorism’, see M Crenshaw, ‘The Psychology of Terrorism: An Agenda for the 21st Century’ (2000) 21(2) PP 405–420.

<sup>24</sup> J Hua and S Bapna, ‘How Can We Deter Cyberterrorism?’ (2012) 21(2) ISJGP 102, 104.

<sup>25</sup> MM Pollitt, ‘Cyberterrorism: Fact or Fancy’ (Proceedings of the 20<sup>th</sup> National Information Systems Security Conference, Baltimore 1997) 285–289.

<sup>26</sup> K Hardy and G Williams (n1) 5.

<sup>27</sup> RC Parks and DP Duggan, ‘Principle of Cyber-warfare’ (2011) 9(5) IEEEESP 30–35; M Rogers, ‘Psychology of Computer Criminals’ (Proceedings of the Annual Computer Security Institute Conference, St. Louis, Missouri 1999); D Verton, *Black Ice: The invisible threat of cyber terrorism* (McGraw Osborne Media 2003); CB Foltz, ‘Cyber terrorism, Computer Crime, and Reality’ (2004) 12(2/3) IMCS 154–166.

<sup>28</sup> Zhang Chi, ‘How does the Chinese Communist Party Legitimise its Approach to Terrorism?’ (DPhil thesis, University of Leeds 2018) 23; Xie Weidong and Yali Wang, ‘The Terrorist Nature of the ‘ETIM’ (‘东突’的恐怖 主义实质)’ (2002) 4 (5) International Forum 22–28.

<sup>29</sup> Zhang Chi, *ibid.*, 24.

<sup>30</sup> Y Wang, ‘keynote speech at the opening ceremony of the Second Global Anti-Terrorism Forum on Combating Cyber Terrorism (王毅在“全球反恐论坛”第二次打击网络恐怖主义研讨论开幕式上发表主旨讲话)’ (Cyberspace Administration of China, 24 Oct 2016) < [http://www.cac.gov.cn/2016-10/24/c\\_1119773020.htm](http://www.cac.gov.cn/2016-10/24/c_1119773020.htm) > accessed 14 Oct 2019.

Another reason for this apparent tardiness is that cyberterrorist activities depend on the development and application of internet technology, which happened more slowly in China than it did in places like the USA or the UK. Moreover, to defend China's 'cyber sovereignty' the CCP has adopted a long-term strategy of 'special action against online terrorist audio and video and the Great Firewall',<sup>31</sup> which has created an environment in which the public would struggle to obtain terrorism-related materials and has limited access to accounts that are not officially verified/endorsed by the State.<sup>32</sup> By doing so, the CCP has been able to legalise its preventive and pre-emptive strategies to respond to cyberterrorism, in order to reduce the threats to national security and social stability posed by radicalisation.

China's official position is that cyberterrorism is a de facto form of terrorism, and such a sweeping approach means that all 'auxiliary' cyberterrorist activities could potentially be considered as a form of terrorism.<sup>33</sup> According to Wang Yi, China resolutely combats all forms of terrorism and is committed to strengthening international counter-terrorism cooperation, as well as increasing exchanges and mutual learning between experts, scholars and practitioners from various countries.<sup>34</sup>

In light of this, the majority of Chinese scholars have followed the official position and adopted the broad definition of cyberterrorism, which includes both tool-oriented cyberterrorism (工具型网络恐怖主义) and target-oriented cyberterrorism (目标型网络恐怖主义),<sup>35</sup> with only a few Chinese scholars applying the narrow definition of

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<sup>31</sup> The Great Firewall of China (GFW) is the combination of legislative actions and technologies enforced by the PRC to regulate the internet domestically. Its role in internet censorship in China is to block access to selected foreign websites and slow down cross-border internet traffic, and also to strengthen control over public opinions online within China. Reuters, 'China launched a special action to eradicate audio and video of violent and terrorism on the Internet (中国启动专项行动铲除互联网上暴恐音视频)' (*Reuters*, 20 June 2014) < <https://www.reuters.com/article/china-anti-terror-av-material-idCNKBS0EV10520140620> > accessed 5 Dec 2020.

<sup>32</sup> Zhang Chi (n28) 149–163.

<sup>33</sup> Zhao Chen, 'Cyberspace has become a new platform of international counter-terrorism' (*China's Office of Central Space Affairs Commission* (中共中央网络安全和信息化委员会办公室), 14 Jun 2017) <[http://www.cac.gov.cn/2017-06/14/c\\_1121140970.htm](http://www.cac.gov.cn/2017-06/14/c_1121140970.htm) > accessed 20 June 2020.

<sup>34</sup> 'The Second Symposium on Combating Cyber Terrorism under the Framework of 'Global Counter-Terrorism Forum' Held in Beijing ("全球反恐论坛"框架下第二次打击网络恐怖主义研讨会在京举行)' (*China's Office of Central Space Affairs Commission* (中共中央网络安全和信息化委员会办公室), 21 Oct 2016) <[http://www.cac.gov.cn/2016-10/21/c\\_1119764953.htm](http://www.cac.gov.cn/2016-10/21/c_1119764953.htm) > accessed 26 July 2020.

<sup>35</sup> Zhu Yongbiao and Ren Yan, *Research on International Cyberterrorism* (国际网络恐怖主义研究) (China Social Sciences Press 2014) 43–54; Fan Mingqiang, *Terrorism in the perspective of sociology* (社会学视野中的恐怖主义) (People's Liberation Army Press 2005) 67; Pi Yong, 'Research on terrorism crime: Cyberterrorist crime and its overall legal countermeasures (恐怖主义犯罪研究—网络恐怖活动犯罪及其整体法律对策)' (2013) 1 *Global Law Review* 5, 8; Tang Lan, 'Aspects of cyber terrorism (网络恐怖主义面面观)' (2003) 7 *International Information*; Yu Xiaofeng, Pan Yihe and Wang Jiangli, *Introduction to Non-Traditional Security* (非传统安全概论) (Zhejiang People's Press 2006) 238; Wang Zhixiang and Liu Ting, 'Research on Cyber-Terrorism Crime and its Legal Regulation' (2016) 24(5) *Journal of National Prosecutors College* 9; Xie Minggang, *Research on Cyber-terrorism* (网络恐怖主义研究) (The 2nd Asia-Pacific Conference on Information Theory 2011); Ye Jun, 'Study on countermeasures for cyberterrorism crimes (网络恐怖主义犯罪对策初探)' (Master's Thesis, Shanghai Jiaotong University 2007); Cheng Xin,

cyberterrorism.<sup>36</sup> This reflects the authoritarian characteristics of China’s approaches to countering cyberterrorism. Scholarly works written in the Chinese language are largely prescriptive, based on the assumption that all types of terrorism-related internet users should be classified as cyberterrorists seeking to ‘damage national security, national unity, national economic construction, social public order, people’s life and property regardless of intent or negligence’.<sup>37</sup>

### 3. Cyberterrorism from China’s perspective: Understanding, threats, manifestations and countermeasures

#### 3.1 Threats and manifestations of cyberterrorism in China

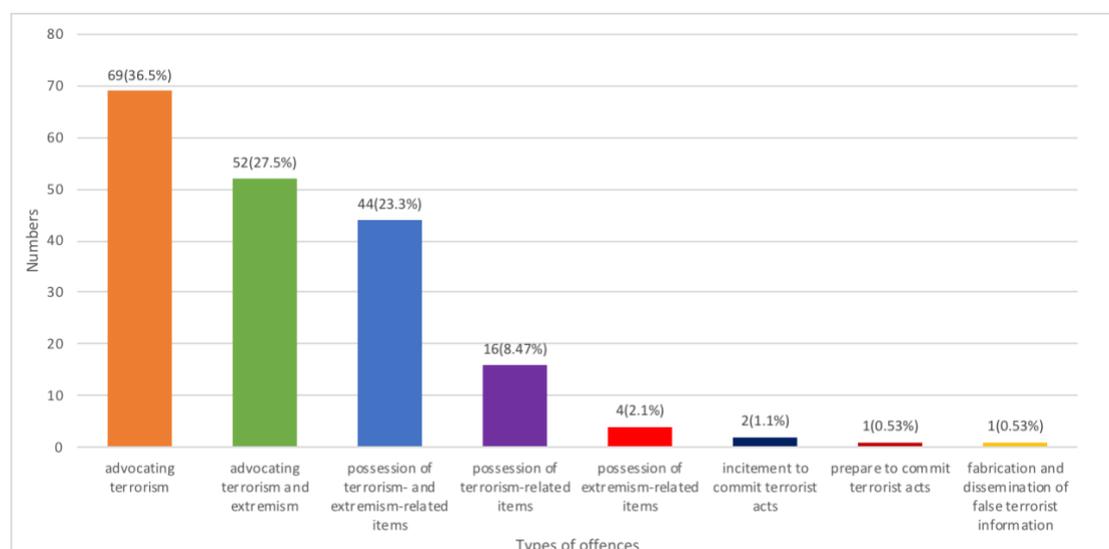


Figure 1: Numbers (percentage) of types of offences under Criminal Law Amendment (IX) from 2015–2021<sup>38</sup>

‘Research on Cyber Terrorism Crimes and Preventive Countermeasures (网络恐怖主义犯罪行为及防范对策研究)’ (Master’s thesis, Northwest University 2010); Xu Guimin and Jiang Shaoke, ‘Definition of cyber terrorism in the era of big data (大数据时代网络恐怖主义的界定)’ (2017) 2 Public Security Science Journal (Journal of Zhejiang Police College) 160.

<sup>36</sup> Guo Yang and Liu Yingwei, ‘Combating Cyberterrorism from Trinity Perspective (三位一体反“网恐”)’ (2003) 6 National Defense News; Yu Xiaoqiu, ‘The Trends and Features of Global Information Network and Security (全球信息网络与安全动向与特点)’ (2002) 2 Modern International Relations Series 23–27.

<sup>37</sup> Hao Wenjiang and Yang Yongchuan, ‘Beijing Olympics and Cyber Security (北京奥运与网络安全)’ (2007) 5 Journal of Beijing People’s Police College 68–74.

<sup>38</sup> The data is from the PKULaw website, using the keywords ‘terrorism and/or extremism’; see <<https://pkulaw.com/case/>>. Please note that some judicial cases related to terrorism/extremism are not open to public access because the website says these cases involve state secrets.

To date there have been no reported incidents of purely cyberterrorist attacks in China. Currently, as shown in Figure 1, the main threats and manifestations of cyberterrorism in China are ancillary cyberterrorists activities such as using the internet to disseminate, incite and propagate terrorism/extremism related information (64%), possession of audio-visual material or other items which are likely be used to commit terrorism acts (33.9%), or supporting or assisting terrorism activities online (1.6%). Indeed, according to Chinese CL and CTL, any online activity that directly or indirectly supports broadly defined 'terrorist activities' or 'terrorist groups', or the dissemination of terrorism- and/or extremism-related content, is illegal and punishable by law.

As well as CL and CTL, in 2014 the Xinjiang local government also released the Opinions on Defining Illegal Religious Activities to guide counterterrorism practice.<sup>39</sup> This document goes further to label a broad range of online activities as 'terrorism/extremism', even though the offenders may only be 'listening to or watching overseas religious radio and television programmes'.<sup>40</sup> This was a response to events in July 2009 when a terrorist attack took place in Urumqi, the capital city of Xinjiang, which resulted in 197 deaths and over 1,700 people being injured.<sup>41</sup> In the aftermath of the 2009 Urumqi terrorist attack, internet access in Xinjiang was completely shut down.

Chinese authorities and some scholars<sup>42</sup> believe that terrorist attacks in Urumqi and elsewhere in China are related to 'internet infiltration' by international terrorist groups (such as Al-Qaeda), and therefore react by tightening ideological control and conflating separatism, extremism and terrorism (the so-called 'three forces (三股势力)'), which

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<sup>39</sup> The Party Committee General Office of the Xinjiang Uygur Autonomous Region (XUAR), and The People's Government of the XUAR, 'Several Opinions on Governing Illegal Religious Activities and Curbing the Infiltration of Religious Extremism (Provisional) (关于进一步依法 治理非法宗教活动遏制宗教极端思想渗透工作的若干指导意见(试行))' (*Qmx.xjkunlun*, 14 May 2014)

<<http://qmx.xjkunlun.cn/tzgz/zcfg/2014/515095.htm>> accessed 19 June 2022.

<sup>40</sup> For example, see Art.18, 19 and 20 for the 26 forms of 'illegal religious activities': 18. Editing, translating, publicising, printing, reproducing, producing, distributing, selling, and disseminating illegal religious publications and audio-visual products without permission; 19. Utilising digital platforms and mediums such as the internet, mobile phones, and mobile storage devices to advocate and disseminate religion without permission; 20. Illegally listening, watching, and disseminating overseas religious radio and television programmes using satellite ground receiving facilities. See Zhang Chi (n28) 255.

<sup>41</sup> Xinhua, 'Reporter in Charge of the Xinjiang News Office Answered Journalists' Question Regarding the Xinjiang 7·5 Incident (新疆新闻办负责人就乌鲁木齐 "7·5"事件答记者问)' (*Gov.cn*, 6 August 2009) <[http://www.gov.cn/jrzq/2009-08/06/content\\_1384601.htm](http://www.gov.cn/jrzq/2009-08/06/content_1384601.htm)> accessed 23 May 2022.

<sup>42</sup> L Gu, 'On New Trend of Current 'East Turkey' Terror Activities in New Period and Countermeasures (新时期'东突'恐怖活动新动向及对策研究)' (2013) 33 (1) *Journal of Xinjiang Police Officers' Academy* 1 3–8; Pi Yong, *Research on Legislations against Cyber-Terrorism (防控网络恐怖活动立法研究)* (Law Press 2017) 168–169; L Liao, S Xu and Z Li. 2009, 'China Hopes Other Countries to Acknowledge the Essence of Separatism and Terrorism of Foreign Forces of the ETIM (中国希望其它国家认清境外东突恐怖分裂势力的本质)' (*Politics.pepple.net*, 7 July 2009)

<<http://politics.people.com.cn/GB/1026/9610205.html>> accessed 16 May 2022; Ministry of Foreign Affairs of the People's Republic of China, 'Shanghai Convention on Combating Terrorism, Separatism and Extremism (打击恐怖主义、分裂主义和极端主义上海公约)' (*Npc.gov.cn*, 12 December 2001) <[http://www.npc.gov.cn/wxzl/wxzl/2001-12/12/content\\_281315.htm](http://www.npc.gov.cn/wxzl/wxzl/2001-12/12/content_281315.htm)> accessed 23 May 2022.

can be conveniently punished under CL and CTL. However, some scholars have questioned whether China has exaggerated the threats of terrorism, extremism and separatism within its borders.<sup>43</sup> In addition, some have argued there is no solid evidence to prove China's claim of close ties between the East Turkistan Islamic Movement (ETIM) and Al-Qaeda via the internet.<sup>44</sup>

The Chinese authorities insist that the internet is a catalyst for the increasingly rampant 'three forces', claiming that 'there are seeds outside the country, soil inside the country, and markets online (境外有种子, 境内有土壤, 网上有市场)<sup>45</sup>, which implies that terrorists inside and outside the country are linking together to plan and commit a series of terrorist activities: disseminating terrorist/extremist ideology, inciting violent activities, training and recruiting members, and releasing terrorism-related audios and videos.<sup>46</sup> For example, China's state media linked domestic terrorist attacks with terrorist organisations abroad (such as ETIM, the World Uyghur Congress etc.), claiming that they were direct contact with perpetrators via the internet, telephone and messages to plan, incite and commit terrorist activities.<sup>47</sup> Additionally, on 10 July 2014 seven regional courts in Xinjiang, including in Xinjiang Yili Kazak Autonomous Prefecture and Urumqi City, jointly released judgements on cases related to disseminating, downloading, storing and watching violent terrorism audio-visual products via the internet.<sup>48</sup> Influenced and radicalised by these products, perpetrators then engage in offences of organising and leading terrorist organisations, manufacturing explosives, inciting violent terrorist activities and so on. Among the 32 defendants, 3 were sentenced to life imprisonment and 29 were sentenced to 4 to 15 years' imprisonment.<sup>49</sup>

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<sup>43</sup> A Bhattacharya, 'Conceptualising Uyghur Separatism in Chinese Nationalism' (2003) 27 (3) SA 357,357–381; DC Boehm, 'China's Failed War on Terror: Fanning the Flames of Uighur Separatist Violence' (2009) 2 BJMEIL 61; B Xu, H Fletcher and J Bajoria, 'The East Turkestan Islamic Movement (ETIM)' (CFR.org, 4 September 2014) <<http://www.cfr.org/china/east-turkestan-islamic-movement-etim/p9179>> accessed 24 May 2022.

<sup>44</sup> M Clarke, 'China's 'War on Terror' in Xinjiang: Human Security and the Causes of Violent Uighur Separatism' (2008) 20(2) TPV 271, 293; Y Shichor, 'Fact and Fiction: A Chinese Documentary on Eastern Turkestan Terrorism' (2006) 4(2) CEFQ 89, 90.

<sup>45</sup> J Jiang, 'Opening speech of the 4th International Symposium on 'Counter-terrorism, De-radicalization and Human Rights Protection' (第四届"反恐、去极端化与人权保障"国际研讨会开幕式致辞)' (Scio.gov, 31 October 2021) <http://www.scio.gov.cn/m/xwbjs/zygy/32310/jh32312/Document/1714530/1714530.htm> accessed 18 June 2022.

<sup>46</sup> Pi Yong (n42).

<sup>47</sup> Xinhua, 'Relevant Departments Disclosed the Real Situation of the Inciting Video of the 'World Uyghur Congress' (有关部门披露'世维会'制造煽动性视频真实情况)' (Gov.cn, 29 July 2009) <[http://www.gov.cn/jrzq/2009-07/29/content\\_1377795.htm](http://www.gov.cn/jrzq/2009-07/29/content_1377795.htm)> accessed 29 May 2022; Xinhua, 'Crime under the Painted Skin – Discover the Real Face of Rebiya's 'World Uyghur Congress' (画皮下的罪恶--且看'世维会'热比娅的真实嘴脸)' (Gov.cn, 8 July 2009) <[http://www.gov.cn/jrzq/2009-07/08/content\\_1359850.htm](http://www.gov.cn/jrzq/2009-07/08/content_1359850.htm)> accessed 27 May 2022.

<sup>48</sup> Pi Yong (n42).

<sup>49</sup> Ibid.

### 3.2 Understanding of and countermeasures to cyberterrorism in China

Our understanding of cyberterrorism in China may be enhanced by considering how it is viewed in different ways from the policy, legal and judicial practice perspectives. First, from a policy perspective, China's anti-cyberterrorism policy stems from the notion of a 'war on terror',<sup>50</sup> which implies that national policies on cyberterrorism trace 'a less clear demarcation between the different types of terrorist activities online'.<sup>51</sup> Furthermore, China's anti-terrorism legislation and policies do not actually distinguish between online and offline terrorism, nor do they clearly distinguish between target-oriented cyberterrorism (a pure cyberterrorist attack) and incitement, fundraising, propaganda and other preparatory or supporting online activities.<sup>52</sup> In addition, the Chinese authorities issued a National Cyberspace Security Strategy in 2017 which clearly expressed concern that the internet was being used as a tool to 'incite, plan, organize, and carry out acts of terrorism, separatism, and extremism';<sup>53</sup> in response to these activities, the Chinese authorities began 'operating one of the most sophisticated systems for online censorship and surveillance of its own citizens'.<sup>54</sup>

Second, from the perspective of substantive law in China, as discussed in section 4, neither CL nor CTL has so far defined or even mentioned the term cyberterrorism. Instead, Chinese legislators choose to adopt vague and broad definitions of 'terrorism' and 'terrorist activities' that do not distinguish between the online or offline nature of terrorist acts.<sup>55</sup> Both laws regard the internet as a medium or tool through which terrorism-related criminal offences may be committed, rather than as an independent constituent element of the crime.<sup>56</sup> In light of this, in the context of China's terrorism

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<sup>50</sup> The 'war on terror' has permitted China not only to deploy significant repressive force, in political, legal and police/military terms, to confront the perceived threat to Xinjiang's security posed by Uyghur terrorism, but also to establish a political and legal framework through which to confront any future challenges to state power. See M Clarke, 'China's 'war on terrorism': Confronting the dilemmas of the 'internal-external' security nexus' (2018) *Terrorism and counter-terrorism in China: Domestic and foreign policy dimensions* 17, 17–38.

<sup>51</sup> D Broeders, F Cristiano & D Weggemans, 'Too Close for Comfort: Cyber Terrorism and Information Security across National Policies and International Diplomacy' (2021) SCT1, 8.

<sup>52</sup> For details of China's policies on cyberterrorism, please see S Parkin, 'China: The 'Three Evils' of Cyberspace and Human Rights' in F Cristiano, D Broeders and D Weggemans (eds.) *Countering Cyber Terrorism in a Time of 'War on Words' Kryptonite for the Protection of Digital Rights?* (The Hague Program for Cyber Norms 2020) 16–20.

<sup>53</sup> Cyberspace Administration of China, 'National Cyberspace Security Strategy (国家网络空间安全战略)' (*Cac.gov.cn*, 27 December 2017) <[http://www.cac.gov.cn/2016-12/27/c\\_1120195926.htm](http://www.cac.gov.cn/2016-12/27/c_1120195926.htm)> accessed 19 May 2022.

<sup>54</sup> International Federation for Human Rights, 'China's New Counter-terrorism Law: Implications and Dangers for Tibetans and Uyghurs' (*Refworld.org*, November 2016) <<https://www.refworld.org/docid/582b119b4.html>> accessed 19 May 2022.

<sup>55</sup> The term 'terrorism' is defined in Article 3 of the CTL as any action taken to 'create social panic, endanger public safety, violate persons or property, or coerce national organs or international organizations', without further specifying special conditions for addressing cyberterrorism specifically; The Art.12 of Cybersecurity Law mentioned terrorism as one of a number of prohibited online activities.

<sup>56</sup> D Broeders, F Cristiano & D Weggemans, 'Too Close for Comfort: Cyber Terrorism and Information Security across National Policies and International Diplomacy' (2021) SCT1, 8.

legislation and policies, cyberterrorism is best understood as ‘refer[ring] to a number of online activities deemed to meet the very broad criteria that define ‘terrorism’ and ‘terrorist acts’ set out in other legislations’.<sup>57</sup> In addition, both CL and CTL offer blurred boundaries between ‘terrorism’ and ‘extremism’,<sup>58</sup> with ‘fabrication and dissemination of fake terrorism information’ stipulated in Art. 291a of CL as one of the tools available to criminalise the production of terrorist propaganda. Moreover, CL Amendment (IX) 2015 stipulated clearly that ‘using audio-visual materials and information networks to advocate terrorism or extremism shall be sentenced to a minimum five-year imprisonment under serious circumstance’.<sup>59</sup> Similarly, Art. 12 of the CSL 2017 exhorts that ‘any person or organisation using a network must not use the network to propagate terrorism or extremism’.<sup>60</sup>

Third, from a practical perspective, the ‘security-first’ approach and prevention strategy has had a negative impact on basic human rights protection. For example, Chinese authorities conduct sophisticated and rigorous online censorship of content posted by the public.<sup>61</sup> Moreover, CSL has introduced new mechanisms (such as real-name registration and identification requirements) to ensure the state’s ability to control various cyber activities and prevent cyberterrorism.<sup>62</sup> In order to curb the rapid spread of radicalisation online the Chinese government has stepped up its deradicalisation policy and attempted to intervene in the early stages when individuals begin to be exposed to terrorism or extremism or other radicalised materials, as evidenced by the 2014 ‘Audio and Video Special Action Against Cyber Terrorism (铲除网上暴恐音视频专项行动)’.<sup>63</sup>

Furthermore, in May 2018 the Supreme People’s Court (SPC), the Supreme People’s Procuratorate (SPP), the Ministry of Public Security and other departments issued joint guidelines on the application of terrorism-related provisions and punishments, which confirmed that ‘individuals who write, publish, broadcast, or advocate content relating to terrorism or extremism either offline or online are, indeed, criminally liable’.<sup>64</sup> Parkin

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<sup>57</sup> M Clarke (ed.), *Terrorism and Counter-Terrorism in China: Domestic and Foreign Policy Dimensions* (Oxford University Press 2018).

<sup>58</sup> The details could be found in section 5.

<sup>59</sup> *Ibid.*

<sup>60</sup> KPMG China, ‘Overview of China’s Cybersecurity Law’ (*KPMG China*, February 2017) <<https://assets.kpmg/content/dam/kpmg/cn/pdf/en/2017/02/overview-of-cybersecurity-law.pdf>> accessed 22 May 2022.

<sup>61</sup> X Qiang, ‘Liberation Technology: The Battle for the Chinese Internet’ (2011) 22(2) *JD47* 47–61.

<sup>62</sup> Art.24 of Cybersecurity Law, see <<http://www.lawinfochina.com/display.aspx?lib=law&id=22826>> accessed 20 June 2022.

<sup>63</sup> Zhang Chi (n28) 41.

<sup>64</sup> SPC, SPP, and Ministry of Public Security, *et al*, ‘Opinions on Several Issues on the Application of Law in Cases of Terrorist Activities and Extremism Crimes from the Supreme People’s Court, Supreme People’s Procuratorate, Ministry of Public Security, and Ministry of Justice (最高人民法院、最高人民检察院、公安部、司法部关于办理恐怖活动和极端主义犯罪案件适用法律若干问题的意见)’ (*Pkulaw.cn*, 5 May 2018) <<http://en.pkulaw.cn.eresources.law.harvard.edu/>> accessed 20 June 2022; S Parkin (n52)

argues that ‘in this way, legitimate concerns about cyberterrorist ancillary activities have been used to legitimize an approach to policing online activities in practice that, in the absence of a functioning rule of law, is at extreme risk of eroding human rights’.<sup>65</sup> In addition, Special Rapporteurs of the UN noted ‘their concern that provisions in the CTL disallowing or shutting down internet telecommunications services under an overly broad definition of terrorism may impact rights to freedom of expression, access to information, and privacy’.<sup>66</sup>

Human Rights Watch (HRW) criticised ‘China’s politically motivated abuse of terrorism prosecution against the Uyghur in Xinjiang because of a broad definition of ‘terrorism’ and ‘terrorist activity’, lack of trial transparency, and violation of fair trial rights’.<sup>67</sup> In addition, China’s judgements on Uyghur terrorism-related cases are not openly accessible, which mean that little evidence exists, and ‘failure to release details about terrorism convictions heightens concerns that the country’s counterterrorism law is being used to prosecute nonviolent activity’.<sup>68</sup> For example, the SPC 2016 annual report (the most comprehensive and reliable resource containing specific data on terrorism convictions) stated that the courts at all levels in China had convicted 1,419 criminals for threatening state security, advocating and inciting terrorism, separatism, and extremism.<sup>69</sup> However, among these, only four verdicts were openly accessible, and six out of the seven convicted criminals were Xinjiang Uyghurs convicted for ‘possessing, accessing, and disseminating terrorism-related videos or audios; clicking on weblinks that contained images of flags of the East Turkestan Islamic Movement (ETIM), or videos about Rebiya Kadeer (leader of exiled Uyghurs)’.<sup>70</sup>

Chinese policymakers and legislators have thus opted to address cyberterrorism through a broad lens, which includes both cyberterrorist attacks and terrorists’ use of the internet in a broader sense. Therefore, in the context of Chinese legislation, judicial practice and policy, cyberterrorism is best understood to refer to a whole range of

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<sup>65</sup> S Parkin (n52) 18.

<sup>66</sup> F Ni Aoláin *et al.*, ‘Comments on the effect and application of the Counter-Terrorism Law of the People’s Republic of China OLCHN 18/2019’ (Office of the United Nations High Commissioner for Human Rights, 1 November 2019) 10–11 <<https://spcommreports.ohchr.org/TMResultsBase/DownloadPublicCommunicationFile?gld=24845>> accessed 20 June 2022. See also *ibid.*, 16.

<sup>67</sup> Human Rights Watch, ‘China: Draft Counterterrorism Law a Recipe for Abuses’ (*Hrw.org*, 20 January 2015) <https://www.hrw.org/news/2015/01/20/china-draft-counterterrorism-law-recipe-abuses> accessed 26 May 2022.

<sup>68</sup> *Ibid.*

<sup>69</sup> Human Rights Watch, ‘China: Disclose Details of Terrorism Convictions: Overbroad Counterterrorism Legal Framework Opens Door to Abuses’ (*Hrw.org*, 16 March 2017) <<https://www.hrw.org/news/2017/03/16/china-disclose-details-terrorism-convictions>> accessed 25 May 2022.

<sup>70</sup> *Ibid.* See also D Broeders, F Cristiano & D Weggemans, ‘Too Close for Comfort: Cyber Terrorism and Information Security across National Policies and International Diplomacy’ (2021) SCT1 12.

online activities related to terrorism and prohibited extremist content, regulated under umbrella legislation recently passed or amended at the national level including the CL and the CTL.<sup>71</sup>

Against this backdrop, China has adopted a series of preventive countermeasures to deal with cyberterrorism. The analysis of China's legislation, policies and judicial practice shows that the concept of cyberterrorism has penetrated into China's broad agenda of national security, which aimed to comprehensively control, regulate, securitise and surveil its cyber sovereignty.<sup>72</sup> Chinese authorities pay increasing attention to online content or online/cyber terrorism, attempting through preemptive responses to prevent serious consequences such as terrorist attacks. For example, the Central Leading Group for Cyberspace Affairs was formulated under the leadership of Xi Jinping in February 2014, with the aim of centralising leadership, coordinating cybersecurity and informatisation work, and consolidating the CCP's control over cyberspace.<sup>73</sup> Subsequently the Cyberspace Administration of China was established as the executive body of the Leading Group, dedicated to managing internet information and content across the country, including monitoring and censoring free expression online, supervision and law enforcement.<sup>74</sup>

The fear of terrorist attacks online and offline, and the use of surveillance technology by law enforcement for protection of information security, have pushed the development of cyberterrorism legislation and policies in the direction of preemption. Consequently, publicly available data (see Figure 1) shows that the development of counter-cyberterrorism to a large extent focuses on online behaviours related to preparatory and supporting activities for cyberterrorism. Therefore, the use of preemptive existing anti-terrorism legislation to combat these broad categories of cyberterrorism (such as cyberterrorism preparation and support activities) inevitably involves a consideration of whether the activity violates basic legal principles and human rights protection. Although the widespread terrorist use of the internet cannot be ignored, since it may fuel radicalisation and terrorist attacks in the real world, it is also important to be aware of the tension between preemptive responses and human rights protection. All of these will be analysed in detail in sections 4 and 5 below.

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<sup>71</sup> S Parkin (n52) 17.

<sup>72</sup> J Leibold, 'Surveillance in China's Xinjiang Region: Ethnic Sorting, Coercion, and Inducement' (2020) 29 (121) JCC 46, 46–60; D Broeders, F Cristiano & D Weggemans, 'Too Close for Comfort: Cyber Terrorism and Information Security across National Policies and International Diplomacy' (2021) SCT1, 9.

<sup>73</sup> R Creemers, P Triolo, S Sacks, X Lu, and G Webster, 'China's Cyberspace Authorities Set to Gain Clout in Reorganization: 'Leading Group' for Cybersecurity and Informatization Upgraded to 'Commission' (*Newamerica.org*, 26 March, 2018) <<https://www.newamerica.org/cybersecurity-initiative/digichina/blog/chinas-cyberspace-authorities-set-gain-clout-reorganization/>> accessed 26 May 2022.

<sup>74</sup> S Parkin (n52) 16, 19.

#### 4. Broad and Vague Definition of Terrorism in China

As noted above, China does not have a specific anti-cyberterrorism law, instead applying existing counterterrorism legislation to combat terrorist activities online. The main pieces of legislation which are applied to deal with cyberterrorism include Criminal Law (CL) and CL Amendment (III),<sup>75</sup> CL Amendment (VIII),<sup>76</sup> and CL Amendment (IX),<sup>77</sup> which criminalise a broad scope of terrorism-related offences. This legislation operates in tandem with the Counter Terrorism Law (CTL) which provides a general legal basis for state laws to combat terrorism,<sup>78</sup> as well as case law concerning matters around interpretation.<sup>79</sup> Such an approach is not unique to China, and reflects an international tendency to expand the definition of acts of ‘terrorism’ and to impose increasingly punitive sanctions.<sup>80</sup>

Although there is no definition of ‘cyberterrorism’ in Chinese legislation, the CTL does provide a definition of ‘terrorism’.<sup>81</sup> It is arguable that this definition is overly broad and vague, which poses a number of pertinent challenges. First, the legislation criminalises the concept of ‘proposition’, which is difficult to clarify and may thus contravene the principle of certainty and legality. This is a term for which there is no conceptual equivalent in English, but refers to the ‘expressing of opinions or speech’ which violate

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<sup>75</sup> In response to the UN Resolution 1373, the Standing Committee of the National People’s Congress adopted and promulgated the ‘Criminal Law Amendment (III)’ on 29 December, 2001, first proposing the term ‘offence of terrorist activities’.

<sup>76</sup> The Amendment (VIII) to the Criminal Law of the People’s Republic of China, as adopted at the 19th meeting of the Standing Committee of the Eleventh National People’s Congress on February 25, 2011, was promulgated and came into force on May 1, 2011. Hu, Explanatory Report on the Draft of the Third Amendment to the Criminal Code of the PRC, (*National People’s Congress*, 24 December 2001 <[http://www.npc.gov.cn/wxzl/qongbao/2002-01/28/content\\_5284092.html](http://www.npc.gov.cn/wxzl/qongbao/2002-01/28/content_5284092.html)> accessed 27 May 2018.

<sup>77</sup> On August 29, 2015 the Criminal Law Amendment (IX) of the People’s Republic of China (hereinafter referred to as the ‘Criminal Law Amendment (IX)’) was issued by the Standing Committee of the National People’s Congress (NPCSC), and came into force on Nov 1, 2015. Amendment (IX) of Criminal Law <<http://www.lawinfochina.com/display.aspx?id=19864&lib=law>> accessed 6 June 2017.

<sup>78</sup> The Counter-Terrorism Law (CTL) as adopted at the 18th Session of the Standing Committee of the Twelfth National People’s Congress of the People’s Republic of China on December 27, 2015, was issued and came into force on January 1, 2016.

<sup>79</sup> For example, offenders using the internet or social media incitement or propaganda terrorism could be seen as terrorists. See Opinions of the Supreme People’s Court, the Supreme People’s Procuratorate and the Ministry of Public Security on Several Issues concerning the Application of Law in the Handling of Criminal Cases Involving Violent Terrorism and Religious Extremism 2018 (2018 最高人民法院、最高人民检察院、公安部关于办理暴力恐怖和宗教极端刑事案件适用法律若干问题的意见) <<http://en.pkulaw.cn.eresources.law.harvard.edu/>> accessed 26 June 2018.

<sup>80</sup> M Clarke, ‘Widening the net: China’s anti-terror laws and human rights in the Xinjiang Uyghur Autonomous Region’ (2010) 14(4) IJHR 542, 548.

<sup>81</sup> According to Art. 3 of CTL, the definition of ‘terrorism’ is ‘any proposition or activity that, by means of violence, sabotage or threat, generates social panic, undermines public security, infringes upon personal and property rights, or menaces state authorities and international organizations, with the aim to realize political, ideological and other purposes.’ Article 3 of Counterterrorism Law, (Chinese: 中华人民共和国反恐怖主义法) <<http://www.lawinfochina.com/Display.aspx?lib=law&Cqid=261788>> accessed 5 June 2019.

the constitutional freedom of speech.<sup>82</sup> The term “proposition” could apply to criticism of government policy (especially on terrorism), or conduct that is within the boundaries of freedom of expression as set out under international human rights law.<sup>83</sup> This implies that those who express their sympathy for acts of cyberterrorism may potentially be designated as engaging in terrorism and be subject to prosecution and sanction accordingly.

The International Federation for Human Rights has contended that these stipulations are opaque and broad enough to justify the penalisation of ‘almost any peaceful expression of ethnic identity, acts of non-violent dissent, or criticism of ethnic or religious policies’.<sup>84</sup> In a similar vein, HRW has critically asserted that ‘the definition of what constitutes ‘terrorism’ is dangerously vague and open-ended, which could potentially apply to anyone advocating for policy changes, peaceful dissenters and critics of government or Party policies’.<sup>85</sup> It also tautologically refers to ‘other terrorist activities’, potentially allowing any activity to be deemed a terrorist offence.<sup>86</sup> Liu contends that such a broad and vague definition of terrorism may cause arbitrary interpretation in judicial practice, which may violate the principle of certainty and legality.<sup>87</sup>

Moreover, the ever-expanding scope of the CTL and the CL is likely to make terrorism a ‘pocket crime (口袋罪)’,<sup>88</sup> thereby allowing law enforcement agencies to classify unrelated activities as terrorism. He Ronggong argues that this broad definition of terrorism may cause arbitrariness and abuses of power in judicial practice.<sup>89</sup> Indeed,

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<sup>82</sup> Article 35 of the Chinese Constitution regarding freedom of speech.

<sup>83</sup> Human Rights Watch (n69).

<sup>84</sup> The International Campaign for Tibet, ‘China’s New Counter-Terrorism Law: Implications and Dangers for Tibetans and Uyghurs’ (*Save Tibet*, 15 Nov 2016), <<https://www.savetibet.org/wp-content/uploads/2016/11/FIDH-ICT-Chinas-new-counter-terrorism-law-implications-and-dangers-for-Tibetans-and-Uyghurs-15-11-2016-FINAL>> accessed 15 Oct 2020.

<sup>85</sup> According to Human Right Watch: ‘Serious Concerns Include: 1. The Definition of what Constitutes ‘Terrorism’ is Dangerously Vague and Open-Ended; 2. Terrorism is conflated with Religious ‘Extremism’; 3. The Designation of Terrorist Organizations by the State is Devoid of Due Process Protections; 4. Enforcing a System of Complete, Permanent Digital Surveillance; 5. The Authority and Powers of the New Body in Charge of Coordinating Counterterrorism Work are Vague; 6. The Draft Law Would Expand Coercive and Surveillance Powers of Law Enforcement Agencies; and so on.’ See Human Rights Watch (n67).

<sup>86</sup> Ibid.

<sup>87</sup> Liu Yanhong, ‘Evaluation and Reflection on the Value of Criminal Law on Terrorism offences in 20 years (二十年来恐怖犯罪刑事立法价值之评价与反思)’ (2018) 20(1) Peking University Law Journal 43–45.

<sup>88</sup> A ‘pocket crime’ is an unofficial legal term that describes the vague definition of an offence that blurs the boundary between different offences. Drawing an analogy between an offence and a pocket crime, the phrase refers to a definition of an offence that can be used to label more than one kind of criminal activity, just like a pocket that contains more than one items. Zhang Xun, ‘Research on the Crime of Picking Quarrels and Provoking Troubles, from the Perspective of Pocket Crime (口袋罪视域下的寻衅滋事罪研究)’ (2013) 3 Politics and Law 3; Zhang Chi (n28) 165.

<sup>89</sup> He Ronggong, ‘Reflection on ‘Preventive’ Anti-terrorism Criminal Legislation (“预防性”反恐刑事立法思考)’ (2013) 3 Chinese Law 156.

it is broad enough to allow the CCP not only to criminalise political opponents, but also to strengthen its social control. Conjecture, namely the use of vague definitions and terms, is also one of the CCP's tactics, giving more flexibility in its fight against cyberterrorism.

Some of the criticism of the broad and vague definition of terrorism in China has been fierce. Zhou argues that the revised definition is still vague and may lead to an expansive interpretation.<sup>90</sup> Meanwhile, human rights activists have added that it could be used to suppress dissidents and religious minorities.<sup>91</sup> For example, Leibold comments that the issue of terrorism had been framed in China in the past to mainly target the Uyghurs, Tibetans and those who disagree with official Chinese policies.<sup>92</sup>

In light of this, some UN experts and other scholars have criticised the lack of precise definitions of core terms, arguing that it presents a significant challenge to human rights protections, as governments retain considerable discretion and flexibility in choosing against whom and how to implement these provisions.<sup>93</sup>

Second, according to Art. 3b of the CTL, the scope of 'terrorist activities' is overly broad, including acts of instigation, preparation, assistance and implementation, meaning basically that the entire process (from the planning stage to the implementation stage) may be identified as terrorism activities.<sup>94</sup> Elsewhere, the term of 'other terrorist activities' in this provision is considered as a 'pocket clause' which leaves huge leeway for interpretation in judicial practice, and may cause violations of the principle of certainty.<sup>95</sup> The vague definition of terrorism and broad boundaries of 'terrorist activities' give rise to vague and open-ended terrorism-related legislation. There are countless critical voices of the CL, the CTL and other terrorism-related legislation in

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<sup>90</sup> Zhou Zunyou, 'China's Comprehensive Counter-Terrorism Law' (*the diplomat*, 23 January 2016) <http://thediplomat.com/2016/01/chinas-comprehensive-counter-terrorism-law/> accessed 20 Oct 2020; Zhang Chi (n28) 165.

<sup>91</sup> BBC, 'China Passes Tough Anti-Terror Laws' (BBC, 28 December 2015) <<http://www.bbc.co.uk/news/world-asia-china-35188137>> accessed 20 Oct 2020; E McKirdy, 'China Approves Wide-Ranging Counter Terrorism Law' (CNN, 28 December 2015) <https://www.cnn.com/2015/12/27/asia/china-terror-law-approved/index.html> accessed 27 Oct 2020; Zhang Chi, *ibid*.

<sup>92</sup> E McKirdy, 'China Approves Wide-Ranging Counter Terrorism Law' (CNN, 28 December 2015) <https://www.cnn.com/2015/12/27/asia/china-terror-law-approved/index.html> accessed 27 Oct 2020; Zhang Chi, *ibid*.

<sup>93</sup> See J deLisle, 'Security First? Patterns and Lessons from China's Use of Law to Address National Security Threats' (2010) 4 JNSLP 397, 410–411; W Cong, 'China's 2015 Counterterrorism Law' (2016) 11(2) JCL 381; see also S Parkin (n52) 16.

<sup>94</sup> Art. 3b of CTL in the PRC enumerates the scope of terrorist activities: (1) Organizing, planning, preparing for, or conducting the activities; (2) Advocating terrorism, instigating terrorist activities, or illegally holding articles advocating terrorism; (3) Organizing, leading or participating in terrorist organizations; (4) Providing information, funds, materials, labour services, technologies, places and other support, assistance and convenience to terrorist organizations, terrorists, the implementation of terrorist activities or training on terrorist activities; and (5) Other terrorist activities.

<sup>95</sup> Jaydar Ahezabay, Research on Criminal Legislation of Preventive Anti-terrorism in China (我国预防性反恐刑事立法研究) (Master's thesis, Xinjiang University 2018) 9.

China due to their vague and ambiguous language,<sup>96</sup> but in fact, using broad and vague language is a feature of most Chinese legislation.<sup>97</sup> For instance, HRW has asserted that ‘many aspects of the counterterrorism law are incompatible with international human rights law and could facilitate future human rights violations’.<sup>98</sup>

## 5. Criminalisation of a Wide Range of Terrorism Precursor Offences in China

According to Clive Walker, the first function of criminal law is to allow for prescient intervention against terrorism endangerment well before a terrorist crime is carried out.<sup>99</sup> The more catastrophic the potential offence, the greater the imperative to prevent it, and the more it can justly be said that prosecution and punishment of the already-completed act comes too late. This is the rationale according to which many countries generally criminalise preparatory, assistance and association offences related to terrorism.<sup>100</sup> However, Ashworth and Zedner have proposed that in order to curtail abuses of preventive counterterrorism provisions, it might be necessary to insist on adherence to the principles of necessity, least restrictive appropriate means, sufficient substantiating evidence and a fair trial.<sup>101</sup> China’s CL has criminalised a wide scope of terrorism precursor offences both online and offline, which may raise

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<sup>96</sup> Emilio Iasiello, ‘China’s Cyber Initiatives Counter International Pressure’ (2017) 10 JSS 1, 8; Nick Akerman and others, ‘China Adopts Tough and Sweeping Cybersecurity Law’ (*The Tmca.com*, 7 Dec 2016) <<https://thetmca.com/china-adopts-tough-and-sweeping-cybersecurity-law/>> accessed 20 July 2019; China’s Cyber Security Law and its Chilling Effects (*Fin. Times*, 2 June 2017) <<https://www.ft.com/content/60913b9e-46b9-11e7-8519-9f94ee97d996>> accessed 20 Aug 2020; Ross O’Brien and John Gruetzner, ‘Cyber Law Creates Hurdle to Chinese Internet Companies’ Growth’ (*Nikkei Asian Review*, 16 June 2017) <<https://asia.nikkei.com/Viewpoints/IRoss-0-Brien-and-John-Gruetzner/Cyber-law-creates-hurdle-to-Chinese-internet-companies-growth>> accessed 20 Aug 2020; Xiaoyan Zhang, ‘Cracking China’s Cybersecurity Law’ (*China Law and Practice*, 19 Jan 2017) <http://www.chinalawandpractice.com/sites/c1pl2017/01/19/cracking-chinas-cybersecurity-law> accessed 20 Aug 2020.

<sup>97</sup> C Duncan, ‘Out of Conformity: China’s Capacity to Implement World Trade Organization Dispute Settlement Body Decisions after Accession’ (2002) 18 AUILR 399, 412, 418–419; R Peerenboom, ‘The X-Files: Past and Present Portrayals of China’s Alien “Legal System”’ (2003) 2 WUGSLR 37, 81; LD Chuang, ‘Investing in China’s Telecommunications Market: Reflections on the Rule of Law and Foreign Investment in China’ (1999) 20 NJI LB 509, 525; Meixian Li, ‘China’s Compliance with WTO Requirements Will Improve the Efficiency and Effective Implementation of Environmental Laws in China’ (2004) 18 TICLJ 155, 165; L Wilson, ‘Investors Beware: The WTO Will Not Cure All Ills with China’ (2003) CBLR 1007, 1017.

<sup>98</sup> See Human Rights Watch (n67).

<sup>99</sup> C Walker, ‘The Impact of Contemporary Security Agendas against Terrorism on the Substantive Criminal Law’, in A Masferrer (ed), *Post 9/11 and the State of Permanent Legal Emergency Security and Human Rights in Countering Terrorism* (Springer 2012) 129.

<sup>100</sup> A Goldsmith, ‘Preparation for Terrorism: Catastrophic Risk and Precautionary Criminal Law’ in A Lynch, E Macdonald and G Williams (eds), *Law and Liberty in the War on Terror* (The Federation Press 2007) 59–74; C Murphy, *EU Counter-Terrorism Law: Pre-Emption and the Rule of Law* (Hart Publishing 2012).

<sup>101</sup> A Ashworth and L Zedner, *Preventive Justice* (Oxford University Press 2014) 195.

concerns about possible violations of the principles of proportionality and minimal criminalisation.

The terrorism offences related to the criminal law's precursor impact refer to the notion of a 'precursor crime', in effect the criminalisation of acts in preparation for terrorism.<sup>102</sup> As well as its broad and vague definition of terrorism, China has also criminalised a wide range of precursor terrorism-related offences, which could be applied to cyberterrorism. Today, compared with traditional terrorism cyberterrorism is difficult to prevent due to its anonymity and convenience.<sup>103</sup> Traditional criminal law generally intervenes after, rather than before, a crime takes place,<sup>104</sup> and in judicial practice there are also some obstacles to early intervention regarding admissibility, disclosure and proof.<sup>105</sup> In order to combat cyberterrorism effectively, as the main mechanism to respond to these threats, the CL is utilised to prevent or avert the anticipatory risks of terrorism.<sup>106</sup>

Through introducing a series of terrorism offences from the preparatory stage to the committing stage, Chinese CL has taken an exceptional stance by criminalising a wide scope of behaviours and imposing harsh penalties, while a number of specific laws (such as CTL and CSL) and relevant administrative regulations<sup>107</sup> have also been established, serving as an ancillary regulatory mechanism to regulate other terrorism-related offences.<sup>108</sup> These offences are criminalised at an early stage and carry formal criminal punishments including criminal detention, control, and fixed-term imprisonment. Their existence in the CL functions as a legitimate basis upon which the Chinese legal authorities are now able to pre-emptively control and monitor potentially 'dangerous' individuals as they see fit.<sup>109</sup> China has thereby demonstrated a tendency

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<sup>102</sup> C Walker, 'The Impact of Contemporary Security Agendas against Terrorism on the Substantive Criminal Law', in A Masferrer (ed), *Post 9/11 and the State of Permanent Legal Emergency Security and Human Rights in Countering Terrorism* (Springer 2012) 129.

<sup>103</sup> CA Rodriguez, 'Cyber terrorism – A rising threat in the Western hemisphere' (2008) 18 Albany Law Journal of Science and Technology 298.

<sup>104</sup> R Chesney and J Goldsmith, 'Terrorism and the Convergence of Criminal and Military Detention Models' (2008) 60 Stanford Law Review 1079, 1084, 1088.

<sup>105</sup> Joint Committee on Human Rights, *Counter-Terrorism Policy and Human Rights: Prosecution and Pre-Charge Detention* (2005-06 HL 240, HC 1576) paras.12, 28.

<sup>106</sup> A Dershowitz, *The Case for Pre-Emption* (W.W. Norton 2006) 88–89; R Suskind, *The One Percent Doctrine: Deep Inside America's Pursuit of Its Enemies Since 9/11* (Simon & Schuster 2007).

<sup>107</sup> For example, to be consistent with Criminal Law, the Anti-Money Laundering Law characterises acts that attempt to conceal or hide gains derived from terrorist crimes as money laundering and subjects them to administrative control and criminal punishment.

<sup>108</sup> Du Miao, 'The Review and Prospect of Counter-Terrorism Lawmaking in China (中国反恐立法的回顾和展望)' (2012) 6 Western Law Review 40,42; Li Zhe, 'China' in K Roach (ed), *Comparative Counter-Terrorism Law* (Cambridge University Press 2015) 580; For a detailed examination of the preemptive doctrine, see J McCulloch and S Pickering, 'Counter-terrorism: The Law and Policing of Pre-emption' in N McGarrity, A Lynch and G Williams (eds), *Counter-terrorism and beyond: The culture of law and justice after 9/11* (Routledge 2010)13–29.

<sup>109</sup> E Li (n1) 363.

to expand the criminalisation of terrorism offences, and the threshold of criminal liability has been shifted to an earlier stage of terrorism-related activity.

Many Chinese scholars have argued that it would be justifiable to expand the scope of anti-terrorism legislation and criminalise a wide range of precursor terrorism offences under the preventive strategy of counterterrorism.<sup>110</sup> Additionally, some researchers have proposed that China should create a specific cyberterrorism offence to clarify the definition and scope of cyberterrorism.<sup>111</sup> Moreover, the close ties between Chinese authorities and academia limit the amount of objective research on existing anti-terrorism legislations. The official positions of ‘cracking down all forms of terrorism’ and the ‘priority of national security and social stability’ are often replicated in scholarly works published in China.<sup>112</sup> In light of this, instead of criticising, most commentators instead function to justify China’s counter-terrorism policies and legal responses.<sup>113</sup> For example, some scholars argue that although inciting, preparing and assisting terrorism offences would not of themselves bring a risk of actual and urgent harm upon the public compared to actual terrorist attacks, these terrorism activities still pose certain risks to the public, and should thus be liable for intervention at an early stage.<sup>114</sup> In most of the Chinese literature the terms ‘cyberterrorism’ and ‘cyberterrorism crime’ may be conflated, since Chinese researchers take it for granted that cyberterrorism is

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<sup>110</sup> Zhang Lei, ‘A Study of the Prevention and Control on Cyberterrorism Crime from the Perspective of Overall National Security (总体国家安全观视域下网络恐怖主义犯罪防控研究)’ (DPhil thesis, Jilin University 2020) 80; Guo Hong, ‘The Justification of Early Intervention of Terrorism Crime (恐怖主义犯罪早期化介入的正当性根据)’ (2018) 1 *Journal of Shandong Police College* 88–95; Wang Zhixiang and Liu Ting (n35); Shu Hongshui and Wang Gang, ‘Discussion on the Cyber Terrorism Crime in China (对我国网络恐怖主义犯罪的探讨)’ (2016) 145 *Journal of Shandong Police College*; Pi Yong, ‘Research on Cyber-terrorism in China and the Related Criminal Law – Comments on the provisions in the Draft of 9<sup>th</sup> Amendment of Criminal Code and the draft of Anti-Terrorism Law (全球化信息化背景下我国网络恐怖活动及其犯罪立法研究—简评我国《刑法修正案(九)(草案)》和《反恐怖主义法(草案)》相关反恐条款)’ (2015) 1 *Political and Law Review* 68-79; Wang Zhixiang and Wang Yidan, ‘Research on Pre-emption of Terrorism Crime (恐怖主义犯罪的前置化处置研究)’ (Seventh Session of International Forum for Contemporary Criminal Law: International Conference on ‘New Trends in the Global Terrorist Threat and Challenges to Legislators and Practitioners’, Zhuhai, December 2017) 565–578.

<sup>111</sup> Wang Zhixiang and Liu Ting (n35); , ‘Cyber-terrorism crime and its legal regulations (网络恐怖主义犯罪及其法律规制)’ (2018) *Rule of Law and Society* 25–26; Li Yan, ‘Study of Legal issues of Cyber terrorism crime identification (网络恐怖主义犯罪认定法律问题研究)’ (Master’s thesis, Lanzhou University 2018); Xu Guimin, ‘Study on the Boundary of criminal liability of cyberterrorism in China (论中国网络恐怖主义犯罪圈的边际)’ (2018) 2 *Social Science in Heilongjiang* 27–32; Pi Yong, *ibid*; Wang Ge, ‘Study on Criminal Legal Response to Cyberterrorism in China (试论我国网络恐怖活动的刑事对策)’ (2017) 30(2) *Journal of Guangxi Police College* 94–98.

<sup>112</sup> Zhao Bingzhi and Du Miao, ‘Pre-protection of Legal Interests and Weave Dense Net of Anti-terrorism Provisions in Criminal Law Amendment(IX) (刑法修正案九中法益保护前置织密反恐法网)’ (*Procuratorial Daily* (Beijing, 28<sup>th</sup> Sep 2015) 3; Pi Yong (n42); Zhao Bingzhi and Niu Zhizhong, ‘Suggestions on the Perfection of China’s Counter Terrorism Criminal Code (我国反恐刑法分则的完善之建言)’ (Seventh Session of International Forum for Contemporary Criminal Law: International Conference on ‘New Trends in the Global Terrorist Threat and Challenges to Legislators and Practitioners’, Yhai, December 2017) 64–77; Wang Zhixiang and Wang Yidan, (n110).

<sup>113</sup> *Ibid*.

<sup>114</sup> Wang Zhixiang and Liu Ting (n35)16; Shu Hongshui and Wang Gang (n110); Pi Yong (n110).

a criminal act.<sup>115</sup> However, they rarely question whether this is in accordance with the basic principles of criminal law, and whether it undermines individual human rights protection.

According to Ashworth, when deciding whether to create new criminal offences, the key question to be considered is whether the behaviour in question is sufficiently serious to warrant intervention by criminal law.<sup>116</sup> Given this, a few Chinese scholars have critically suggested that the scope of terrorism precursor offences is too broad and allows for excessive pursuit of prevention and severe punishment, which may contravene the principle of minimal criminalisation.<sup>117</sup> Therefore, precursor offences should be sufficiently injurious to warrant intervention by the criminal law.

In a close analysis of existing anti-cyberterrorism legislation, it seems that three widely accepted general principles are being partially or entirely ignored: first, the early intervention and extension of criminal liability which violates the principle of minimal criminalisation; second, the vagueness of these inchoate offences and lack of specific terms contravene the principle of legal certainty; and third, the lack of proximity to the commission of the ultimate harm and the risk of harm result in harsh punishment and may violate the principle of proportionality. This issue will be analysed in further detail below.

## **5.1 Intensification of the Crackdown on Association with or Membership of Proscribed Organisations**

One frequently encountered type of expansion of precursor crimes is the criminalisation of association with or membership of proscribed organisations. Pertinently, Art. 120 was inserted into the CL in 1997, stipulating the offence of 'organising, leading, and participating in terrorist activities'.<sup>118</sup> According to this provision, as long as the perpetrators have organised, led or participated in a terrorist

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<sup>115</sup> Xiao Shengyun, 'Research on Cyber Terrorism Crime' (Master's thesis, Graduate School of Chinese Academy of Social Sciences 2018) 4; Hou Yanfang, 'Study on Criminal Legal Response to Cyberterrorism Crime in China (论我国网络恐怖活动犯罪的刑法规制)' (2016) 3 Shandong Social Sciences.

<sup>116</sup> A Ashworth, 'Is the Criminal Law a lost Cause?' (2000) 116 LQR 225.

<sup>117</sup> Wang Zhiyuan, 'Evaluation on Criminal Law Amendment (IX) from Perspective of Crime Control Strategy (刑法修正案九的犯罪控制策略视野评判)' (2016) 1 Contemporary Law; Qi Wenyuan, 'The Revision of Criminal Law Should Avoid Overcriminalization Tendency (修订刑法应避免过度犯罪化倾向)' (2016) 3 Research on Law and Business; Liu Yanhong, 'China should stop overcriminalization legislation (我国应当停止犯罪化的刑事立法)' (2011) 11 Law Science.

<sup>118</sup> China's Criminal Law, Art. 120 Para.1: 'Whoever organises, leads or actively participates in a terrorist organisation shall be sentenced to a prison term ranging from 3 to 10 years; other participants shall be sentenced to a prison term less than 3 years, criminal detention or public surveillance.' Among them, the phrase 'organise terrorist organisations' refers to the act of convening of a number of people as the ringleader or any other principals to initiate, or recruit, employ, draw, and encourage many people establish terrorist organisations. 'Leads terrorist organisations' refers to the person who has succeeded to the leadership of a terrorist organisation, and has conducted planning, commanding, arrangement, and coordination of the establishment of terrorist organisations and terrorist activities after their establishment.'

organisation's activities, they will commit this offence regardless of whether or not they commit other crimes (such as murder, explosion or kidnapping). Pi is broadly supportive of this provision because it intervenes before an actual violent terrorist activity can occur, thus preventing harmful consequences.<sup>119</sup> As this provision does not stipulate a specific means of conduct, persons using the internet to implement such acts are also punishable in accordance with this provision. Moreover, the term 'other participants' alludes to 'pocket crime',<sup>120</sup> which is overly broad and vague and could be applied to any activities (online or offline) in connection with a proscribed organisation.

Additionally, the Amendment (III) to Art. 120 also suggests a turn not only towards the criminalisation of 'terrorism' but also of political dissent in general. However, the failure to define what constitutes a 'terrorist organisation' leaves the door open for this law to be deployed against any groups, organisations or religious associations that the State deems to be a threat, whether they be political, non-political or non-violent. In particular, a controversial issue regarding to this provision is that the broad definition of terrorism may have led to some divergence between the CCP and the international community regarding the designation of terrorist organisations.<sup>121</sup> For instance, the CCP has listed the World Uyghur Congress as a terrorist group,<sup>122</sup> while in the eyes of the international community this is a legal organisation that advocates human rights. Basically, this provision also appears to violate the principles of certainty and minimal criminalisation.

In addition, another controversial case is the ETIM, which was listed as a terrorist organisation in China, the US and by the UN. However, the US removed the ETIM from its list of terror groups in 2020, saying there was 'no credible evidence that ETIM continues to exist'.<sup>123</sup> Correspondingly, there are some controversial criminal cases in

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<sup>119</sup> Pi Yong (n42)469.

<sup>120</sup> A 'pocket crime' is an unofficial legal term that describes the vague definition of an offence that blurs the boundary between different offences. Drawing an analogy between an offence and a pocket crime, the phrase refers to a definition of an offence that can be used to label more than one kind of criminal activity, just like a pocket that contains more than one item. Zhang Xun, 'Research on the Crime of Picking Quarrels and Provoking Troubles, from the Perspective of Pocket Crime (口袋罪视域下的寻衅滋事罪研究)' (2013) 3 Politics and Law; Zhang Chi (n28) 165.

<sup>121</sup> The World Uyghur Congress is a typical example of this divergence. The CCP has listed it as a terrorist group, while the international community generally sees it as a legal organisation that advocates human rights. It is also recognised by the UN as the representative of the Uyghur people at the UN Office of the High Commissioner for Human Rights. See State Council Information Office, 'East Turkistan Terrorist Forces Cannot Get Away with Impunity (东突'恐怖势力难脱罪责)' (*People net*, 21 Jan 2002) <<http://www.people.com.cn/GB/shizheng/3586/20020121/652705.html>> accessed 25 Sep 2020; see also 'Unrepresented Nations and Peoples Organisation (UNPO) Stakeholder Report' UN Office of the High Commissioner for Human Rights; Zhang Chi, *ibid.* 156.

<sup>122</sup> State Council Information Office, *ibid.*

<sup>123</sup> AFP in Washington, 'US removes shadowy group from terror list blamed by China for attacks' (*The Guardian*, 6 Nov 2020) <<https://www.theguardian.com/world/2020/nov/06/us-removes-shadowy-group-from-terror-list-blamed-by-china-for-attacks>> accessed 29 March 2022.

judicial practice; for example, Shirzat Bawudun, a former head of the Xinjiang Department of Justice, was found guilty of colluding with the ETIM after meeting a key member of the ETIM in 2003. In the end, according to the Xinjiang Higher People's Court, Bawudun was sentenced to death with a two-year reprieve after it was found that he had 'conspired with a terrorist organisation, taken bribes, and carried out separatist activities'.<sup>124</sup> Similarly, Sattar Sawut, a former Director of the Xinjiang Education Department, was also sentenced to death with a two-year reprieve after being found guilty of incorporating ethnic separatism, violence, terrorism and religious extremism content into textbooks in the Uighur language.<sup>125</sup> In addition, another controversial case is the trial of the outspoken Uighur scholar Ilham Tohti on charges of separatism.<sup>126</sup>

These cases have given rise to strong criticism from the US and human rights organisations. For example, the US State Department Country Reports point out that some human rights organisations accuse the Chinese government of suppressing the Uighur minority in the name of anti-terrorism.<sup>127</sup> Amnesty International reported in 2013 that Chinese authorities had criminalised perceived 'illegal religious' and 'separatist' activities in the region and clamped down on 'peaceful expressions of cultural identity'.<sup>128</sup> HRW further accuses the PRC government of directing a 'crushing campaign of religious expression' against the Uighurs in the name of countering terrorism and separatism.<sup>129</sup>

One of the reasons for these disputes is that Chinese legislation does not clearly distinguish between 'terrorism, separatism and extremism', which tend to be used indiscriminately. Moreover, judges have no power to interpret these terms in judicial decisions, but conflate their charges, which may contravene principles of certainty and proportionality.

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<sup>124</sup> AFP, 'China hands two Uighur ex-government officials death penalty for 'separatism'' (*France24.com*, 7 April 2021) <https://www.france24.com/en/asia-pacific/20210407-china-gives-uyghur-former-government-officials-death-penalty-for-separatism> accessed 22 May 2022.

<sup>125</sup> Ibid.

<sup>126</sup> Radio Free Asia, 'Detained Uyghur Scholar Tohti to Stand Trial in Urumqi for 'Separatism'' (*Rfa.org*, 12 September 2014) <http://www.rfa.org/english/news/uyghur/trial-09122014132025.html> accessed 14 May 2022.

<sup>127</sup> US Department of State, Bureau of Counterterrorism, 'Country Reports on Terrorism 2007' (*State.gov*, April 2008) 33 <<http://www.state.gov/documents/organization/105904.pdf>> accessed 23 May 2022; U.S. Department of State, Bureau of Counterterrorism, 'Country Reports on Terrorism 2008' (*State.gov*, April 2009) 38 <<http://www.state.gov/documents/organization/122599.pdf>> accessed 23 May 2022.

<sup>128</sup> Amnesty International, 'Annual Report: China 2013' (*Amnestyusa.org*, 23 May 2013) <<http://www.amnestyusa.org/research/reports/annual-report-china-2013?page=3>> accessed 22 May 2022.

<sup>129</sup> Human Rights Watch, 'China: Religious Repression of Uighur Muslims' (*Hrw.org*, 12 April 2005) <<https://www.hrw.org/news/2005/04/12/china-religious-repression-uyghur-muslims>> accessed 24 May 2022.

## 5.2 Criminalisation of Publishing of Statements Likely to be Understood as Direct or Indirect Encouragement or other Inducement to Commit, Prepare or Instigate Acts of Terrorism

Criminalising the fabrication or dissemination of false terrorist information<sup>130</sup> represents a further expansion of the category of precursor terrorist offences. Since the tightening of the CL, the dissemination of false information has become a stand-alone clause, and the standard of sentencing is determined according to the extent of the potential for disruption to social order. It should be pointed out that an important element of this offence is ‘the serious disturbance of social order’, which refers to social panic leading to the breakdown of daily social activities.<sup>131</sup> Although the SPC has issued guidelines to guide local courts on the classification of ‘severely disrupting social order’, there are still some ‘pocket clauses’ in this guideline such as ‘other serious disruptions to social order’ or ‘other serious consequences’.<sup>132</sup> In light of this, Art. 291a also fails to specify a maximum sentence or to clearly define ‘serious consequences’, providing leeway for judicial arbitrariness.

An example is the case of Qin X,<sup>133</sup> who was dissatisfied with his personal situation and posted more than 10 messages abusing the CCP via *sina weibo* (a Chinese social media platform) which were deleted by the cyber police. In this case, it is controversial whether there is sufficient evidence to prove his messages were ‘severely disrupting social order’ and ‘causing serious consequences’. Moreover, the offender had no terrorism purpose and no connection with any terrorist organisation, and his sentence of a seven-month period of criminal imprisonment instead of administrative detention may violate the principles of proportionality and minimal criminalisation. This case demonstrates that the cyber police have absolute power to control the content of speech on social media, and the judge’s decision also reflects compliance with the

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<sup>130</sup> China’s Criminal Law, Art. 291a: ‘Whoever spreads hoaxes of explosive, poisonous or radioactive substances, of infectious-disease pathogens or of other substances, fabricates terrorist information invoking explosive, biochemical, radioactive or other threats, or intentionally disseminates terrorist information while clearly knowing that it is fabricated, thereby seriously disrupting public order, shall be sentenced to fixed-term imprisonment of not more than five years, criminal detention or public surveillance; if the consequences are serious, he shall be sentenced to fixed-term imprisonment of not less than five years.’

<sup>131</sup> Zhou Zunyou, *Balancing Security and Liberty: Counter-Terrorism Legislation in Germany and China* (Dunker & Humblot 2014) 145.

<sup>132</sup> SPC, ‘Interpretation of the Supreme People’s Court on Several Issues concerning the application of law in the trial of criminal cases involving the fabrication and intentional dissemination of false terrorist information(最高人民法院于审理编造、故意传播虚假信息刑事案件适用法律若干问题的解释)’ (*Court.gov.net*, 12 Nov 2013, < <https://www.court.gov.cn/shenpan-xiangqing-5821.html>> accessed 25 Mar 2022.

<sup>133</sup> Qin X case, (2019) Gui 0102 Xing Chu No.236 (桂 0102 刑初 236 号). Afterwards, in order to provoke and take revenge on the cyber police, Qin X fabricated false terrorist information suggesting that ‘on February 26, our East Turkistan volunteer army will launch a Jihad car crash against Shuozhou police department’, causing the public security organ of Shanxi Province to start counter-terrorism emergency measures. Ultimately, Qin was sentenced to a seven-month period of imprisonment.

SPC's principle of 'severely cracking down on the offence of fabricating or disseminating false terrorist information'.<sup>134</sup>

The purpose of introducing this clause was to curb the spread of rumours or the dissemination of fabricated information related to terrorism. What started out as an attempt to discourage libellous vitriol on the internet quickly became a powerful means through which the Chinese criminal justice system could control social media content. In 2013 the SPC published three 'model cases'<sup>135</sup> for the adjudication of spreading false terrorist information, which represented a non-binding guide for the lower courts.

HRW has argued that this provision does not clarify what constitutes a 'rumour', heightening concerns that the provision will be used to curtail freedom of speech, particularly on the internet.<sup>136</sup> HRW has also claimed that Chinese activists are often prosecuted for speech-related 'crimes' such as 'inciting ethnic hatred'.<sup>137</sup> Sophie Richardson argues that this provision is a powerful weapon for the CCP to control online speech, including the sharing of any reporting of events that departs from the official version.<sup>138</sup>

According to the Court spokesman Sun Jungong, 'No country would consider the slander of other people as 'freedom of speech''.<sup>139</sup> The CCP believes that rumours or false terrorism should not be protected by the freedom of speech prescribed by the Constitution. This means that in the eyes of the CCP, freedom of speech only protects those statements that the CCP deems to be legitimate. Therefore, the CCP has the authority to determine what speech is a 'rumour' and what speech is not. Accordingly, this provision may have a so-called chilling effect on online communities in China.

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<sup>134</sup> SPC, the 6 situations of convicted of fabricating and spreading false terrorist information (编造传播虚假信息恐怖信息 6 情形入罪) (*Njlawyers.org*, 10 October 2013)

<<http://www.njlawyers.org/info/e7a807c8712343e4acd4f6288c9fc7f0>> accessed 16 June 2022.

<sup>135</sup> Case 1: Zhang Wanqi fabricates false terrorism information case; Case 2: Pan Jun fabricates false terrorism information case; Case 3: Xiong Yi fabricates false terrorism information case (案例一: 张琬奇编造虚假信息恐怖信息案; 案例二: 潘君编造虚假信息恐怖信息案; 案例三: 熊毅编造虚假信息恐怖信息案). See 'The Supreme People's Court published 3 model cases regarding Fabricated Terror Threat' (*People net*, 29 Sep 2013) <<http://legal.people.com.cn/n/2013/0929/c188502-23074503.html>> accessed 13 Nov 2020. Until 2015 the criminal law warranted a fixed term of imprisonment of up to five years for such conduct, and therefore the three model cases saw sentences of between fifteen months and four years, depending mainly on the seriousness of the disruption of social order and on the underlying motive for disseminating the false information.

<sup>136</sup> Human Rights Watch, 'China: New Ban on 'Spreading Rumors' About Disasters' (*HRW*, Nov 2, 2015) <<https://www.hrw.org/news/2015/11/02/china-new-ban-spreading-rumors-about-disasters>> accessed 22 Sep 2019.

<sup>137</sup> For example, the case of human rights lawyer Pu Zhiqiang, who has been detained since May 2014 for a number of social media posts questioning the government's policies towards Uighurs and Tibetans.

<sup>138</sup> Human Rights Watch (n136).

<sup>139</sup> J Kaiman, 'China cracks down on social media with threat of jail for 'online rumours'' (*The Guardian*, 10 Sep 2013) <<https://www.theguardian.com/world/2013/sep/10/china-social-media-jail-rumours>> accessed 21 September 2019.

Moreover, some scholars have gone further by expanding the scope of this provision to cover the offences of recruiting cyberterrorists,<sup>140</sup> inciting participation in a cyber terrorist organisation, shielding and condoning cyber terrorist activities and increasing the penalties for cyberterrorists.<sup>141</sup>

### 5.3 Criminalisation of Terrorist Propaganda and Incitement (Art. 120c)<sup>142</sup>

The use of criminal law to regulate the incitement of terrorist activities, especially the indirect incitement of terrorist activities, is considered to be an important means of cracking down on terrorism at source. This should be considered alongside Art. 1 (a) of UN Resolution 1624 (2005), which provides that ‘all countries are called upon to take necessary and appropriate measures in accordance with their obligations under international law in order to legally prohibit incitement to commit one or more types of terror behavior’.<sup>143</sup> At first glance, Art. 120c (criminalising incitement to commit terrorism) is perfectly in line with this international standard. However, it is argued that Art. 120c is problematic for a number of reasons.

First, the terms ‘extremism’ and ‘terrorism’ in this provision are not explicitly defined. The term ‘extremism’ is frequently used in the CL, sometimes in parallel with ‘terrorism’ and sometimes alone, but CL does not clarify the difference between the two terms. As shown in Figure 1, there are 121 cases related to advocating offences (Art. 120c), 36.5% were convicted of ‘advocating terrorism’, while 27.5% were convicted of ‘advocating terrorism and extremism’. However, in no judgement did a judge clearly define these two terms, and neither was it clearly set out how to identify ‘terrorism’ or ‘extremism’ audio-visual materials. This conflation of ‘terrorism’ and ‘extremism’ violates the principle of legality. More specifically, the open-ended scope of the term ‘advocating terrorism’ and the vague definition of ‘extremism’ in this provision arouses concern, since the State may misinterpret these terms to facilitate the execution of law enforcement activities against non-violent dissent.<sup>144</sup> In judicial practice, terrorism and extremism activities may be penalised indiscriminately, violating the principle of

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<sup>140</sup> Zhai Xiufeng, ‘The mobilization characteristics and dilemma of Cyberterrorism Countermeasures (网络恐怖主义的动员特征及应对困境)’ (2017) 39 *Modern communication (Journal of Communication University of China)* 160–162.

<sup>141</sup> Zhang Lei (n110) 111–112.

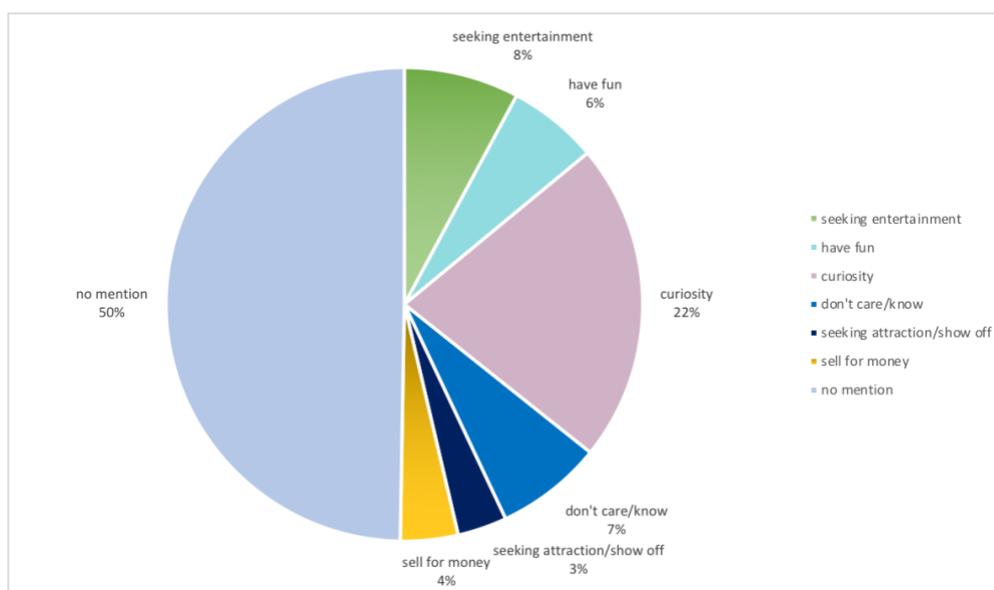
<sup>142</sup> China’s Criminal Law, Art. 120c: ‘Whoever advocates terrorism or extremism or instigates terrorist activities by way of preparing or distributing any books, audios or video materials or any other article advocating terrorism or extremism or by instructing or issuing information shall be sentenced to imprisonment of not more than five years, criminal detention, surveillance or deprivation of political rights in addition to a fine; or if the circumstances are serious, be sentenced to imprisonment of not less than five years in addition to a fine or forfeiture of property.’

<sup>143</sup> UN Security Council, Resolution 1624 (14 Sep 2005), UN Doc S/RES/1624.

<sup>144</sup> International Federation for Human Rights, ‘China’s New Counter-terrorism Law: Implications and Dangers for Tibetans and Uyghurs’ (*Refworld*, November 2016) <https://www.refworld.org/docid/582b119b4.html> accessed 8 November 2020.

proportionality. HRW has warned that this will result in human rights violations, by conflating peaceful advocates of independence with terrorists.<sup>145</sup> Inserting ambiguity into the definition of terrorism is part of the CCP's law-making strategy, with the intention to create room for the Chinese government to legitimately combat any forces that are deemed to be threats to state sovereignty and political legitimacy.<sup>146</sup>

Second, the offence of inciting terrorism is framed in a deliberately broad and vague manner. First, with respect to the *mens rea*, Art. 120c does not explicitly stipulate whether incitement to terrorism requires a deliberate intention, but judicial practice shows that even when the perpetrator has no specific intention, they can also be convicted under this provision. A 'model case' issued by the SPC is Zhang Xinghai's advocating of terrorism and extremism online.<sup>147</sup> In this case, the perpetrator was convicted for 'curiosity about terrorism related videos'.



<sup>145</sup> Human Rights Watch, 'Eurasia: Uphold Human Rights in Combating Terrorism' (*HRW*, 14 June 2006) <<https://www.hrw.org/news/2006/06/14/eurasia-uphold-human-rights-combating-terrorism>> accessed 26 Oct 2020.

<sup>146</sup> Zhang Chi (n28) 149–163.

<sup>147</sup> At the beginning of 2016 the defendant Zhang Xinghai went online to access QQ chat software and other applications through the mobile internet for the purpose of curiosity or fun (attracting others' attention and improving the number of views). He found that some people published violent horror videos and pictures on the internet, and he downloaded and saved them. After that, he uploaded some of the violent videos and pictures to the QQ space for others to watch. These videos and pictures all involved the use of extremely bloody and cruel means to endanger the lives of others and promote religious extreme thoughts. They were typical violent terrorist propaganda. The defendant Zhang Xinghai was judged to have committed a crime of terrorism and extremism, and was sentenced to two years and three months in prison and fined 5,000 RMB. Zhang Xinghai Case, 'Yue19xingchuzi, No.220 (2017)粤 19 刑初 22 号'(Court.gov.net,2017) <<http://www.court.gov.cn/zixun-xianqing-90482.html>> accessed 10 June 2018.

Figure 2: Offender's intentions related to terrorism-related offences under CL Amendment (IX) from 2015–2021

According to empirical research conducted by Mei Chuanqiang and Zang Jinlei, as long as the perpetrators carried out propaganda and incitement acts, then regardless of whether they intended to incite terrorism or not, in practice they would be punishable under Art. 120c.<sup>148</sup> In fact, in an analysis of all open-access cases (Figure 2), almost 50% explicitly mentioned that the perpetrator did not have a special intention of inciting terrorism, although they did use the internet to upload, download and distribute terrorist videos, pictures and other audio-visual materials for reasons such as curiosity, having fun, showing off and seeking attention. It could be argued that this provision criminalises the merely curious for whom a lack of special intent, without reasonable excuse, might well equate to over-criminalisation. Furthermore, according to Lucia, 'it breaches the legitimate limits of coercive state power and threatens fundamental rights, creating a chilling effect on academic and journalistic enquiry and informed public debate'.<sup>149</sup>

Third, in terms of *actus reus*, China has adopted a wide scope of incitement, including direct incitement and indirect incitement. In addition, this provision does not explicitly stipulate the use of the internet to carry out the incitement of terrorism and extremism, but according to judicial practice<sup>150</sup> individuals may be punished for such conduct regardless of whether they intended to incite terrorism either online or offline.<sup>151</sup> In the case of Aini Aisan, the conduct penalised was watching and listening to violent terrorist videos and audio material, terrorist training, inciting attacks on patriotic believers, and assigning others to carry out terrorist attacks.<sup>152</sup> In this case, the criminalisation of mere viewing of terrorist-related material online may have the risk of 'criminalising thought', which may result to over-criminalisation and violate the core principles of criminal law.

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<sup>148</sup> Mei Chuanqiang and Zang JinLei, 'Sanctions of Cyber Propaganda of Terrorism and Extremism Offences – Based on the Investigation of the Current 20 Sample Cases (网络宣扬恐怖主义、极端主义案件的制裁思路——基于对当前 20 个样本案例的考察)' (2018) 2 Journal of Chongqing University (Social Science Edition).

<sup>149</sup> L Zedner, 'Countering terrorism or criminalizing curiosity? The troubled history of UK responses to right-wing and other extremism' (2021) 50(1) CLWR57, 61.

<sup>150</sup> Mei Chuanqiang and Zang JinLei (n148).

<sup>151</sup> As of April 30, 2018, according to data from China Judgement Online, there are a total of 21 cases convicted of this crime, all of which were committed using the internet.

<sup>152</sup> China's Supreme People's Court, 'Verdict of Aini Aisan for Murder, Organisation and Planning Terrorist Attacks (艾尼·艾叁等故意杀人、组织、领导恐怖组织死刑复核刑事裁定书)' (*Court.gov.cn*, 10 Sep 2015) <<http://www.court.gov.cn/paper/content/view/id/9587.html>> accessed 8 November 2020.

Fourth, in terms of the probability of harm,<sup>153</sup> the incitement of terrorism is an inchoate offence whereby the incitement does not need to occur in practice, nor does it require the pursuit of harmful consequences.<sup>154</sup> Art. 120c does not specify whether incitement needs to be made public or targeted toward an unspecified majority. For example, in the case of Zhang Shilin<sup>155</sup> it is unclear how his behaviour resulted in any substantial seditious consequences, but he was still sentenced to a nine-month period of imprisonment and a fine of 2,000 RMB. Zhang and Zhao claim that an incitement to terrorism should need to target the public.<sup>156</sup> It could be argued that the provisions are too general and extensive, lacking in clear and detailed descriptions and constraints on crime elements, and are open to wide interpretation by judges.<sup>157</sup> Moreover, the standard of ‘serious circumstances’ and ‘particularly serious circumstances’ needs to be clarified, or there may be overly extended application in judicial practice leading to over-criminalisation.

Xiang Huai holds that judicial interpretation should set a clear standard for terrorism and extremism, to avoid excessive arbitrariness in practice and violation of the principle of legality.<sup>158</sup> Meanwhile, Du Xiaofei states that anti-terrorism legislation is suspected of being over-criminalised, which may lead to excessive state power and human rights violations.<sup>159</sup> Furthermore, Liu Renwen proposes that although the serious harm inflicted by terrorism demands early intervention by law, the basic rights of citizens cannot be sacrificed in doing so. The principles of proportionality and legality should thus be fully respected under the judicial process.<sup>160</sup>

#### 5.4 Criminalisation of a Broad Scope of Preparatory Terrorist Acts (Art. 120b)

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<sup>153</sup> The possibility of the risk of harmful consequences to the public.

<sup>154</sup> See A Ashworth, *Principles of Criminal Law* (Oxford University Press 2003) 458.

<sup>155</sup> Zhang Shilin case, (2019) Yun 01 Xing Chu No.629(云 01 刑初 629 号). Zhang Shilin posted a message in the QQ group and QQ homepage, saying: ‘Does anyone want to go to Xinjiang to join the ‘Jihad organization?’ Although he realised this might violate the law and deleted it one hour later, the cyber police still arrested him for inviting or inciting others to go to Xinjiang to participate in ‘Jihad’. IN fact he had never been to Xinjiang and had no connection with ‘Jihad’; he posted merely to show off, seek attention and for entertainment purposes. In the end the judge did not adopt his defence of a lack of terrorist intention and sentenced him to nine months’ imprisonment and a fine of 2,000 RMB.

<sup>156</sup> Zhang Mingkai, ‘Freedom of speech on the Internet (网络言论自由与刑事犯罪)’ (Tencent Research Institute, 30 Dec 2014) <<https://www.tisi.org/3415>> accessed 13 Oct 2019; see also Zhao Bingzhi, *Understanding and Application of Amendment (IX) to Criminal Law of the PRC* (China Legal Press 2016) 120.

<sup>157</sup> See Li Zhe and Zhang Yi, ‘Comparison of inciting terrorism act in China and the UK (中英煽动恐怖主义犯罪比较)’ (2016) 24(5) Journal of the National Prosecutor’s College 49.

<sup>158</sup> See Xiang Zhun, ‘Study on the Strict Criminalization of the Crime of Terrorist Activities – Based on the Criminal Law Amendment (IX) (《对恐怖活动犯罪现象的严刑化规制研究——以<刑法修正案(九)>为基点》)’ (2016) 2 Xinjiang Social Science Forum 37.

<sup>159</sup> Xiaofei Du, ‘Research on Anti-terrorism Legislation in the UK (英国反恐立法研究)’ (Master’s thesis, Shandong University 2011) 34.

<sup>160</sup> Renwen Liu, ‘The Review of Counter-terrorism Criminal Legislation in China and its Evaluation (中国反恐刑事立法的描述与评析)’ (2013) *The Jurist*, 51, 48.

China has further expanded the scope of its CL by introducing some instigation, preparation and assistance offences under Amendment (IX), which can be found in Art. 120b.<sup>161</sup> It could be criticised that Art. 120b is too ambiguous and broad, which might contravene the principles of certainty and minimal criminalisation. For instance, the previous provision of ‘financing terrorism activities’ has been amended to ‘assisting terrorism activities’, which serves to encompass various activities including training, recruiting and transporting. In addition, this article does not specify what constitutes ‘organisational training terrorism’, particularly with regard to whether the term covers moral training or is restricted to physical training for terrorism purposes. Moreover, the term ‘any other intermediate acts’ amounts to a ‘pocket clause’, which may cover almost any acts related to terrorism. These offences may be related to inchoate offences; for instance, ‘engagement’ with the planning or preparation of any terrorist activities is prosecuted at a much earlier stage than for instances of attempted crime. Likewise, the CTL has incorporated a list of similar offences with a lower degree of malice, and subjected offenders to custodial administrative sanctions.<sup>162</sup>

To avoid the occurrence of serious terrorist acts, these offences penalise suspects at a much earlier stage of planning than the ordinary criminal law of attempt.<sup>163</sup> In particular, the revised CL and CTL have classified preparatory offences in two categories that are subject to different sanctions according to the degree of ‘seriousness’.<sup>164</sup> While more ‘serious’ preparatory offences amount to criminal penalties, less ‘serious’ preparatory offences which do not constitute criminal offence are subject to administrative punishment under the CTL and the Public Security Administration Punishments Law.<sup>165</sup> However, in some judicial cases the offender may be given an administrative punishment first and then a criminal punishment due to the same act, which may contravene the principles of proportionality and *non bis in idem*. For example, in the case of Li X<sup>166</sup> and Ma Yongcheng,<sup>167</sup> the offender was given a sentence of a fifteen-day administrative detention for possession of violent terrorism-related audio-visual materials, and then was sentenced to an eight-month term of

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<sup>161</sup> China’s Criminal Law Art.120b: .(1) Preparing lethal weapons, hazardous articles or other tools for conducting terrorist activities. (2) Organizing training on terrorist activities or actively participating in training on terrorist activities. (3) Contacting any overseas terrorist organization or person for the purpose of conducting terrorist activities. (4) Making a plan or any other preparation for conducting terrorist activities.....

<sup>162</sup> China’s Counter-Terrorism Law, Art. 80 and Art. 81.

<sup>163</sup> E Li (n1)363.

<sup>164</sup> China’s Criminal Law, Art. 120b and China’s Counter-Terrorism Law, Art.5.

<sup>165</sup> Ibid.

<sup>166</sup> Li X case, (2020) Yu 03 Xing Chu No.16(豫 03 刑初 16 号). The offender, Li X, was given a fifteen-day administrative detention and a fine of 5,000 RMB for possession of violent terrorism-related audio-visual materials. Afterwards, he also was sentenced to an eight-month term of imprisonment and a fine of 5,000 RMB due to the same behaviour.

<sup>167</sup> Ma Yongcheng case, (2018) Qing 22 Xing Chu No. 1(青 22 刑初 1 号). Ma Yongcheng was given a ten-day administrative detention and a fine of 2,000 RMB. Afterwards, he was also sentenced to one year of criminal control and a fine of 1,000 RMB for the same act.

imprisonment for the same act. This is also in line with the Chinese authorities' strategy of severely cracking down on cyberterrorism.

Due to the vagueness and extensiveness of the wording of the legal provisions in CL and CTL, an arbitrary interpretation and expansion of punishment may materialise in judicial practice. For instance, there is no uniform applicable standard across the country, and different local courts give different judgements for similar cases, ranging from a fifteen-day detention to lifetime imprisonment. In the case of Wang Bingzhang, he was accused of uploading and publishing a number of terrorism propaganda articles, and organising and leading violent terrorist activities. Eventually he was sentenced to lifetime imprisonment.<sup>168</sup> However, in the case of Wang Moufeng, he was accused of downloading numerous videos showing ISIS's violent terrorism activities out of curiosity, and was finally sentenced to fifteen days in detention.<sup>169</sup> This shows that in judicial practice, different local courts interpret the seriousness of the circumstances differently so there can be a huge gap in the judgement results across provinces, which violates the principles of certainty and commensurability.

Wang Zhixiang has expressed agreement with such a preventive strategy to curb cyberterrorism at an early stage.<sup>170</sup> However, Zhang Mingkai argued that in general the provisions relating to countering terrorism in Amendment (IX) are too broad and intervene too early to protect legal interests (法益), leading to over-criminalisation and excessive punishment.<sup>171</sup> For instance, compared with the previous Art. 120 in the Criminal Law 1997, the revised Art. 120a<sup>172</sup> has added a property penalty for perpetrators. This demonstrates that China has been consistently increasing penalties to combat terrorist crimes. In addition, in the case of Xiong Yongqiang<sup>173</sup> the offender received an aggregated punishment for both possession of terrorism-related items and preparing terrorist acts.<sup>174</sup> Despite the correlation between his possession of

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<sup>168</sup> The case of Wang Bingzhang, Shenzhen Intermediate People's Court of Guangdong Province (2003)深中法刑一初字第 41 号(*Shen Zhong Fa Xing Yi Chu Zi No.41*) <[http://china.findlaw.cn/data/gsfqgw\\_4397/1/30896.html](http://china.findlaw.cn/data/gsfqgw_4397/1/30896.html)> accessed 21 May 2020.

<sup>169</sup> Zheng Shuai, 'The guy was detained for watching violent videos by 'climbing over the Great Firewall' (小伙"翻墙"看暴恐视频被拘留)' (*Qilu Evening News*, 26<sup>th</sup> Apr 2016) <<https://www.dv67.com/plus/view-142842-1.html>> accessed 15 June 2020.

<sup>170</sup> Wang Zhixiang (ed), *Interpretation and Analysis of the Amendment (VIII) to the Criminal Law* (Chinese People's Public Security University Press 2012) 173–174.

<sup>171</sup> Zhang Mingkai, 'Study on the Provisions of Terrorist Crimes in the Criminal Law Amendment (IX)' (2016) 1 *Modern Law*.

<sup>172</sup> China's Criminal Law, Art.120a: 'Any individual who provides financial support to a terrorist organization or conducts terrorist activities, or provides training on terrorist activities shall be sentenced to imprisonment of not more than five years, criminal detention, surveillance ...; or if the circumstances are serious, be sentenced to imprisonment of not less than five years...'

<sup>173</sup> Xiong Yongqiang case, (2017) Wan 01 Xing Chu No. 54(皖 01 刑初 54 号).

<sup>174</sup> In September 2015 Xiong Yongqiang downloaded 4 videos about terrorist violent activities, such as a woman being beheaded by a masked man, an ISIS Jihad song, and documents about 'how to make a bomb'. In addition, in March 2016 the offender also chatted with other supporters of 'Jihad' through QQ, calling on Muslims all over the world to launch Jihad activities and claiming to prepare weapons and

terrorism-related videos and documents and the preparation of terrorist activities, the judge ultimately sentenced him to both charges and aggregated the punishment,<sup>175</sup> rather than treating the case as only one serious charge, which demonstrates the punitive strategy towards countering cyberterrorism in Chinese judicial practice. This may also contravene the principle of proportionality and the principle of *non bis in idem*.

Art. 120b of CL lacks clarity, as previously discussed, and this may also lead to several problems in the operation of enforcement organs. For example, in the case of Lei Zhenyuan and Yang Yang,<sup>176</sup> Lei was accused of inciting Yang to participate in terrorism training and Jihad organisation. In fact, Lei merely sent a violent terrorist video clip to Yang. In this case, it is difficult to understand why the offender's behaviour of distributing videos constitutes an actual act of 'training'. In this case, because of the vague and broad scope of the offence of preparatory terrorist acts in China, a very early stage of activity was criminalised and severely punished, which violates principles of certainty, proportionality and minimal criminalisation.

Similarly, in the case of Jia Xu<sup>177</sup> the offender created a QQ group (a Chinese social media) with around 60 members, where he distributed pictures and videos related to violent terrorist acts and bloody ISIS beheadings, as well as a document related to making dynamite. However, there was insufficient evidence to prove that the perpetrator recruited the group members for terrorist purposes. In fact, he also raised the defence that he had no religious belief and no connection with terrorism, but rather committed the acts out of curiosity, a desire to show off, and a wish to attract others' attention to satisfy his own sense of vanity. Although the judge accepted his defence and believed that there was no evidence to prove his behaviours had caused serious consequences, in the end he still was sentenced to an eighteen-month term of imprisonment and a fine of 5,000 RMB.

Labelling the offenders' behaviours in the two cases above as 'training' or 'recruiting' or other preparatory acts for terrorism purposes seems highly dubious. It is also difficult to deduce the criteria whereby the judge determined the measurement of the severity

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make bombs. He also bought bomb-making materials and conducted experiments.

<sup>175</sup> The judge convicted Xiong Yongqiang of possession of terrorism-related items and sentenced him to one year of imprisonment and a fine of 2,000 RMB. He was also convicted of preparing to commit terrorist activities and sentenced to two years' imprisonment and a fine of 5,000 RMB. After aggregating these two charges, the judge decided that the offender should serve a total of two years and six months' imprisonment and a fine of 7,000 RMB.

<sup>176</sup> Lei Zhenyuan and Yang Yang case, (2017) Yun 01 Xing Chu No.122(云 01 刑初 122 号). Lei offered the defence that he was only 19 years old and had no terrorism purposes and no connection with terrorist organisations, but had acted out of vanity, bragging and lying to Yang. The judge did not accept this defence, and Lei was eventually convicted of inciting terrorist activities and sentenced to a 21-month term of imprisonment and a fine of 3,000 RMB.

<sup>177</sup> Jia Xu, (2016) Liao 02 Xing Chu No.158(辽 02 刑初 158 号).

of the 'circumstances'. Essentially, there are no official documents providing instructions on how the punishment should be applied. Given this vague language and uncertain standards, people cannot predict whether their actions will violate the law, and this in turn violates the legal principles of certainty.

Such vague standards may result in the Chinese government using legislation as a tool to over-criminalise terrorism-related offences. Some commentators believe that these vague laws were designed to give the authorities more flexibility and leeway to interpret and implement the laws.<sup>178</sup> For example, the authorities in charge may apply a case-by-case approach to interpreting the law.<sup>179</sup> Such an interpretative approach may result in selective prosecution; indeed, regulators may choose to enforce the law more harshly against disobedient people. Therefore, a more fundamental concern in terms of the new law is probably not the vagueness of its language, but rather the fact that the country has few democratic checks and balances.<sup>180</sup> In view of this, many grey areas are generated even when the law is enforced.

Based on the investigation presented above, the relevant provision may be deemed vague, which could amount to a deficiency with respect to the principle of legality. As criminal law is directly related to the basic rights and liberties of the people, it must be clear and should not rely heavily upon different courts' interpretations.

### **5.5 Overly Broad Offence of Collection of Information or Possession of Items for Terrorism Purposes**

Another precursor offence is the possession of any book, audio or video material, or any other items related to advocating terrorism or extremism (Art. 120f).<sup>181</sup> According to data from China Judgments Online, from 2016 to 2021 there have been a total of 26 cases concerning the possession of terrorist and extremist articles. In all such cases, the perpetrators used the internet or social media to download or upload videos.<sup>182</sup> This shows that terrorists are now more inclined than ever before to use the internet to acquire or possess terrorism-related materials.

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<sup>178</sup> C Clover and SF Ju, 'China Cyber Security Law Sparks Foreign Fears' (*Financial Times*, 7 Nov 2016) <<https://www.ft.com/content/c330a482-a4cb-11e6-8b69-02899e8bd9d1>> accessed 24 Oct 2020.

<sup>179</sup> E Iasiello, 'China's Cyber Initiatives Counter International Pressure' (2017)10(1) JSS 1, 8.

<sup>180</sup> Ibid.

<sup>181</sup> China's Criminal Law, Art. 120f: 'Whoever illegally holds any book, audio or video materials or any other article while obviously aware that it advocates terrorism or extremism shall, if the circumstances are serious, be sentenced to imprisonment of no more than three years, criminal detention or surveillance in addition to a fine, or be only sentenced to a fine.'

<sup>182</sup> China Judgments Online, <<http://wenshu.court.gov.cn/website/wenshu/181217BMTKHNT2W0/index.html?pagelD=93814fce018f425935c85a6e4a6022c3&s21=%E6%81%90%E6%80%96%E4%B8%BB%E4%B9%89>> accessed 1<sup>st</sup> Oct 2019.

Similar to inciting terrorism, the conviction threshold for this crime is very low. For example, in the case of Guo Wei, as long as the perpetrator held audio or video materials or other items related to terrorism, he was deemed to be committing an offence under this provision, regardless of any terrorism-related intention and the consequences of holding such materials.<sup>183</sup> Moreover, Art. 120f does not require a reasonable suspicion that the possession be related to committing, preparing, inciting or other acts connected with terrorism, which may violate principles of legality and minimal criminalisation. For example, in the case of Yang XX<sup>184</sup> and Xu Changcai,<sup>185</sup> the judge held the view that as long as the offender possessed the terrorism-related items with knowledge of their content, it could be presumed that the perpetrator's *mens rea* was an intention for terrorism purposes, regardless of their motivation (such as curiosity).

In fact, after analysis of all 64 cases of possession of terrorism-related items, the interesting thing is that none of the perpetrators had specific terrorism or other political or religious purposes, but were acting out of curiosity,<sup>186</sup> seeking excitement,<sup>187</sup> or having fun.<sup>188</sup> Moreover, the majority of the perpetrators are not well-educated, and did not realise that possession of terrorism-related items violated criminal law.<sup>189</sup> Nevertheless, the perpetrators were ultimately sentenced to relatively heavy punishments, up to three years and six months' imprisonment, which may violate principles of proportionality and minimal criminalisation.

Moreover, it is difficult to clarify the term 'serious circumstances', which may lead to arbitrariness in the application of convictions and penalty measures.<sup>190</sup> Due to the ambiguous definition of terrorism and different criteria for measuring penalties, it is likely that similar offences could result in different sentences. For example, although the central authority provides basic legal documents to guide local authorities in practice, the vague criteria determining the 'circumstances' of the crimes allows local

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<sup>183</sup> Guo Wei was accused of illegal possession of material propagating terrorism and extremist articles. The perpetrator downloaded propaganda videos, inciting and violent materials from the internet and uploaded them to the Baidu cloud account and a QQ group, and was finally sentenced to two years in prison in 2018; '闽 05 刑初字第 65 号 (Min 05 Xing Chu Zi No.65)' (*China Judgement Online*, 2018) <<http://wenshu.court.gov.cn/website/wenshu/181107ANFZ0BXSK4/index.html?docId=367f66fef4dd4444a6fea992009cb6e2>> accessed 20 Sep 2020.

<sup>184</sup> Yang XX case, (2018) Hu 0115 Xing Chu No.647 (沪 0115 刑初 647 号).

<sup>185</sup> Xu Changcai case, (2018) Yun 2503 Xing Chu No. 159 (云 2503 刑初 159 号).

<sup>186</sup> For example, see the case of Zhang Xin, (2017) Lu 1326 Xing Chu No. 185 (鲁 1326 刑初 185 号).

<sup>187</sup> See the case of Qin Xiaowu, (2017) Gui 0203 Xing Chu No.372 (桂 0203 刑初 372 号).

<sup>188</sup> See the case of Wang Xiaonan, (2017) Jing 01 Xing Chu No.47 (京 01 刑初 47 号).

<sup>189</sup> For example, see the Zhao Ying case, (2017) Zhe 02 Xing Chu No.20 (浙 02 刑初 20 号); the Meng Qingchun case, (2020) Lu16 Xing Chu No.4 (鲁 16 刑初 4 号); and the Song Xiaoming case, (2017) Qing 01 Xing Chu No.30 (青 01 刑初 30 号).

<sup>190</sup> J Ahezabay (n95)11.

authorities to interpret the law as they see fit.<sup>191</sup> For example, in Xinjiang province, Zhu XX<sup>192</sup> was given exemption from criminal punishment for downloading terrorism-related videos and pictures from *sina weibo*, while in a similar case in Anhui province Zhang Lei<sup>193</sup> was sentenced to two years' imprisonment for collecting and holding terrorism-related video clips and pictures.

The legislation gives the judiciary power and pressure to identify the severity of the 'circumstances' in order to maintain justice.<sup>194</sup> Judicial organs should abide by the principle of 'balancing leniency with severity',<sup>195</sup> but in the context of counter-terrorism some cases have been severely punished merely for being suspected of links with terrorism,<sup>196</sup> which reflects China's tendency to combat terrorism by applying the principle of strictness. For instance, in the case of Wang Xiaonan<sup>197</sup> the offender was sentenced to a seven-month term of imprisonment and a fine of 1,000 RMB merely for possession of six terrorism-related pictures, downloaded out of curiosity and seeking entertainment.

Furthermore, in practice there is no clear boundary or criteria to determine the handing down of criminal or administrative punishment for the same or similar offences. For example, in the Jiang X case<sup>198</sup> in Inner Mongolia province the defendant was sentenced to three years and six months' imprisonment for possession of terrorism-related videos and disseminating them via a WeChat group, while in Shanxi province Zhu XX<sup>199</sup> was given 15 days in detention and a fine of 2,000 RMB for the same offence. This may lead to violations of the principles of equality and proportionality. Moreover, this 'one size fits all' criminalisation of the offence of possession of terrorism-related video clips or pictures without any terrorism intention or purpose may result to over-criminalisation. This offence should more properly be given administrative punishment rather than criminal punishment. Moreover, it is argued that 'the imposition

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<sup>191</sup> For example, an offender in Hunan province was given 13 days in detention and an 8,000 RMB fine for uploading terrorist videos to a WeChat group, while in a similar case an offender in Sichuan province was given 10 days in detention, and another offender in Shanxi province was given 5 days in detention for uploading terrorist video clips. See Jiangxi Provincial Public Security Department, 'Public Security Services Remind You: Do Not Wait until Arrest to Learn This Is Illegal (公安提醒:不要等到被抓了才知道这是在犯法)' (*Jiangxi Public Security*, 5 Jan 2017) <<http://www.jxga.gov.cn/news/jingshijujiao/2017-01-05/38319.html>> accessed 24 Oct 2020; see also Zhang Chi(n28) 169–170.

<sup>192</sup> Zhu XX case, (2016) Xin 2302 Xing Chu No.59 (新 2302 刑初 59 号).

<sup>193</sup> Zhang Lei case, (2017) Wan 01 Xing Chu No.57 (皖 01 刑初 57 号).

<sup>194</sup> Zhang Chi(n28) 191.

<sup>195</sup> Further details on 'balancing leniency with severity' can be found in section 5.6.

<sup>196</sup> Zhang Chi, *ibid*.

<sup>197</sup> Wang Xiaonan case, (2017) Jing 01 Xing Chu No.47 (京 01 刑初 47 号).

<sup>198</sup> Jiang X case, (2018) Nei 04 Xing Chu No.10 (内 04 刑初 10 号).

<sup>199</sup> J Wu, 'A man in Yan'an was detained for 15 days and fined on suspicion of possessing and disseminating violent terrorist audio and video (涉嫌持有、传播暴恐音视频,延安一男子被行拘 15 日并处罚款)' (*Sina*, 10 December 2019). <<https://news.sina.com.cn/s/2019-12-10/doc-iihznzahi6486864.shtml>> accessed 17 June 2022.

of strict liability without any requirement of culpability arguably offends against the presumption of innocence'.<sup>200</sup>

As noted above, China operates a 'blanket' criminalisation of all cases of possession of terrorism-related items merely out of curiosity or seeking entertainment, without any intention of committing, preparing, inciting, or other acts connected with terrorism. This raises a problem of whether China's legal responses to cyberterrorism, particularly those that target minor cyberterrorism offences, are necessary, proportionate, effective and in compliance with fundamental rights. Moreover, criminalising the curiosity of those who download or possess terrorism-related videos or pictures may not constitute legitimate criminalisation, and 'overextends state power and risks chilling effects on freedom of speech, association, academic freedom, journalistic enquiry and informed public debate – all of which are the lifeblood of a liberal democracy'.<sup>201</sup>

## 5.6 Aggravated Punishment for Terrorism

The development of China's counter-terrorism laws is further exemplified by the penal arrangements for terrorist offences under the CL. According to Liu Renwen and Ni Chunle, China's anti-terrorism laws are characterised by emergency reaction and a tendency to take strict and stern measures.<sup>202</sup>

First, in Amendment (III) the sentencing range for those who organise and lead a terrorist organisation was increased from 3 to 10 years to a mandatory minimum of 10 years.<sup>203</sup> Additionally, legal punishments for organisers, leaders and active participants were distinguished, and statutory sentences for the former two were aggravated.<sup>204</sup> This shows that Chinese CL has tended to use increasingly severe penalties to combat offences related to terrorist organisations.

Second, a 'terrorism connection' is also an aggregate offence, and carries the maximum punishment of the death penalty for ringleaders or participants in a terrorist

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<sup>200</sup> See Andrew Ashworth and Lucia Zedner, *Preventive Justice* (OUP, Oxford 2014) 99; Joanna Simon and Lucia Zedner, 'Countering Terrorism at the Limits of Criminal Liability' in Benjamin Vogel and Matthew Dyson (eds), *The Limits of Criminal Law* (OUP, Oxford 2018) 416–17.

<sup>201</sup> L Zedner, 'Countering terrorism or criminalizing curiosity? The troubled history of UK responses to right-wing and other extremism' (2021) 50(1) *CLWR* 57, 57.

<sup>202</sup> Renwen Liu, 'A Description and Analysis of Chinese Anti-terrorism Criminal Legislation' (2015) 3 *Renmin Chinese Law Review*, 131; Ni Chunle, 'The Justification and Risks of Preventive law: The Review of Anti-terrorism Criminal Legislation ("预防性"正义及其风险——中国反恐刑事立法审视)' (2018) 2 *Journal of Shanghai University of Political Science and Law*, 99.

<sup>203</sup> China's Criminal Law, Art. 120 Para. 1: 'Whoever organizes or leads a terrorist organization shall be sentenced to a fixed-term imprisonment of over 10 years or life imprisonment; those who actively participate in a terrorist organization shall be sentenced to a fixed-term imprisonment ranging from 3 to 10 years; other participants shall be sentenced to a fixed-term imprisonment of less than 3 years, criminal detention, public surveillance or deprivation of political rights.'

<sup>204</sup> Zhou Zunyou (n131) 140.

organisation.<sup>205</sup> For example, in the case of Qin Xiaowu<sup>206</sup> and Jiang X<sup>207</sup>, the offenders were given aggregated punishments for possessing terrorism-related audio-visual materials and then posting them via WeChat group, even though these two charges were closely connected.

Third, Amendment (VIII) further increased the penalties available to curb terrorist activities and expanded the scope of the definition of ‘special recidivism’,<sup>208</sup> stipulating that terrorist activists are part of the practice of establishing ‘special recidivists’.<sup>209</sup> According to Art. 66, such ‘special recidivists’ relating to terrorism are now subject to heavier punishment compared to non-terrorism offences. Fighting terrorism by increasing penalties has also been one of the key elements of the punitive anti-terrorism strategy in China. According to Wang, since terrorists’ cyber activities are anonymous and likely to cause social panic, such activities should be punished severely as a means of prevention.<sup>210</sup>

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<sup>205</sup> China’s Criminal Law, Art. 120 Para.2: ‘Whoever commits the crime in the preceding paragraph and also commits murder, explosion, or kidnapping shall be punished by an aggregate sentence.’

<sup>206</sup> Qin Xiaowu case, (2017) Gui 0203 Xing Chu No.372 (桂 0203 刑初 372 号).

<sup>207</sup> Jiang X case, (2018) Nei 04 Xing Chu No.10 (内 04 刑初 10 号). Jiang X downloaded some violent terrorism-related audio-visual materials out of curiosity and uploaded them to attract others’ attention. The judge determined that Jiang X had been convicted of advocating terrorism and sentenced him to a three-year term of imprisonment and a fine of 3,000 RMB. He was also convicted of possession of terrorism-related audio-visual materials and sentenced to one year of imprisonment and a fine of 1,000 RMB; the judge aggregated these two charges and finally determined that Jiang X should serve three years and 6 months and pay a fine of 4,000 RMB.

<sup>208</sup> Applicable solely to terrorism-related crimes, organised crime and crimes that threaten national security, special recidivism refers to circumstances where an offender recommits an offense at any time after serving the sentence or being granted an absolution, after which the recidivist is subject to a sterner punishment than ordinary re-offenders.

<sup>209</sup> China’s Criminal Law, Art.66. The old provision provided that only criminals endangering national security constituted special recidivists, but the new provision was expanded to state that all criminals engaged in ‘jeopardizing the national security, terrorist activities or organized crimes’ are to be treated as recidivists. These special recidivists should be given a heavier punishment.

<sup>210</sup> Wang Zhixiang (n170).

Numbers	Offence Types	Punishment (Minimum)	Punishment (Maximum)
1	advocating extremism	6-month imprisonment	8-month imprisonment
2	advocating terrorism	12-month control	24-month imprisonment
3	advocating terrorism and extremism	exempt from criminal punishment	42-month imprisonment
4	possession of terrorism- and extremism-related items	A fine of RMB 10,000	30-month imprisonment
5	possession of terrorism-related items	3-month criminal detention	12-month imprisonment
6	possession of extremism-related items	6-month imprisonment	22-month imprisonment
7	incitement to commit terrorist acts	N/A	9-month imprisonment
8	prepare to commit terrorist acts	N/A	30-month imprisonment
9	fabrication and dissemination of false terrorist information	N/A	7-month imprisonment

Figure 3: Sentence for different types of offence under CL Amendment (IX) from 2015–2021

Fourth, the counterterrorism legal framework still relies on a punitive strategy. If the continuously revised and promulgated law on terrorism is the first line of defence against terrorism, then the second line of defence is the application of harsh punishments and sentencing for terrorism-related offences in judicial practice in China. As shown in Figure 3, the punishment of terrorism precursor offences is relatively harsh, even though the offenders may have no terrorism intention or cause any serious consequences. Among these, only one case has ever been judged to be exempt from criminal punishment. In the above analysis, in the context of anti-cyberterrorism, punitiveness is seen in the context of the intensification of laws (such as CL, CTL CSL) and their derivate punishments, specifically in extending the duration of sentencing in law and increasing the severity of punishment in practice.

Some scholars have claimed that the Chinese government's main strategy in countering terrorism before 2001 had been punitive.<sup>211</sup> Driven by the State's enactment of the 'strike hard' campaigns to combat crime in the reform era (1980s–1990s),<sup>212</sup> the Chinese government relied heavily upon punitive<sup>213</sup> strategies to

<sup>211</sup> EVW Davis, 'Uyghur Muslim Ethnic Separatism in Xinjiang' (2008) 35(1)AAAR15,16; M Wayne, 'Inside China's War on Terrorism' (2009) 18(59)JCC 249, 249–150; Nicolas Becquelin, 'Criminalizing Ethnicity: Political Repression in Xinjiang' (2004) 39(I) CRF, 1; M Vicziany, 'State Responses to Islamic Terrorism in Western China and Their Impact on South Asia' (2010) 12(2) CSA 243, 244–245 ; L Steele and R Kuo, 'Terrorism in Xinjiang?' (2007) 6(1) Ethnopolitics 1, 11–12.

<sup>212</sup> During the reform period, three nationwide 'strike hard' campaigns were initiated in 1983, 1996, and 2001 respectively, with numerous small-scale campaigns launched at the local level.

<sup>213</sup> Punitiveness is a criminological concept of assessing punishment, which refers to connotations of excess – that is, 'the pursuit of punishment over and above that which is necessary or appropriate'. Rogue Matthews, 'The Myth of Punitiveness', (2005) 9(2) Theoretical Criminology 179.

combat offences that endangered national security and social stability. Repressive measures including arbitrary arrests, public sentencing, swift adjudication and harsh punishments<sup>214</sup> were employed by law enforcement agencies to generate a deterrent effect, and to educate the public that terrorism would not be tolerated in Chinese society.<sup>215</sup>

Furthermore, analysis of the evolution of anti-terrorism legislation, as shown in the above-mentioned aggravated punishments, demonstrates that China has developed an even more punitive anti-terrorism legal framework in the post-2001 era. Following 9/11, anti-terrorism legislation in most countries is contingent,<sup>216</sup> and China is no exception. For example, as many as nine provisions in Amendment (III) adopted, all of which refer to terrorist crimes, where it is clearly stated that they are ‘targeted to some new situation of the terrorist activities that have recently emerged, and in order to crack down on terrorism strictly’.<sup>217</sup> It seems clear that no matter the breadth or intensity of criminal law intervention, there is an obvious attitude of harsh punishment and strictness. For example, in the case of Zhang Yonggui<sup>218</sup> the offender was sentenced to a 14-month term of imprisonment and a fine of 2,000 RMB for posting only one terrorism-related video clip on a WeChat group.

In addition, according to a working report the SPC severely punishes violent terrorists and crimes that endanger national security.<sup>219</sup> The SPC report highlighted that ‘crimes of endangering national security and violent terrorism should be punished severely’ and required that courts should ‘increase penalties for inciting separatism, organising, leading and participating in terrorist organisations, and disseminating terrorism videos’.<sup>220</sup> According to statistics from the SPC there were 558 cases involving incitement to separatism, violent terrorist attacks and so on in 2014, an increase of 14.8% compared with 2013, and 712 criminals were sentenced (up by 13.3%

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<sup>214</sup> For example, the death penalty and life imprisonment.

<sup>215</sup> N Becquelin, ‘Criminalizing Ethnicity: Political Repression in Xinjiang’ (2004) 39(I) CRF, 1.

<sup>216</sup> A common feature of these emergency legislations is the expansion of the power of the police and intelligence services to obtain information about terrorists and terrorist activities. Although strict conditions and procedures are imposed on the exercise of these powers, legislators are still not comfortable, so some countries have set up ‘sunset clauses’ such as the ‘Anti-Terrorism Law’ enacted in Germany in 2001, which require the legislature to review the situation to decide whether to extend the applicable period of these laws. In addition, in many countries anti-terrorism laws as part of an emergency response can also be restricted by launching a constitutional review mechanism. For more details see Zhou Zunyou, ‘Development of German Anti-terrorism Legislation (德国反恐立法的发展)’ (Proceedings of the Symposium on Social Stability and Anti-Terrorism (社会稳定与反恐斗争学术研讨会论文集), Beijing, 13 October 2012).

<sup>217</sup> See Zhao Bingzhi (ed), *The Latest Understanding of the Criminal Law Amendment (刑法修正案最新理解适用)* (China Legal Publishing Press 2009) 366.

<sup>218</sup> Zhang Yonggui case, (2019) Wan 0881 Xing Chu No. 162 (皖 0881 刑初 162 号).

<sup>219</sup> Zhou Qiang, ‘Work Report of the Supreme People’s Court 2018 (最高人民法院工作报告 2018)’ (*Court.Gov.cn*, 25 March 2018) <<http://www.court.gov.cn/zixun-xiangqing-87832.html>> accessed 17 Oct 2020.

<sup>220</sup> *Ibid.*

compared with 2013).<sup>221</sup> By 2015 courts at all levels in the country had concluded a total of 1,084 crimes against national security and violent terrorist crimes (up by 94.3% year-on-year), and sentenced 1,419 criminals (up by 99.3% year-on-year).<sup>222</sup> This demonstrates that the prosecution of terrorist and extremist crimes have shown an upward trend in China in recent years. At the same time, it also reflects the country's efforts to increase punishment and expand the scope of criminalisation. To deal with any attempts to subvert state power and create ethnic contradictions, the Chinese government's policy is to fight early and not allow such activity to spread, and to prevent terrorism and extremism from gaining any momentum.

This is not only exemplified by the courts' increased imposition of the severest sanctions (e.g. the death penalty and life imprisonment) in the context of the State's pursuit of 'social harmony' by adopting the 'Balancing Leniency and Severity (BLS 宽严相济)' policy, but is also demonstrated by the ways in which terrorist offenders are tried and sentenced in the adjudicative process.<sup>223</sup> BLS is a new crime control strategy which was promoted by the Chinese SPC and which has served as the country's basic criminal justice policy since 2005. It reflects the authorities' attempt to abide by the penal policy of BLS while sentencing serious crimes in a more nuanced manner, as it involves 'the application of, when appropriate, relatively harsher penalties in some minor cases and relatively lighter penalties in some serious cases (严中有宽, 宽以济严, 宽中有严, 严以济宽)'.<sup>224</sup>

With the strengthening of its anti-terrorism laws since 2001, China has justified criminalisation on strong legal grounds.<sup>225</sup> Therefore, criminalisation reduces penal punitiveness by penalising terrorist offenders in a rational manner. More importantly, in criminalising terrorist offenders, harsh penalties are not applied as indiscriminately and erratically as they might be during sporadic crackdowns.<sup>226</sup>

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<sup>221</sup> Zhou Qiang, 'Work Report of the Supreme People's Court 2015 (最高人民法院工作报告 2015) (*People.net*, 12 March 2015) <<http://legal.people.com.cn/n/2015/0313/c42510-26688031.html>> accessed 15 July 2018.

<sup>222</sup> Zhou Qiang, 'Work Report of the Supreme People's Court 2016 (最高人民法院工作报告 2016) (*China.net*, 15 March 2017) <[http://www.china.com.cn/legal/2016-03/21/content\\_38072747.htm](http://www.china.com.cn/legal/2016-03/21/content_38072747.htm)> accessed 15 July 2018.

<sup>223</sup> E Li (n1) 375.

<sup>224</sup> S Trevaske, *The Death Penalty in Contemporary China* (Springer 2012) 214.

<sup>225</sup> Over the past two decades the Chinese government has revised and passed a spate of laws on counter-espionage, national security, national intelligence, counter-terrorism, cybersecurity and foreign NGO management, not to mention the two instrumental pieces of legislation – the Criminal Law and the Criminal Procedure Law. Such interconnected packages of counter-terrorism, national security and law enforcement legislation repeatedly obligate citizens, organisations and companies to provide cooperation and support for police activities that tackle terrorism. See MS Tanner, 'Beijing's New National Intelligence Law: From Defense to Offense' (*Law Fare*, 20 Jul 2017) <<https://www.lawfareblog.com/beijings-new-national-intelligence-law-defense-offense>> accessed 8 November 2020.

<sup>226</sup> Human Rights Watch (n69). In this report four terrorism-related cases handled in 2016 were observed and the sentences of seven offenders varied from case to case, ranging from the exemption of criminal penalties to three years of imprisonment.

However, the increased use of 'soft' penalties for certain crimes<sup>227</sup> does not necessarily indicate the reduced application of heavy punishments.<sup>228</sup> Rather, the debate about heavy punishment has shifted to the question of whom to 'strike hard', thereby confining severe punishment to a smaller group of the 'most serious criminals'.<sup>229</sup> For example, severe sanctions have not only persisted, but have been upgraded to deal with terrorism-related crimes because of their heinous nature and threat to national security. The unified sentencing model<sup>230</sup> has moved on from the rigorous justice of the 'strike hard' era, but is now driven by nationally standardised and strengthened sentencing rules to continue the fight against terrorism in the new era.<sup>231</sup>

Using criminalisation rather than the 'strike hard' campaign or crackdowns reflects the CCP's pursuit of a rule of law strategy for counter-terrorism.<sup>232</sup> In particular, this explanation shows that China's due process is not devised to strike a balance between civil liberties and national security in comparison to many counter-terrorism law developments in Western jurisdictions.<sup>233</sup> In short, it is more precisely a process that justifies and legitimises the use of state authoritarian power to penalise acts that endanger the Party's political stability, concealing this under a cloak of legality.

## 6. Prevention and the Pre-emptive Tendency

China's general strategy for countering terrorism encompasses not only ex-post approaches to terrorism, which focus on generating the effects of deterrence and denunciation, but also ex-ante responses to combating terrorism which aim to disrupt and prevent terrorism.<sup>234</sup> This preventive tendency can be analysed from the following substantive, political and practical perspectives.

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<sup>227</sup> According to Art. 80 and 81, the punishment is 10 to 15 days' detention.

<sup>228</sup> For example, in the case of Wang Bingzhan, he was accused of uploading and publishing a number of terrorism propaganda articles, and organising and leading violent terrorist activities. Eventually he was sentenced to lifetime imprisonment. The case of Wang Bingzhan, Shenzhen Intermediate People's Court of Guangdong Province (2003) (深中法刑一初字第 41 号(*Shen Zhong Fa Xing Yi Chu Zi No.41*)) <[http://china.findlaw.cn/data/qsflgw\\_4397/1/30896.html](http://china.findlaw.cn/data/qsflgw_4397/1/30896.html)> accessed 21 May 2020.

<sup>229</sup> S Trevaskes, 'The Shifting Sands of Punishment in China in the Era of 'Harmonious Society'' (2010) 32(3) LP 332, 341.

<sup>230</sup> All nationwide courts should comply with BLS when sentencing.

<sup>231</sup> For a detailed discussion on China's penal shift in the 2000s, see E Li, 'The Cultural Idiosyncrasy of Penal Populism – The Case of Contemporary China' (2015) 55 BJC 146–163; S Trevaskes, 'The Shifting Sands of Punishment in China in the Era of 'Harmonious Society'' (2010) 32(3) LP 332, 341.

<sup>232</sup> S Trevaskes and E Nesossi, 'Control By Law' in J Golley, L Jaivin and L Tomba (eds), *Control: China Story Yearbook 2016* (ANU Press 2017).

<sup>233</sup> See Fu Hualing, 'China's National Security Law: The Danger of an All-Encompassing National Security Framework' (*Human Rights in China*, 31 August 2015) <<https://www.hricina.org/en/cina-rights-forum/chinas-national-security-law-danger-all-encompassing-national-security-framework>> accessed 20 October 2020.

<sup>234</sup> Enshen Li, 'Fighting the Three Evils: A Structural Analysis of Counter-Terrorism Legal Architecture in

From a substantive law perspective China has tended toward a preventive anti-terrorism legal framework, typified by the Chinese government's move to criminalise an array of new terrorism offences and intensify the sentencing and punishment of perpetrators. Furthermore, in China's counter-terrorism law reforms the preventive rationale is articulated in the CTL, which states that 'counter-terrorism efforts adhere to the principles of combining specialized efforts with the mass line, emphasizing prevention, combining punishment and prevention and anticipating the enemy's moves, and remaining proactive'.<sup>235</sup> Depicted as a 'preventive law' in tandem with the CL that punishes those who have committed terrorism offences, the CTL has developed a pre-emptive framework to identify, manage and control the threat that terrorism represents.<sup>236</sup> Compared to the CL, which criminalises preparatory offences, the CTL goes further by punishing grassroots organisations and civilians who have responsibilities to cooperate with the authorities to prevent acts of terrorism.

To pre-empt terrorism in today's high-tech era, telecommunication service operators, internet service providers (ISPs) and other institutions in China are now required to 'provide technical interfaces, decryption and other technical support, and assistance to public security organs and state security organs undertaking investigation of terrorist acts in accordance with the law'.<sup>237</sup> Pursuant to Art. 19 of CTL, ISPs are further required to 'put into practice network security systems and information content monitoring systems, technical prevention and safety measures, to avoid the dissemination of information with terrorist or extremist content'.<sup>238</sup> By the same token, ISPs as well as telecommunications, finance, accommodation and car rental industries are obliged to undertake ID checks on clients.<sup>239</sup> According to Art. 84 of the CTL, if a company does not comply with its legal obligations, it can be heavily fined or may even face up to 15 days of administrative detention.<sup>240</sup> In a speech at the Telephone and Television Conference with the National Counter-terrorism Leading Group in January 2016, the Secretary of the Central Political and Legal Committee, Guo Shengkun, reiterated the importance of proactive policing and pre-emption in China's counter-terrorism legal arsenal.<sup>241</sup>

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China' (2019) 33(3) EILR 330.

<sup>235</sup> China's Counter Terrorism Law (CTL), Art.5.

<sup>236</sup> Xie Wei and Zhang Lujing, 'Experts State: A People's War on Terrorism Serves as a Top Level of Counter-terrorism Approach Since the Founding of PRC (专家称:全民反恐是建国以来反恐反暴的最高级别)' (CCP News Net, 10 June 2014) <http://theoiy.people.com.cn/n/2014/0610/c40531-25129607.html> accessed 20 Oct 2020.

<sup>237</sup> CTL, Art. 18, 85–93.

<sup>238</sup> CTL, Art. 19.

<sup>239</sup> E Li (n1) 367.

<sup>240</sup> CTL, Art. 84.

<sup>241</sup> Xinhua, 'National Counter-terrorism Small Group and the Department of Public Security Jointly Held TV and Telephone Meeting (国家反恐领导小组和公安部联合召开电视电话会议)' (*Xin Hua News Agency*, 17 Jan 2016) [http://news.xinhuanet.com/politics/2016-01/17/c\\_1117800329.htm](http://news.xinhuanet.com/politics/2016-01/17/c_1117800329.htm) accessed 23 Sep 2020.

From the policy perspective, the guiding principle of counterterrorism in China is also demonstrated in its prevention strategy. For example, Xi Jinping's speech at the 14th Collective Study Sessions (26 April, 2014) of the Politburo set the tone for the CCP's position on counter-terrorism. Xi stated, '[We] must take decisive action, maintain a high level of pressure, and resolutely crush the arrogance of terrorists',<sup>242</sup> clearly demonstrating the determination of the CCP to fight terrorism and maintain stability.<sup>243</sup> Xi's speech as a guiding principle of counterterrorism also runs through China's anti-terrorism legal framework. For instance, as discussed above, anti-terrorism legislation and enforcement also reflect this guiding principle, such as an overly broad and vague definition of terrorism, over-criminalisation, harsh punishment for terrorism and an expansion of executive powers.

In addition, Xi Jinping proposed an Overall Security Outlook<sup>244</sup> at the first meeting of the National Security Commission in April 2014, which became the guiding principle of China's counter-terrorism strategy and legislation.<sup>245</sup> Xi Jinping also pointed out at the first internet conference in April 2018 that 'without cyber security, there would be no national security'.<sup>246</sup> This implies that the CCP has incorporated the prevention and control of cyberterrorism into the overall national security system.<sup>247</sup> Due to their self-alignment with the CCP's counter-terrorism principle, many Chinese scholars have justified the rationale behind preventive anti-terrorism laws and practices.<sup>248</sup> Zhang

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<sup>242</sup> Xinhua, 'Xi Jinping: Making Violent Terrorists 'Like Rats Scurrying across a Street, with Everybody Shouting 'Beat Them' (习近平:要使暴力恐怖分子成 为'过街老鼠 人人喊打)' (*Xinhua*, 26 April 2014) <[http://news.xinhuanet.com/politics/2014-04/26/c\\_1110426869.htm](http://news.xinhuanet.com/politics/2014-04/26/c_1110426869.htm)> accessed 26 Aug 2020.

<sup>243</sup> Zhang Chi (n28) 145.

<sup>244</sup> The Overall Security Outlook (综合安全观, *zonghe anquan guan*) includes: external security, internal security, security of national territory, citizen's security, traditional and non-traditional security, development and stability.

<sup>245</sup> Xi Jinping, 'Xi Jinping: Adhere to the Overall Security View and Walking the Road of Chinese National Security with Chinese Characteristics (习近平:坚持总体国家安全观,走中国特色国家安全道路)' (*Xinhuanet*, 15 April 2014) <[http://news.xinhuanet.com/2014-04/15/c\\_1110253910.htm](http://news.xinhuanet.com/2014-04/15/c_1110253910.htm)> accessed 26 Aug 2020.

<sup>246</sup> Xi Jinping, 'Without cyber security, there would be no national security (没有网络安全就没有国家安全)' (*cac.gov*, 20 Apr 2018) <[http://www.cac.gov.cn/2018-12/27/c\\_1123907720.htm](http://www.cac.gov.cn/2018-12/27/c_1123907720.htm)> accessed 25 Aug 2020.

<sup>247</sup> Zhang Lei (n110) 3, 97–98; Li Tao, 'Research on the prevention and control of cyber terrorism crime from the perspective of overall national security (总体国家安全观视角下网络恐怖主义犯罪防控研究)' (2019) 4 *Journal of China Criminal Police College* 5; Kang Junxin, 'The Formation and Development of Anti-Terrorism theory in New Era of Xi Jinping (习近平新时代反恐理论的形成与发展)' (2018) 5 *Research on Law and Economy* 4; Ni Chunle, 'The Study on Local Anti-Terrorism Legislation under the Perspective of the Overall Security Outlook (论总体国家安全观视角下的反恐怖主义地方立法)' (2018) 4 *Journal of China Criminal Police Academy* 6; Pan Guanyuan and Zhang Debiao, *Strategy on Anti-Cyberterrorism: How to deal with Cyberterrorism (网络反恐大策略:如何应对网络恐怖主义)* (Current Affairs Publishing Press 2016) 251.

<sup>248</sup> Zhou Guangquan, 'The Establishment of Positive Outlook on Criminal Legislation in China (积极刑法立法观在中国的确立)', (2016) 4 *Legal Research* 23–40; Mei Chuanqiang and Tong Chunrong, 'The Research on Preventive Counter-Terrorism under the Perspective of the Overall Security Outlook: Taking the Report of 19<sup>th</sup> CPC National Congress as the Starting Point (总体国家安全观视角下的预防性防控研究——以十九大报告为切入点)' (2018) 40(1) *Modern Law Science* 146; Zhang Lei, 'Reflection and Prospect of Criminal Legislation Policy on Terrorist Crimes in Our Country (我国恐怖主义犯罪刑事立法政

Lei *et al.* claim that under the guiding principle of the Overall Security Outlook, it is justifiable to apply preventive and punitive legislation and to expand the scope of criminal law to curb the risk of cyberterrorism.<sup>249</sup> For example, the CCP has adopted stricter policies to regulate the use of the internet and block content that may destabilise the regime, which is particularly evident from the introduction of the so-called Great Firewall and the concept of ‘cyber sovereignty’.<sup>250</sup> Importantly, the CCP completely shut down access to the internet after the Urumqi riots in Xinjiang in 2009. Although access restrictions have since been eased, there are still many high-pressure measures applied to prevent the dissemination of ‘terrorist’ ideology, such as the local government’s publishing of the Notice on Prohibiting the Dissemination of Terrorist Audio and Video in 2016.<sup>251</sup> Guo Shengkun *et al.*, the then head of the National Counterterrorism Leading Organ, proposed the criminal policy of ‘fighting against terrorism from an early stage’ in August 2013, aiming to prevent and eliminate the threat of terrorism to the greatest extent possible.<sup>252</sup>

However, He Ronggong *et al.*, while affirming the rationality and effectiveness of the preventive tendency of China’s cyber-terrorism legislation, also criticised excessive expansion to a certain extent in the name of anti-terrorism.<sup>253</sup> Furthermore, Wu Shenkuo *et al.* proposed that the development of China’s anti-terrorism legislation

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策的反思与展望》(2018) 10 Jinan Journal (Philosophy and Social Science) 92–94.

<sup>249</sup> Zhang Lei (n110) 101; Guo Hong (n110) 88–95.

<sup>250</sup> Zhang Chi (n28) 43.

<sup>251</sup> Huang Jingang, ‘Altay Municipal People’s Congress Authority Actively Carried out Special Actions against Terrorist Audio and Video’ (*alt.gov*, 26 April 2016) <<http://www.alt.gov.cn/Article/ShowArticle.aspx?ArticleID=114393>> accessed 28 Oct 2020; Wang Jun and Qiang He, ‘Zhang Chunxian’s ‘Personalised’ Governance of Xinjiang in the Past 6 Years (张春贤‘个性化’治疆这 6 年)’ (*ifeng*, 13 April 2016) [http://news.ifeng.com/a/20160413/48448872\\_0.shtml](http://news.ifeng.com/a/20160413/48448872_0.shtml) accessed 28 Oct 2020; *ibid.*, 43.

<sup>252</sup> Guo Shengkun, ‘Adhere to principle of fighting early and small, make great efforts to counter terrorism and maintain stability (坚持打早打小, 露头就打原则, 抓好反恐维稳工作)’ (people net, 28 Aug 2013) <<http://cpc.people.com.cn/n/2013/0828/c64094-22720093.html>> accessed 6 Oct 2020; Wang Xiumei and Zhao Yuan, ‘Research on criminal policy of anti-terrorism in contemporary China (当代中国反恐刑事政策研究)’ (2016) 3 Journal of Beijing Normal University (Social Science Edition).

<sup>253</sup> He Ronggong (n89)148–156; Li Yonghao, ‘Evaluation on the Legislative Trend of Criminal Law’s Early Intervention in Terrorist Crimes (刑法对恐怖犯罪提前干预立法趋势评析)’ (Master’s thesis, Southeast University 2017) 29; Mei Chuanqiang, ‘Review and improvement of China’s anti-terrorism criminal legislation: Evaluation of terrorism-related offences in Amendment (IX) (我国反恐刑事立法的检讨与完善--兼评〈刑法修正案(九)〉相关涉恐条款)’ (2016) 1 Modern Law; He Ronggong, ‘The expansion and limitation of preventive criminal law (预防刑法的扩张及其限度)’ (2017) 4 Legal Research; Guo Zhilong, ‘The Situation of Preventive Criminalisation in China: From the perspective of comparison between terrorism and cybercrime (预防性犯罪化的中国境域——以恐怖主义与网络犯罪的对照为视角)’ (2017) 2 Legal Science; Zhang Mingkai, ‘The Study on Terrorism-related Offences in Criminal Law Amendment (IX) (论〈刑法修正案(九)〉关于恐怖犯罪的规定)’ (2016) 1 Modern Law; Mei Chuanqiang and Li Jie, ‘The Review of Anti-terrorism Criminal Legislation in China (我国反恐刑法立法的预防性面向“检视”)’ (2018) 1 The Legal Science 48–57; Jiang Min, ‘The Boundary of Anti-terrorism Legislation of Criminal Law (刑法反恐立法的边界研究)’ (2017) 35(5) Tribune of Political Science and Law 79–93.

should avoid any form of authoritarian tendencies, observing the principles of proportionality, minimal criminalisation, human rights protection and the rule of law.<sup>254</sup>

From a practical perspective, the enforcement of anti-terrorism legislations in China has increasingly focused on prevention rather than retribution. In particular, the executive organs are granted broad powers to interrogate, detain and control suspected terrorists during the pre-trial period. For example, the Criminal Procedure Law (CPL) was amended in 2012 by the National People's Congress (NPC), which revised seven provisions related to terrorism offences and expanded police powers to investigate terrorist offenders prior to trial to include 'technical investigation',<sup>255</sup> often referred to as 'secret investigation'.<sup>256</sup> Furthermore, there is a tendency to use non-criminal disruption methods to deal with terrorism preparatory offences. For example, unlike the CPL which grants the police ex post powers to investigate terrorist acts that have already occurred, the CTL focuses on the authorisation of pre-emptive discretion to allow the police to be proactive in their handling of terrorism.<sup>257</sup> More specifically, the CTL empowers the police to take immediate lethal action when faced with violent incidents, and to impose preventive detention and control orders on suspects who are considered a great risk to national security and social stability. Prevention under the CTL ushers in a host of 'pre-crime' measures that permit the State to intervene and restrain an individual on the basis of anticipated further harm, rather than in the wake of wrongdoing.<sup>258</sup> In addition, according to a newly-published White Paper and report from the SPC, the CCP places emphasis on 'striking at terrorism and extremism in accordance with the law' and 'giving top priority to a preventive counter-terrorism approach'.<sup>259</sup> This implies that the courts in China are also focusing on prevention, an approach which has the potential to contravene the principle of the presumption of innocence and the right to a fair trial.

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<sup>254</sup> Wu Shenkuo, 'Talking about Criminal Preparation and its participation form in expansion (扩张中的犯罪预备及参与形式)' (2010) 4 *Journal of Sichuan Police College* 30–36; Han Ze, 'Research on Preventive Criminal Legislation of Counter-terrorism (预防性反恐刑事立法研究)' (Master's thesis, Hei Longjiang University 2019); Li Hong, 'On the Prescriptions on the Offences Concerning Terrorism and Extremism in the PRC's Criminal Law Amendment IX from the Perspective of Limiting Potential Damage Offense (《刑法修正案(九)》中有关恐怖主义、极端主义犯罪的刑事立法——从如何限缩抽象危险犯的成立范围的立场出发)' (2015) 6 *Journal of Soochow University (Philosophy & Social Science Edition)* 84–95.

<sup>255</sup> Article 148 of the Criminal Procedure Law first allows the use of 'technical investigation' by police in terrorism cases. After the public security organ has filed a case, it may, insofar as required for investigation and after passing strict approval, take measures of technical investigation for cases involving crimes endangering state security, crimes of terrorism, organised crime with characteristics of the criminal underworld, major drug-related crimes, or other crimes that pose a serious threat to society.

<sup>256</sup> There has been debate over what constitutes 'technical investigation' in the Chinese criminal justice system. For a detailed discussion, see Lan Yuejun, 'The Measures of Technical Investigation from a Comparative Perspective (比较法视野中的技术侦查措施)' (2013) 1 *Journal of China's Criminal Law* 66, 66–67.

<sup>257</sup> E Li (n1) 371.

<sup>258</sup> *Ibid.*

<sup>259</sup> See Chief Justice Zhou Qiang (n219).

## 7. National Security and Social Stability Priority over Human Rights Protection in the Anti-terrorism Laws and Enforcement

There is a general paradox in national strategies to combat terrorism: on the one hand terrorism poses a threat to the basic rights of citizens, while on the other hand, in a country's efforts to thwart terrorism it may erode civil rights to a certain extent (for example, in terms of freedom of speech and privacy). Therefore, like other countries China has to meet the challenge of striking a suitable balance between security and liberty (two seemingly opposing interests) in their handling of cyberterrorism. Some studies in the Western context have noted that security and freedom should be balanced, but have gone on to suggest that especially as the threat of terrorism intensifies, some degree of freedom should be sacrificed in order to strengthen security.<sup>260</sup> Meanwhile, the security-liberty balance has not stimulated much debate in China, which applies 'rule by law' with the accompanying discretion to combat terrorism in an effective, albeit repressive, manner. We have observed how anti-terrorism legislations and enforcement in China have shown a growing tendency to ignore human rights, putting security first.

Anti-terrorism legislation in China stipulates that public safety is the first priority. For example, according to Art. 1 of the CTL, the spirit of the CTL is to maintain national security and social stability.<sup>261</sup> Moreover, Art. 5 of the CTL stipulates that 'anti-terrorism work adheres to the principle of 'priority of precaution', combining punishment and prevention, [and] maintaining pre-emption, which establishes the 'priority of security and prevention' strategy to counter terrorism'.<sup>262</sup> In addition, the purpose of the revision of anti-terrorism clauses in a series of Amendments to CL is also to effectively combat terrorism offences, maintain national security and social order, and protect people's lives and property.<sup>263</sup> In terms of judicial practice, the guidelines of the supreme judicial and executive organs also emphasise the priority of security. For example, the reports of the SPC and SPP require these bodies to 'put the maintenance

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<sup>260</sup> S Macdonald, 'The Unbalanced Imagery of Anti-terrorism Policy' (2009) 18 CJLPP 519–540; S Macdonald, 'Why We should Abandon the Balance Metaphor: A New Approach to Counterterrorism Policy' (2009) 15 ILSA JICL 95–146; EA Posner and A Vermeule, *Terror in the Balance: Security, Liberty, and the Courts* (Oxford University Press 2007); RA Posner, *Not a Suicide Pact: The Constitution in a Time of National Emergency* (Oxford University Press 2006); J Waldron, 'Security and Liberty: the Image of Balance' (2003) 11 Journal of Political Philosophy 191–210; L Zedner, 'Securing Liberty in the Face of Terror: Reflections from Criminal Justice' (2005) 32 Journal of Law and Society 507–533.

<sup>261</sup> CTL, Art.1.

<sup>262</sup> CTL, Art.5. He Ronggong (n89)148.

<sup>263</sup> Li Shishi, then director of the Legal Work Committee of the Standing Committee of the National People's Congress, 'gave an explanation on the draft of the Criminal Law Amendment (IX)' (*Chinese.gov*, 27 Oct 2014) <[http://www.gov.cn/xinwen/2014-10/28/content\\_2771624.htm](http://www.gov.cn/xinwen/2014-10/28/content_2771624.htm)> accessed 20 Oct 2020.

of national political security, especially regime security, and system security in the first place, and earnestly safeguard national security and social stability'.<sup>264</sup>

However, China has also made certain attempts to protect human rights at the legislative level.<sup>265</sup> Art. 6 of the CTL stipulates that counter-terrorism work should be carried out in accordance with the law, should respect and protect human rights, and should safeguard the legitimate rights and interests of citizens and organisations, but without further explanation of how to achieve these goals.<sup>266</sup> Therefore, although policy slogans and legal provisions emphasise the protection of human rights in China, it would appear that this is mere rhetoric. Some Chinese scholars have critically suggested that legal responses and policy in relation to cyberterrorism are overreactive, which may curtail human rights, and that China should take into greater consideration the finding of a balance between security and liberty.<sup>267</sup>

In light of this, many human rights organisations and Western countries have expressed strong concerns and even condemned China's human rights violations as a result of its anti-terrorism laws. For example, the US State Department spokesman Mark Toner said, '[T]he US remains concerned about the broad and empty wording of this legal provision and its definition, which may lead to further restrictions on Chinese speech, acceptance, peaceful assembly and religious freedom.'<sup>268</sup> Freedom House also claims that China's anti-terrorism laws represent a move to limit speech and dissent in the name of counter-terrorism, and that 'the new anti-terrorism law has expanded the already extensive power of the Chinese government to monitor citizens, tighten censorship, and give officials legitimate excuses to detain journalists, activists and ethnic minorities and minority religious groups'.<sup>269</sup> In addition, Amnesty International expressed a similar view: 'China's CTL is actually a law that violates freedom. It provides a huge space for China's official repression activities, which will

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<sup>264</sup> Zhou Qiang (n219); China Daily, 'The report of the SPC and SPP targeted to violent terrorism offences, no one is immune from terrorism (两高报告剑指暴恐犯罪 面对恐怖主义谁都不能独善其身)' (China Daily, 13 March 2015) <[http://www.chinadaily.com.cn/dfpd/xj/2015-03/13/content\\_19802124.htm](http://www.chinadaily.com.cn/dfpd/xj/2015-03/13/content_19802124.htm)> accessed 20 Sep 2020; Cao Jianming, 'Supreme People's Procuratorate work report' (*Supreme People's Procuratorate.gov*, 9 March 2018) <[https://www.spp.gov.cn/spp/tt/201803/t20180309\\_369886.shtml](https://www.spp.gov.cn/spp/tt/201803/t20180309_369886.shtml)> accessed 20 Sep 2020.

<sup>265</sup> JA Lee, 'Hacking into China's Cybersecurity Law' (2018) 53 WFLR 99.

<sup>266</sup> CTL, Art.6.

<sup>267</sup> Qin Guanying, *Research on Terrorism Crime from the Perspective of Non-traditional Security (非传统安全视域下的恐怖主义犯罪研究)* (Law Press 2018) 96; Sun Pinjie, 'Research on the problems and countermeasures of technical intelligence in anti-terrorism work (技术情报在反恐工作中存在的难题及对策研究)' (2019) 3 Journal of Intelligence 26–32; Zhang Lei (n110)105; Qi Wenyuan and Wei Hantao, 'Pros and Cons of the Anglo-American Anti-terrorism Legislation and Its Implications (英美反恐立法的得失及其启示)' (Master's Thesis, Social Science of Chinese Universities 2015).

<sup>268</sup> Lin Feng, 'Why doesn't the West accept China's Counter-Terrorism Law? (中国反恐法为何西方不买账)' (*Voachinese*, 30 Dec 2015) <<https://www.voachinese.com/a/west-china-anti-terrorism-law-20151229/3123535.html>> accessed 12 July 2018.

<sup>269</sup> Ibid.

help the Chinese government safeguard national security, that is, defend the rule of the CCP.<sup>270</sup> Moreover, Bequelin argues that CSL rules would give the Chinese government enormous power to monitor a substantial electronic database of telecom operators operating in China and force companies to provide decryption technology.<sup>271</sup> In summary, China has been subject to significant international criticism for its alleged human rights violations.<sup>272</sup>

In response to the criticism from the West and NGOs that China's counter-terrorism law amounts to human rights violations, the official response in China has been to accuse the West of 'double standards'.<sup>273</sup> For instance, the official Chinese media outlet, the *People's Daily*, accused HRW of ignoring China's specific realities and challenges, and blindly adopting self-righteous human rights standards to attack China.<sup>274</sup> In addition, similar to China, the US government also monitors internet companies and requires them to disclose user data when investigating terrorism cases.<sup>275</sup> Moreover, some Chinese authorities have also claimed that China's anti-terrorism laws were formulated with reference to Western equivalents (such as the USA PATRIOT Act); for example, Li Shouwei insisted that some of the assistance obligations imposed on ISPs were clearly defined in the law, and would not be used to undermine citizens' freedom of speech and religious beliefs.<sup>276</sup> Li told Reuters reporters that Art. 18 of CTL was in line with the requirements of the UN Security Council on combating cyberterrorism, which are basically consistent with the legal provisions imposed by European states and the US.<sup>277</sup>

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<sup>270</sup> Amnesty International, 'The comments on the difference of anti-terrorism laws between China and the US (大赦国际评中美反恐法的区别)' (*Amnesty International*, 27 Dec 2015) <<https://zh.amnesty.org/more-resources/评论/中国反恐法其实是一大侵犯自由的法律.html>> accessed 12 July 2018.

<sup>271</sup> Lin Feng, 'Why doesn't the West accept China's Counter-Terrorism Law? (中国反恐法为何西方不买账)' (*VOA Chinese*, 30 Dec 2015) <<https://www.voachinese.com/a/west-china-anti-terrorism-law-20151229/3123535.html>> accessed 12 July 2018.

<sup>272</sup> L Friedman, 'On Human Rights, the United States and the People's Republic of China at Century's End' (1998) 4 *JILS* 241, 241, 249–50.

<sup>273</sup> According to many Chinese scholars and officials, the West, led by the US, does not live up to its commitment to international peace and adopts double standards in defining terrorism. Some argue that the US only defines terrorism according to its own interests. See Zhang Chi (n28) 140; Zhang Hong, 'The Impact of Post-Cold War Big Power Relations on Terrorism (冷战后大国关系对恐怖主义的影响)' (2004) 25 *Renmin University of China*; Chen Yadong, 'Analysis of the Impact of Terrorism on Chinese Foreign Policy (试析恐怖主义问题对中国外交的影响)' (2007) 4 *Asia and Africa Review* 25.

<sup>274</sup> Xinhua, 'Human Rights Watch's report confuses (人权观察的报告混淆视听)' (*Xinhua*, 5 Feb 2016) <[http://www.xinhuanet.com/politics/2016-02/05/c\\_128705442.htm](http://www.xinhuanet.com/politics/2016-02/05/c_128705442.htm)> accessed 10 July 2019.

<sup>275</sup> Global net, 'China's anti-terrorism legislation does not need to be intervened and criticized by foreign countries (中国反恐立法不需要外国指手画脚)' (*Global.net*, 5 Mar 2015) <<https://china.huangjiu.com/article/9CaKrnJlrUj>> 5 Mar 2020.

<sup>276</sup> Li Shouwei, Deputy Director of the Criminal Law Department of the NPC Law Committee of China, 'China's Counter Terrorism Law: Why does the West not buy it? (中国反恐法为何西方不买账)' (*VOA Chinese*, 27 December 2015) <<https://www.voachinese.com/a/west-china-anti-terrorism-law-20151229/3123535.html>> accessed 12 July 2019.

<sup>277</sup> The NPC Law Committee interprets that the Counter-terrorism law: Article 18 will not harm the freedom of speech of citizens on the Internet' (*People's Net*, 27 Dec 2015)

However, Teng Biao and Bequelin express similar views, namely that even if the Chinese anti-terrorism laws were literally completely consistent with the relevant laws of Western democratic countries, their implementation would be completely different due to stark differences between legal systems and the institutional environment, particularly including independent judicial review and mutual supervision of powers.<sup>278</sup> Ultimately, these scholars or organisations hold that the Chinese legal system to a large extent shapes China's legal responses to terrorism, which implies that national security and social stability take priority over human rights protection in anti-terrorism laws and their enforcement. This suggests that although the CCP has tried to protect individual rights at the legislative level, its 'rule by law' legal system limits it from achieving a proper balance of liberty and security. In contrast, legal responses to cyberterrorism in China's Western democratic counterparts (such as the UK and the US) are based on the rule of law and subject to independent judicial review and legal scrutiny, restricting state power and protecting citizens' rights to the maximum extent. Therefore, due to China's deep-rooted authoritarian political context and 'rule by law' legal system, there are no internal and external restrictions because of a lack of the basic principles of the rule of law (such as an independent judiciary and the supremacy of law), which leads to arbitrariness in state power and the erosion of individual rights and fundamental principles such as proportionality and legality.

## **8. International cooperation and regional cooperation: China's role and challenges**

In terms of international cooperation, China has expressed a strong willingness to cooperate with other countries to formulate cyberspace counter-terrorism strategies and legal frameworks. In addition, China has also taken the initiative to build a series of international cooperation platforms to deal with cyberterrorism. For example, in June 2014 the 68th UN General Assembly adopted China's revision proposal and for the first time included content related to combating cyberterrorism in the 'United Nations Global Counter-Terrorism Strategy'.<sup>279</sup> In addition, China has actively participated in the UN agenda on cyberterrorism.<sup>280</sup> For instance, at the 2019 UN Security Council Briefing on 'Threats to International Peace and Security Caused by Terrorist Acts', the Chinese Ambassador Wu Haitao said, '[W]e [the international community] should ...

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<http://npc.people.com.cn/n1/2015/1227/c14576-27981922.html>, accessed 15 July 2019.

<sup>278</sup> N Bequelin, Amnesty International (n270).

<sup>279</sup> C Cai, 'Cybersecurity in the Chinese Context: Changing Concepts, Vital Interests, and Prospects for Cooperation' (2015) 1(03) CQISS 471, 492.

<sup>280</sup> Bureau of Counterterrorism, 'Country Reports on Terrorism: 2017' (*State.gov*, September 2018) <<https://www.state.gov/reports/country-reports-on-terrorism-2017/>> accessed 24 May 2022.

stop terrorist organisations from misusing the internet and telecommunications technologies. ... We should focus on enhancing international cooperation in combating cyberterrorism, terrorist financing and the spread of extremist ideologies.<sup>281</sup>

China has also actively participated in the UN Open-Ended Working Group's (OEWG) agenda, and has submitted its views on cyberterrorism on a dedicated UN website.<sup>282</sup> For example, China clearly acknowledged that cyberterrorism is a serious threat, and proposed an entire section on combating cyberterrorism constructively which it hopes will be integrated in the OEWG report.<sup>283</sup> In this proposal China suggested that states should block terrorist use of the internet, and specifically called for 'intelligence exchanges and law-enforcement cooperation on countering terrorism' between states, the development of 'cooperative partnership[s] with international organizations, enterprises and citizens in fighting cyberterrorism', and the need for states to request 'internet service providers to cut off the online dissemination channel of terrorist content by closing propaganda websites and accounts and deleting terrorist and violent extremist content'.<sup>284</sup> However, these proposals and discourses by the Chinese authorities have been subject to criticism for violating online freedoms such as freedom of information and expression, since they clearly require relevant companies and ISPs to censor online content and take responsibility for supervision.<sup>285</sup>

The different views and demands of China and the West in relation to 'internet freedom' or 'internet sovereignty' are also a major obstacle to China's participation in international cooperation.<sup>286</sup> In fact, however, many of these Chinese proposals are no different from some Western policies which also require social media companies and intermediaries such as ISPs to remove terrorism-related online content.<sup>287</sup> Therefore, the focus of the question must be on how the state defines and interprets cyberterrorism. Due to its lack of a rule of law, China as an authoritarian regime has the scope to stretch its definitions and application of cyberterrorism measures.

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<sup>281</sup> H Wu, 'Statement by Ambassador Wu Haitao at Security Council Briefing on Threats to International Peace and Security Caused by Terrorist Acts' (*Fmprc.gov*, 11 February 2019) <<https://www.fmprc.gov.cn/ce/ceun/eng/chinaandun/securitycouncil/thematicissues/counterterrorism/t1637059.htm>> accessed 18 May 2022.

<sup>282</sup> For an overview of OEWG's planned activities and resources, please see United Nations Office for Disarmament Affairs (UNODA)'s website <<https://www.un.org/disarmament/open-ended-working-group/>> accessed 19 May 2022.

<sup>283</sup> China's commentary on the OEWG's initial pre-draft (*front.un-arm.org*, April 2020) 1–5 <<https://front.un-arm.org/wp-content/uploads/2020/04/china-contribution-to-oewg-pre-draft-report-final.pdf>> accessed 22 May 2022.

<sup>284</sup> *Ibid.*, 5. See also D Broeders, F Cristiano & D Weggemans, 'Too Close for Comfort: Cyber Terrorism and Information Security across National Policies and International Diplomacy' (2021) SCT1, 15.

<sup>285</sup> E Zuckerman, 'Intermediary Censorship' in R Deibert, J Palfrey, R Rohozinski, and J Zittrain (eds) *Access Controlled. The Shaping of Power, Rights, and Rule in Cyberspace* (MIT Press 2010) 71–85.

<sup>286</sup> C Cai (n279)471–496.

<sup>287</sup> T Gillespie, 'Platforms Are Not Intermediaries' (2018) 2 (2) GLTR 198, 198–216; R Gorwa, 'What Is Platform Governance?' (2019) 22 (6) ICS 854, 854–571.

China and Western liberal democracies also have divergent understandings and attitudes towards basic issues such as terrorism, separatism and human rights, which represents another challenge for China when it comes to international cooperation. Furthermore, China actively seeks to bring its own counterterrorism values into its cooperation with other countries. For example, on 29 June 2012 Wang Min, China's Deputy Permanent Representative to the UN, stated that China expressed its full support for the UN Global Counter-Terrorism Strategy, emphasising respect for sovereignty, unity and territorial integrity.<sup>288</sup> However, Wang also noted the divergence between China and the West regarding Uyghur separatist groups and the designation of terrorist groups and individuals, and stated that the West should respect China's sovereignty without interference.

In this regard, at the regional level China has launched the Shanghai Cooperation Organisation (SCO), which emphasises targeting separatist organisations which are not usually designated as terrorists in the West.<sup>289</sup> The SCO was established to provide a good framework for China to cooperate closely with its geographical neighbours in combating terrorism, extremism, separatism and various other cross-border criminal activities.<sup>290</sup> During the SCO's Astana summit in 2005 the regional Heads of State decided to increase their security cooperation significantly, with a particular focus on 'taking precautionary measures against cyberterrorism'.<sup>291</sup> In addition, on March 22, 2013 the SCO's Regional Anti-Terrorism Structure Council reached an agreement on contingency plans 'to combat the use or potential use of computer networks for terrorist, separatist and extremist ends'.<sup>292</sup> The anti-terrorism cooperation within the SCO framework highlights the common interests of China and its neighbouring countries, and helps to normalise the common positions and perceptions of SCO member states on 'terrorism, extremism and separatism'.<sup>293</sup> In addition, on 14 October 2015 China organised the SCO's Xiamen anti-terrorist and military drills with a focus on cyberterrorism for the first time,<sup>294</sup> aiming to 'assist member states to exchange the legal procedures, organisational and technical capacity and workflow in combating terrorists online activities; to improve the

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<sup>288</sup> Q Lin and L Wang, 'China Expressed Its Full Support for Fully Implementing the UN Global Counter-Terrorism Strategy (中国表示支持全面 落实联合国《全球反恐战略》)' (Xinhua.net, 29 June 2012) <[http://www.gov.cn/jrzq/2012-06/29/content\\_2172751.htm](http://www.gov.cn/jrzq/2012-06/29/content_2172751.htm)> accessed 17 June 2022.

<sup>289</sup> Zhang Chi (n28) 5.

<sup>290</sup> P Guang, 'A Chinese perspective on the Shanghai Cooperation Organization' (2007) 17 SIPRI Policy Paper 45, 46.

<sup>291</sup> N Nazarbaev, J Hu, K Bakiev, V Putin, E Rakhmonov, and I Karimov, 'Declaration Of Heads Of Member-States Of Shanghai Cooperation Organisation' (2005) 9(3) World Affairs: The Journal of International Issues 140,140–146.

<sup>292</sup> C Cai (n279) 491.

<sup>293</sup> Zhang Chi (n28)172.

<sup>294</sup> Xinhua, 'SCO's first anti-cyberterrorism drill was successfully held in Xiamen (上合组织首次网络反恐演习在厦门成功举行)', (gov.cn, 14 Oct 2015) <[http://www.gov.cn/xinwen/2015-10/14/content\\_2946854.htm](http://www.gov.cn/xinwen/2015-10/14/content_2946854.htm)> accessed 30 May 2022.

cooperation mechanism used to identify and prevent the use of the internet for terrorism, separatism and extremism among SCO member states'.<sup>295</sup> However, HRW has criticised the SCO's framework for counter-terrorism cooperation as 'reinforcing the worst practices of member states', namely human rights violations and particularly the designation of peaceful independence advocates as terrorists.<sup>296</sup>

## 9. Conclusion

The newly emerging phenomenon of cyberterrorism is on the increase and potentially threatens the world, including China. Due to a general lack of any specialised anti-cyberterrorism law, legal responses to cyberterrorism often rely on existing anti-terrorism laws, which can lead to ill-defined responses that are open to significant interpretation and with little oversight or accountability, no transparency and so on. For example, as shown above there have been a number of problems with the legal responses to cyberterrorism in China, notably over-criminalisation, unpredictability, lack of counterbalances, and violation of the principles of proportionality, legality, certainty and minimal criminalisation.

To quote Xi Jinping, the guiding principle of counterterrorism strategy in China is also demonstrated in its prevention strategy. Against this backdrop, this article argues that China has a prevention and pre-emptive tendency in its legal anti-terrorism framework to combat cyberterrorism. Moreover, in China's political context, which prioritises national security and social stability, legislators have broadened the scope of the counter-terrorism legal framework. This reflects the legal reality of 'rule by law' in China, through which the CCP seeks to expand state power by broadening counter-terrorism legislation to achieve its political goals. Additionally, China's counter-terrorism approach is constrained by authoritarian characteristics such as a lack of checks and balances for human rights protection, a lack of independent judicial review for executive powers, and the prioritising of national and collective interests over individual interests.

In light of this, the following question arises: how should China deal with the above-mentioned issues in its anti-terrorism legislation? In this article I put forward a series of suggestions for ways out of China's current anti-terrorism dilemma, and also propose an agenda for further research. Does China need to enact specific anti-cyberterrorism legislation? If so, based on the above critical analysis, what should

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<sup>295</sup> Ibid.

<sup>296</sup> Human Rights Watch (n145).

China pay attention to? First, China should clarify its definition of cyberterrorism to avoid vagueness. In addition, China should consider adopting a comprehensive counter-terrorism approach that protects individual freedoms of expression and religion, which are also seen as guiding principles for anti-cyberterrorism legislation and enforcement. Furthermore, the CCP should also consider that anti-cyberterrorism approaches must comply with the rule of law rather than 'rule by law', basic human rights principles, due process, and proper respect for civil rights.

A further implication of the arguments in this article is that there is a clear need for international cooperation to combat cyberterrorism. At present there is no specialised anti-cyberterrorism convention, so it is necessary to establish an international legal framework, reach international consensus, and make joint global efforts to criminalise various terrorist acts and exercise universal jurisdiction.<sup>297</sup> Moreover, the lack of a special convention against cyberterrorism has prompted multilateral international organisations to enhance security through the harmonisation of legislation, coordination and cooperation in law enforcement, and the utilisation of anti-cyberterrorism actions.<sup>298</sup> Due to the transnational nature of cyberterrorism, it is necessary to coordinate legislation to prevent cyberterrorists from taking advantage of judicial and legal loopholes between countries to carry out cyberterrorist activities.

However, the problems inherent in existing counter-terrorism legislations may preclude China's involvement in international cooperation to combat cyberterrorism. In particular, due to differences in legal systems, political systems, understanding of the rule of law and human rights protection between China and the West, the Chinese government faces many challenges in establishing anti-cyberterrorism cooperation with its Western counterparts. Therefore, how China should deal with these challenges and disagreements is an area that requires further research.

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<sup>297</sup> K Prasad, 'Cyberterrorism: Addressing the Challenges for Establishing an International Legal Framework' (3rd Australian Counter Terrorism Conference, Perth, 3<sup>rd</sup>–5<sup>th</sup> December 2012) 10.

<sup>298</sup> PM Tehrani, NA Manap and H Taji, 'Cyber terrorism challenges: The need for a global response to a multi-jurisdictional crime' (2013) 29 CLSR 207, 215.