

The Definition of Terrorism

A Report by Lord Carlile of Berriew Q.C.
Independent Reviewer of Terrorism Legislation



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by the Secretary of State for the Home Department,
by Command of Her Majesty

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THE DEFINITION OF TERRORISM
A REPORT BY LORD CARLILE OF BERRIEW Q.C.
INDEPENDENT REVIEWER OF TERRORISM LEGISLATION

INTRODUCTION

1. On the 9th November 2005 the then Home Secretary The Rt. Hon. Charles Clarke M.P. told the House of Commons that he had agreed to a request from the Chairman of the Select Committee on Home Affairs, The Rt. Hon. John Denham M.P., that I should conduct a review of the definition of terrorism and report accordingly¹. I had given my prior agreement to the Home Secretary. This is the resulting report.

2. I was asked to undertake this task because, since September 2001, I have been the independent reviewer of legislation connected with terrorism. I have produced several reports in that time, all of which can be found via the Home Office website². Most of my reports are concerned with the working and fitness for purpose of the Acts of Parliament in question, rather than with broader conceptual issues. The work involved in preparing those reports has given me substantial insight into the practical work involved in countering terrorism. I have spent time with police, HM Revenue and Customs, and the armed services. I have looked closely at the situation in Northern Ireland, and have consulted with political parties and community groups there. I am briefed by the Security Service. I welcome and receive many representations from members of the public, academic contributors, lawyers and politicians.

¹ House of Commons Hansard debates for 9 Nov 2005 col 335.

² www.homeoffice.gov.uk and follow 'security' links.

3. My background and experience mean that this report is not an academic treatise. Rather, it is intended to be an informed collection of thoughts and advice based on direct and indirect practical experience, evidentially founded wherever possible, and on research.
4. For this report to earn credibility it seemed to me essential that all potentially interested groups and persons should have the opportunity to contribute. Accordingly, a call for papers was advertised in national newspapers in February 2006. A wide range of potential contributors was contacted directly by email and letter. A week-long travelling seminar took place, with invitations co-ordinated by conference organisers to ensure as wide a reach as was appropriate. This seminar visited Belfast, Cardiff, Glasgow and Nottingham as well as holding two sessions in London. I was pleased to see members of the general public at those seminars and was grateful for the contributions of speakers of note in the legal, academic and social policy sectors. I have learned much from those seminars, as from the many written contributions received.
5. I wish to record my special gratitude to Carys Owen, barrister, who has assisted me extensively with research, ideas and organisation; Deborah Moss, who researched terrorism definitions and related documents from around the world and assembled them into manageable order, and to officials, who made the arrangements to facilitate my work on this report. I owe a tremendous debt to the many contributors of views and papers. There have been so many, some necessarily confidential in nature, that I have concluded that the production of a list of them would have little meaning. However, if any of the contributors would like confirmation of their contributions, I should be happy to provide the appropriate acknowledgement. They can contact me for this purpose via carlilea@parliament.uk.

BACKGROUND

6. There is no universally accepted definition of terrorism. It remains the subject of continuing debate in international bodies.

7. A useful starting point for this report is the definition of terrorism included in the *Prevention of Terrorism (Temporary Provisions) Act 1989*:

“... the use of violence for political ends, and includes any use of violence for the purpose of putting the public or any section of the public in fear.”

8. That definition had major drawbacks. Though it excluded threats of violence, otherwise it was very broad so far as actions were concerned. Notably, it did not require a *serious* level of violence or *serious* damage or risk to health and safety or electronic disruption. Conversely, it was restricted in terms of intention/design, in that it excluded violence for a religious end, or for a non-political ideological end. *Section 1 Terrorism Act 2000* was designed to remedy defects in the 1989 definition.

9. In his seminal review of terrorism legislation in 1996 Lord Lloyd of Berwick³ recommended that a different definition should be adopted. He suggested the operational definition used at the time by the Federal Bureau of Investigation in the USA:

“The use of serious violence against persons or property, or threat to use such violence, to intimidate or coerce a government, the public or any section of the public, in order to promote political, social or ideological objectives.”

³ *Inquiry into Legislation against Terrorism*: [1996] Cm 3420: para 5.22.

However, as Lord Lloyd noted at the time, that definition would not cover such situations as the disruption of air traffic control or other vital electronic systems. Violence and damage are not synonyms by any means. Serious damage to such systems may have drastic consequences. The definition included in what became the *Terrorism Act 2000* was debated at length in Parliament. Lord Lloyd himself said of it:

“We must obviously do our best with the definition. However, having spent many hours looking at many different definitions, I can only agree with what was said by both the noble Lord, Lord Goodhart, and the noble Lord, Lord Cope; namely, that there are great difficulties in finding a satisfactory definition. Indeed, I was unable to do so and I suspect that none of us will succeed. As I say, we must do our best but I hope we will not spend too much time on the definition”.

10. I am entirely in agreement with that comment. Hard as I have striven, and as many definitions as I have read, I have failed to conclude that there is one that I could regard as the paradigm. Unsurprisingly, I have been unable to achieve what was not achieved by Lord Lloyd – perhaps because it is not possible to do so. This report will not offer major new statutory language. However, I hope that the unbiased reader will accept that it produces remarks and recommendations capable of maintaining a proper balance between the exigencies presented by the types of terrorism evident globally at present, and the need to sustain a fair system of law founded on undiluted democratic values.

THE PRESENT DEFINITION

11. The present definition of terrorism used in UK legal systems is to be found in *section 1, Terrorism Act 2000*, as amended⁴:

1 Terrorism: interpretation

(1) *In this Act “terrorism” means the use or threat of action where—*

- (a) the action falls within subsection (2),*
- (b) the use or threat is designed to influence the government or an international governmental organisation or to intimidate the public or a section of the public, and*
- (c) the use or threat is made for the purpose of advancing a political, religious or ideological cause.*

(2) *Action falls within this subsection if it—*

- (a) involves serious violence against a person,*
- (b) involves serious damage to property,*
- (c) endangers a person’s life, other than that of the person committing the action,*
- (d) creates a serious risk to the health or safety of the public or a section of the public, or*
- (e) is designed seriously to interfere with or seriously to disrupt an electronic system.*

(3) *The use or threat of action falling within subsection (2) which involves the use of firearms or explosives is terrorism whether or not subsection (1)(b) is satisfied.*

(4) *In this section—*

- (a) “action” includes action outside the United Kingdom,*
- (b) a reference to any person or to property is a reference to any person, or to property, wherever situated,*
- (c) a reference to the public includes a reference to the public of a country other than the United Kingdom, and*

⁴A regularly updated current text of the *Terrorism Act 2000* is now provided by the government at www.stautelaw.gov.uk

(d) “the government” means the government of the United Kingdom, of a Part of the United Kingdom or of a country other than the United Kingdom.

(5) In this Act a reference to action taken for the purposes of terrorism includes a reference to action taken for the benefit of a proscribed organisation.

[N.B. The words in subsection (1)(b) “or an international governmental organisation” were inserted by the Terrorism Act 2006, s 34(a), and came into force on the 13th April 2006.]⁵

12. The definition is of real practical importance. It triggers many powers, as well as contributing to the description of offences. For example, it enables the authorities to take action in relation to suspected breaches of *section 1, Terrorism Act 2006*, which makes it an offence to publish a statement intended indirectly to encourage acts of terrorism; to proscribe organisations under *Terrorism Act 2000 section 3*; to deal with terrorist property; to cordon areas; to arrest a person reasonably suspected of being a terrorist without warrant, pursuant to *section 41*; to stop and search without suspicion under *section 44*; to detain and question persons at ports of entry under *schedules 7 and 8*.

13. Many have striven to find a definition for terrorism⁶. Conclusions have been diverse. “Above the gates of hell is the warning that all that enter should abandon hope. Less dire but to the same effect is the warning given to those who try to define terrorism”, said one author⁷. Another, questioning whether terrorism was worth defining, a key question, thought a definition is no easier to find than the Holy Grail⁸.

⁵SI 2006/1013, art 2(1), (2)(b).

⁶In my search for academic sources and materials on this subject, as in numerous other connected respects, I am heavily in the debt of Professor Clive Walker of Leeds University; and of Professor Conor Gearty of the London School of Economics. They may disagree with some of my conclusions, for which I alone am responsible.

⁷Tucker D, *Skirmishes at the Edge of Empire* (Praeger, Westport, 1997, p51).

⁸Levitt G, *Is Terrorism Worth Defining?* [1986] Ohio Northern University Law Review 97.

14. One academic definition that has found wide respect is based on a linguistic survey of over 100 definitions produced around the world⁹. It provides:

‘Terrorism is an anxiety-inspiring method of repeated violent action, employed by (semi-) clandestine individual, group or state actors, for idiosyncratic, criminal or political reasons, whereby - in contrast to assassination - the direct targets of violence are not the main targets’.

15. Even a cursory examination of that non-legislative text demonstrates that its undoubted value is as the lowest common denominator produced from a wide range of sources. It is the result of a search more for a classification than a definition. For example, it would include the activities of a lone, violent and eccentric campaigner against the use of electricity; or against laws prohibiting smoking in public places; or Thomas Hamilton the loner Dunblane child murderer. Terrible crimes though he committed, terrorism is not a suitable label.

16. *Terrorism Act 2000 section 1* is not the only current definition of terrorism in UK Law. The *Reinsurance (Acts of Terrorism) Act 1993 section 2(2)* provides:

“In this section “acts of terrorism” means acts of persons acting on behalf of, or in connection with, any organisation which carries out activities directed towards the overthrowing or influencing, by force or violence, of Her Majesty’s government in the United Kingdom or any other government de jure or de facto”

⁹Schmid A and Jongman A derived 22 word categories from a study of 109 definitions; *Political Terrorism* (North-Holland, Amsterdam, 1987).

The 1993 Act definition deals with particular issues connected with insurance. It is cited mainly for completeness. However, its concentration on *organisations* supports and is an example of the view that the involvement of a group or collective of some kind is central to what should be regarded as terrorism as opposed to idiosyncratic dangerous actions by individuals.

INTERNATIONAL SOURCES

17. I have attempted to categorise national definitions of terrorism. Although some of the comments in Table 1 below may not command universal agreement, I trust that they will be accepted as a fair judgment¹⁰. All the countries named are signatories to a wide range of international treaties on terrorism and its consequences.

18. Table 1: Countries

Country	General description	Comments
Afghanistan	No separate national definition	Implements UN Resolution 1373 (which does not define terrorism)
Albania	No separate national definition	Signatory to all material international treaties
Algeria	Very broad	
Andorra	No separate national definition	Signatory to international treaties
Angola	Narrow	Intention must be against the constitution or state institutions
Argentina	No separate national definition	
Armenia	Very broad	
Australia	Similar definition to the UK	See <i>Security Legislation Amendment (Terrorism) Act 2002</i> . An action to advance a political, religious or ideological cause and with the intention of coercing the government or intimidating the public.
Austria	No separate national definition	Terrorism referred to in the criminal code, but there are not specific terrorism offences

¹⁰ Parts of the table are derived from *Counter-Terrorism Legislation & Practice, A Survey of Selected Countries* Foreign and Commonwealth Office, October 2005.

Country	General description	Comments
Azerbaijan	Narrow and purposive	Refers specifically to “... <i>the aim of undermining public security, spreading panic among the population or forcing State authorities to take decisions that comply with the demands of the terrorists</i> ”
Bahamas	No separate national definition	
Bahrain	No separate national definition	
Bangladesh	Very broad	
Belgium	Very broad	
Belize	No separate national definition	
Benin	No separate national definition	Reforms currently taking place to incorporate treaty obligations into criminal code
Bhutan	No separate national definition	
Bolivia	Very broad	Includes conspiracy by 3 or more people to traffic in controlled substances: sentences are very low
Bosnia/Herzegovina	No separate national definition	
Botswana	No separate national definition	
Bulgaria	Very broad	

Country	General description	Comments
Canada	Similar definition to the UK. The legislative matrix is complex.	Defined by specific reference to UN Conventions and Protocols. Acts intended to intimidate the public or compel a person, a government or a domestic or international organization to do or refrain from doing any act, inside or outside Canada; refers to <i>serious</i> injury or risk to health and safety, and <i>substantial</i> property damage.
China	Extremely broad	Includes aspects of freedom of speech and association
Croatia	Narrow and focused, separate definitions of <i>International</i> and <i>Anti-State</i> terrorism	Broad definition of actions, qualified to narrow result of " <i>causing a feeling of personal insecurity to citizens</i> ".
Cyprus	No separate national definition	Criminal Code refers as crimes to many acts defined in other statutes as terrorism (e.g. use of armed force against the government)
Czech Republic	Narrow definition of crimes of terror	Focused on the constitutional order of the Republic
Denmark	Broad; recent addition of a definition to the Criminal Code	Focus on offences to disturb the established order and intimidate the population
Egypt	Very broad, substantially unchanged since murder of President Sadat	Criticized by UN Human Rights Committee
Estonia	Narrowly defined	Closely tied to international obligations
Finland	Similar to UK in effect	
France	Broad	Code refers to disturbance to public order by means of intimidation or terror. Would certainly characterise a serious idiosyncratic criminal (e.g. Thomas Hamilton) as a terrorist

Country	General description	Comments
Germany	No specific definition. No additions to the substantive law since 9/11. Procedural changes made in 2002 to enhance policing of domestic terrorists.	Very similar overall effect to UK legislation.
Greece	Narrow and confined to serious harm to state or international organizations.	Statutory defence for acts aimed at establishing or restoring democratic regimes or in the exercise of fundamental civil or political rights.
Hungary	No separate definition. Strict adherence to international treaties.	
Iceland	Broad definition comparable to UK.	Includes assaults and threats to traffic safety, if intended to cause considerable fear among the public.
India	Very broad	Includes presumption of being a terrorist if in possession of firearms in certain designated areas.
Indonesia	Broad	Substantial threats to the State have emerged. The Bali bombing of October 2002 led to greater legal rigour against terrorists.
Ireland	Very broad	
Italy	Similar to UK	
Latvia	Very broad in terms of acts, but narrow intention focused on harming the State or international organizations.	
Liechtenstein	Very broad range of acts linked to international obligations.	
Lithuania	Very broad in terms of acts, but narrow intention focused on harming the State or international organizations.	

Country	General description	Comments
Luxembourg	Very broad in terms of acts, but narrow intention focused on harming the State or international organizations.	
Macedonia	Broad definition of acts, including creation of a sense of insecurity among the citizens; must be aimed at the State or its organs or senior representatives and officials.	
Malta	No separate national definition	
Monaco	No separate national definition	Broad definition of criminal association
Netherlands	Criminal acts effectively defined by reference to international treaties.	
Norway	Dualist system, requiring domestic legislation to incorporate international treaty obligations	Effect similar to UK, though by a different legislative route.
Poland	Narrow definition focused on attacks on States and their official representatives; otherwise subject to ordinary criminal law.	
Romania	Broad definition, similar to UK in effect	
Russia	Broad in terms of actions, with intention to undermine public security, terrorise the population or pressurise the authorities to take decisions.	
Serbia/Montenegro	Broad, with close connection with the consequence of causing the feeling of insecurity among the citizens. Specific reference to international treaty obligations for broader notion of international terrorism.	Broad definition of actions and effect is qualified by requirement that there should be the intention of endangering the constitutional order or security of the Republic.

Country	General description	Comments
Slovakia	Requires a serious crime or threat of such a crime against life health, people or property.	Intention must be to intimidate the population, seriously destabilise or destroy the political etc system of a country or international organization, or to compel a government to do or abstain from any act.
Slovenia	Narrow definition of internal terrorism; must be intended to jeopardise security of the Republic; international terrorism more broadly defined to take account of treaty obligations.	
Spain	Very broad definition of terrorism; also, aggravated form of ordinary crime where intention is to subvert the constitutional order or to effect serious disturbances of public order.	Special court system for dealing with terrorism; procedurally different from other serious crime.
Sweden	Broad definition of acts, with narrow consequences of seriously damaging a state or international organisation, and linked intent of a political nature.	Dualist system requiring domestic law to give effect to international treaties.
Switzerland	Broad definition comparable to UK	Statutory defence if intention is to establish or re-establish a democratic regime or the rule of law or to enable the exercise or safeguarding of human rights (<i>Penal Code Art 260, para 3</i>)
Turkey	Broad definition	
Ukraine	Very broad definition	Could include intention of influencing relatively minor State bodies and officials.

Country	General description	Comments
United States of America	PATRIOT Act of 2001. Very broad definition Department of State operationally describes terrorism as <i>“premeditated, politically motivated violence perpetrated against non-combatant targets by subnational groups or clandestine agents, usually intended to influence an audience”</i> ¹¹	Wide executive powers including access to confidential information about citizens. A pendulum reaction to the events of 9/11.

19. There are several international treaties of relevance to the definition of terrorism.

The principal international agreements are set out in Table 2.

20. Table 2: International Treaties

International Convention for the Suppression of Terrorist Bombings [1997]	Creates a regime of universal jurisdiction over the unlawful and intentional use of explosives and other lethal devices in, into, or against various defined public places with intent to kill or cause serious bodily injury, or with intent to cause extensive destruction of the public place.
UN Resolution 1189 [1998]	Every State has the duty to refrain from organising, instigating, assisting or participating in terrorist acts in another State or acquiescing in such activities.
UN Resolution 1267 [1999]	Condemned the Taliban in Afghanistan; required all States to act accordingly; referred to <i>“preparation or organisation of terrorist acts”</i> without a definition.
International Convention for the Suppression of the Financing of Terrorism [1999]	Defines terrorism by reference to a list of treaties; or <i>“any other act intended to cause death or serious bodily injury to a civilian, or to any other person not taking an active part in the hostilities in a situation of armed conflict, when the purpose of such act, by its nature or context, is to intimidate a population, or to compel a government or an international organisation to do or abstain from doing any act”</i> .

¹¹ US Department of State *Patterns of Global Terrorism*, available via www.state.gov/s/ct/rls/pgtrpt/

UN Resolution 1368 [2001]	Followed 9/11 attacks. Secretary-General Kofi Annan described a terrorist attack on one country as <i>“an attack on humanity as a whole”</i> . Without definition, all terrorism to be condemned whatever the political origins. This is the start of a ‘zero tolerance’ approach, sustained since then by the Secretary-General and carried through the Madrid Summit.
UN Resolution 1373 [2001]	Requires all Member States to criminalise funding of terrorism; and to establish as serious criminal offences any planning, support and perpetration of terrorist acts.
European Union Council Framework Decision on Combating Terrorism [2002]	Established minimum rules as to elements of terrorist actions: concentrates on offences of most serious violence with the intention of <i>“seriously altering or destroying the political, economic, or social structures of a country”</i> . Narrower than UK <i>Terrorism Act 2000</i> ; for example, would exclude poisoning of the public water supply with the intent to cause sickness rather than kill.
UN Resolution 1566 [2004]	<i>“Imperative to combat terrorism in all its forms and manifestations by all means”</i> ; requirement in so doing to comply with international human rights, refugee and humanitarian law. Describes as terrorist acts <i>“criminal acts, including against civilians, committed with the intent to cause death or serious bodily injury, or taking of hostages, with the purpose to provoke a state of terror in the general public or in a group of persons or particular persons, intimidate a population or compel a government or an international organisation to do or to abstain from doing any act, which constitute offences within the scope of and as defined in the international conventions and protocols relating to terrorism, are under no circumstances justifiable by considerations of a political, philosophical, ideological, racial, ethnic, religious or other similar nature, and calls upon all States to prevent such acts and, if not prevented, to ensure that such acts are punished by penalties consistent with their grave nature”</i> .

UN Resolution 1624 [2005]	Condemns all acts of terrorism and incitement to commit a terrorist act or acts <i>“irrespective of their motivation, whenever and by whomsoever committed”</i>
Council of Europe Convention on the Prevention of Terrorism [2005]	<p>Includes</p> <p><i>“Recognising that terrorist offences and the offences set forth in this Convention, by whoever perpetrated, are under no circumstances justifiable by considerations of a political, philosophical, ideological, racial, ethnic, religious or other similar nature, and recalling the obligation of all Parties to prevent such offences and, if not prevented, to prosecute and ensure that they are punishable by penalties which take into account their grave nature;</i></p> <p><i>Recalling that acts of terrorism have the purpose by their nature or context to seriously intimidate a population or unduly compel a government or an international organisation to perform or abstain from performing any act or seriously destabilise or destroy the fundamental political, constitutional, economic or social structures of a country or an international organisation;</i></p> <p><i>For the purposes of this Convention, “public provocation to commit a terrorist offence” means the distribution, or otherwise making available, of a message to the public, with the intent to incite the commission of a terrorist offence, where such conduct, whether or not directly advocating terrorist offences, causes a danger that one or more such offences may be committed.</i></p> <p><i>Each Party shall adopt such measures as may be necessary to establish public provocation to commit a terrorist offence, as defined in paragraph 1, when committed unlawfully and intentionally, as a criminal offence under its domestic law.”¹²</i></p>
UN Global Counter-terrorism Strategy [2006]	<p>Reiterates the criminality of all terrorism <i>“in all its forms and committed by whomever, wherever and for whatever reasons”</i>.</p> <p><i>Requires extradition or prosecution of “any person who supports, facilitates, participates or attempts to participate in the financing, planning, preparation or perpetration of terrorist acts or havens”</i>.</p> <p>Reaffirms consistency with international law.</p>

¹²The Convention represents the consensus of signatories to the ECHR, a geographical, political and cultural group of broadly similar nations with common interests.

21. The *Council of Europe Convention of 2005* is of signal importance, as it brought the Council into line with the zero tolerance approach of the United Nations confirmed at the 2005 Madrid Summit. It should be noted that the Council of Europe is the source and owner of the *European Convention on Human Rights*.

THE ARGUMENTS

22. Given the summary of the international position as set out in the Tables above, I now summarise the principal submissions and arguments presented to me for the purpose of this report. That they are so briefly stated is not to be taken as dismissive of any of them. They seem to me to fall into 4 clear and concise propositions, not entirely mutually exclusive, as set out in Table 3.

Table 3: Propositions

<p>Proposition 1: No definition needed, nor special procedures</p>
<p>Reasons: All terrorist actions and offences, substantive and inchoate, are covered by existing criminal law. No special laws are needed, and no definition of terrorism. The creation of a definition and special measures for terrorism bring with them an inevitable deficit in individual freedoms. This is more likely to lead to arbitrary and unconstitutional action by the State.</p>
<p>Proposition 2: Definition needed but no special procedures and offences: adjustment to sentencing powers adequate</p>
<p>Reasons: Although all terrorist actions and offences, substantive and inchoate, are covered by existing criminal law, sentencing powers for such offences may not be sufficient to take into account the terrorism element. Whilst terrorism offences should be investigated and charged under existing criminal laws to avoid a deficit in individual freedoms, where there is a terrorism element the sentencing judge should be able so to find and increase the sentence proportionally. The analogy of racially aggravated offending is cited as an example of this type of approach already in use.</p>
<p>Proposition 3: Definition needed, including special procedures and offences, but a tighter definition than at present</p>
<p>Reasons: This proposition is close to the current UK legislative position. A reality check leads one to the conclusion that terrorism is a special category of criminal activity; that particular procedures are required to deal with such activity; and that for some purposes new crimes require definition to reflect the threat; but these should be more tightly drawn to limit criminalisation to the core activities and intentions of terrorists.</p>
<p>Proposition 4: Definition needed, including special procedures and offences, drawn broadly and to anticipate estimates of future terrorism activity.</p>
<p>Reasons: This proposition seeks at the very least the current position, with some wanting stronger executive powers against terrorism suspects.</p>

23. In considering these propositions, one is faced with an inevitable conflict between a starting point that is entirely rights based, and one that is founded on pragmatic problem solving in the face of a threat. The latter view certainly risks the potential dilution of rights and freedoms taken for granted in relation to non-terrorism laws.

24. I have been assisted in finding what I regard as the appropriate starting point for dealing with these propositions by the numerous academic contributions received. I have found especially helpful the following comments by Professor Clive Walker of the University of Leeds, in an article dealing with cyber-terrorism¹³:

“The first step in the argument should be to impose firm principle on any legal initiative. ...full constitutional governance requires continual application of a number of elements. The first is a ‘rights audit’ which means that the rights of individuals are respected according to traditions of the domestic jurisdictions and the demands of international law. The latter will include the periodic review of the very existence of any emergency or special measures. The second element is ‘democratic accountability which includes attributes such as information, open and independent debate, and an ability to participate in decision making. The third element is ‘constitutionalism’ - the subjection of government to norms, whether legal or extra legal (such as codes). More specific requirements in the field of special powers include the public articulation of reasons in support of particular actions taken for the public welfare, assurances through effective mechanisms that the crisis cannot be ended by normal means and that the powers will not be used arbitrarily and are proportionate to the threat, and adherence to the overall purpose of the restoration of the fundamental features of constitutional life. Constitutionalism also requires that, at a more individual level, excesses can be challenged, including through the courts.”

25. Of assistance too is a remark included in a written paper provided to me by Professor Tom Hadden of Queen’s University Belfast, an observer at close quarters of the effect of terrorism on terrorised communities. He said:

¹³ [2006] 110 Penn State Law Review 625

“The legal response to the outbreak of terrorist activity should be limited to measures that will enable the security agencies and the police to intervene to prevent terrorist attacks and to bring criminal charges against those involved with as few derogations from ordinary criminal procedures as possible.”

26. There are many severe critics of the *Terrorism Act 2000* definition. A recent example is the report *“The Rules of the Game”*, from the University of Essex¹⁴. This report describes the statutory definition as too wide to satisfy the clarity required for the criminal law; and opines that it *“leaves room for political bias and could be used to prosecute people active in legitimate social or political movements who are exercising their rights”*. As the same report reminds us, Amnesty International and the Parliamentary Joint Committee on Human Rights¹⁵, have made similar comments. However, neither the Essex study nor other broad critics provide an alternative formulation for a definition to deal with the risk, discussed in the paragraphs 28-32 below.

27. In a letter to me dated the 22nd August 2006 the Minister of State at the Home Office, Tony McNulty MP, expressed the view that the current definition is *“comprehensive and effective approved following extensive debate in Parliament”* He claimed that *“there is no evidence that the broadness of the definition has caused problems in the way it has operated”*. With reference to the discretion to prosecute and use other special powers he said:

¹⁴Blick A, Choudhury T and Weir S, a report by Democratic Audit, Human Rights Centre, University of Essex, for the Joseph Rowntree Reform Trust.

¹⁵Joint Committee on Human Rights, *Counter-Terrorism Policy and Human Rights: Terrorism Bill and related matters*, 28 November 2005, available via www.parliament.uk

“... it is the long-standing policy to prosecute terrorist activity using general offences wherever possible and that terrorism specific offences, preventative measures and powers are used either where no comparable general offence exists or where specific powers or measures are needed to enable them to investigate or prevent this special category of crime. This means that the definition of terrorism only comes into play in a relatively small number of cases”.

However, the Minister recognises that the definition of terrorism, along with many other legal definitions, cannot be said to be 100 per cent perfect. He asks to guard against abandoning a definition that has proved over 6 years to be effective in covering terrorist activity, and which is understood easily by the police and other agencies working against terrorism at the operational level.

THE RISKS POSED BY TERRORISM

28. The opinions quoted and described in the four preceding paragraphs (and the many similar assertions I have heard) make it necessary for me to comment on the nature of the risk. Many assessments have been given by politicians, police officers, the Director-General of the Security Service and other operational officials with a far greater depth of knowledge than my own. I am able to make my own assessment on the basis of briefings from such officials, together with records and documents I see in connection with parts of my work as independent reviewer. As an example of what I see, I would mention my routine and frequent examinations of the material supporting the making of control orders under the *Prevention of Terrorism Act 2005*.
29. The risk and the nature of terrorist crime are only the first pieces of evidence in the case for special laws. The second part of that evidence arises from the form of planning of such crime, and the consequent difficulties in detecting and preventing it.
30. In dealing with much 'ordinary' serious crime, such as armed robbery or organised drug dealing, the police are sometimes able to mount a 'sting' or surveillance operation whereby they maximise their opportunity to detect it by allowing the crime to 'run' until the last possible moment. For example, robberies at London Heathrow Airport in May 2004 were detected in this way, with a large police presence waiting to arrest the robbers as they made their way into their targeted parts of the airport. Several convictions and very long prison terms resulted. In that kind of operation there is a restricted geographical target, a known and limited group of potential victims of violence, and therefore a risk analysis and element manageable by a skilled police service.

31. Terrorism crime is different. Fanatics and others moved by a fervent ideological or similar purpose are less predictable than professional criminals. Suicide bombers represent a very special lethal risk, as there is always the possibility that they will detonate if approached. The fruition of other crimes does not stimulate the same dread or risk¹⁶. The nature of the targets used, and the flexibility of deployment of suicide bombing, generally mean that the date and time of fruition can be moveable at short notice, and brought forward significantly if there is any suspicion of having been infiltrated or detected. The danger to participating and other informants is extreme; informants can be precious in such cases even if what they provide is only a small part of a big picture. Surveillance can be difficult and is very labour and resource intensive. Terrorists are often trained and wary of human and electronic surveillance.
32. I am in no doubt that, for the time being at least, there are groups of people dedicated to violent and lethal jihad. They are capable of organising themselves both separately and collectively. They can do so on a sustained basis. They are patient so long as they have a confident sense of security. They are intent upon and have the means to cause terror among a wide and unpredictable section of the community. They are driven by a common purpose though not always with clear common goals. They are skilful in choosing targets for their maximum fatalities. The ethos underpinning their common purpose is to condemn Western society and its value systems, and to replace it and them by a set of values and with a legal system claimed to be a pure form of Islam. Their secondary purpose has become to change the foreign policies of several countries. Domestically within the UK there is abundant material, some of it necessarily outside the public domain for reasons of national security, to support the view that numerous terrorism cells are active. They are difficult to find.

¹⁶ A comment made to me in these terms by Professor Clive Walker.

TERRORIST LABEL (IMITATORS)

33. There are other organisations and persons, unconnected with violent jihad and other comparable causes, with broadly terrorist purposes and means. These include a very small minority of extreme animal rights activists, whose capacity for causing nuisance and sometimes serious damage and injury is undoubted and determined. There are individuals too, such as Theodore Kaczynski the American so-called *Unabomber*, and the British lone bomber David Copeland, who use terrorist tactics and materials and from time to time can cause as much terror as large groups. Generally the UK authorities deal with these groups and individuals under the criminal law without the use of terrorism legislation, as asserted by Home Office Minister Tony McNulty (see paragraph 27 above). The designation of *terrorist* may even be seen by some to be a badge of office, a cachet. In dealing with any definition, discretion and policy will always have a proper part. Put simply, what I mean by this is that the authorities should always treat suspects within the normal rather than special criminal laws unless their threat and structure requires operationally that they should be regarded formally as terrorists.

34. Many examples can and have been cited of individuals who might fall inappropriately within the current definition, if considered solely in strict legal terms. They might include a political protester such as the suffragette Emily Wilding Davison, who threw herself under a horse at Epsom racecourse on the 13th June 1913; or the eco-protester 'Swampy'. Each of them arguably caused the risk of danger to other people who might have attempted to rescue them. Another example might be an imitator of the leading British contemporary artist Cornelia Parker, whose work *Cold Dark Matter: an Exploded View* [1991] consists of the

exploded remains of a garden shed and contents. Her explosion was with the assistance of the Army, but an unauthorised imitator might fall foul of the definition in the *Terrorism Act 2000*. The question posed by such cases is whether the discretion to prosecute or use terrorism related provisions is a sufficient protection for examples such as these. Further attention is given to this issue in paragraph 60-64 below. The question posed by such cases is whether the discretion to prosecute or use terrorism related provisions is a sufficient protection for examples such as these. Further attention is given to this issue below.

ASSESSMENT

35. Given the risk level posed by violent jihadists as with formerly active Irish paramilitary groups such as the IRA and other terrorist groupings such as the Red Brigades¹⁷) there is the primary justification for dealing with them in a special way.
36. The provisions of the *Terrorism Act 2000* include prophylactic and pre-emptive measures against terrorists. These include:

Table 4: Important *Terrorism Act 2000* powers

Part II - Proscription	Proscription of terrorist organisations; and offences of membership
Part III - Terrorist property	Offences of raising funds for terrorist organisations; duty to disclose information and co-operate with police; seizure and forfeiture of terrorist money
Part IV - Terrorist investigations	Special powers to cordon areas; and to facilitate investigations
Part V - Counter-terrorist powers	Stop and search of persons and premises; arrest without warrant; parking restrictions; port and border controls (section 53)

37. Some of the powers referred to in table 4 are the subject of specific controversy. Of especial note is *section 44*, which enables police to stop and search for terrorism material in designated areas and subject to Home office confirmation. There is broad agreement now, as I have suggested elsewhere and repeatedly, that the section is overused¹⁸; and I believe this view to be generally shared by senior police officers with especial experience of terrorism work.

¹⁷ An Italian based Marxist revolutionary group active especially in the 1970s. They were responsible for over 10,000 acts of violence, including the murder of serving Italian Prime Minister Aldo Moro in 1978.

¹⁸ See various of my reports on the operation of the Terrorism Act 2000, via the Home Office website www.homeoffice.gov.uk

38. However (subject to reservations about the way in which *section 44* is used) there is in my view clear evidence that the powers are necessary and very useful in the investigation, early disruption and detection of terrorism. Given that the essence of terrorism is to terrify the population at large or wholly unpredictable sections of the community, I have no doubt that such provisions are proportional and necessary for the most part. The ordinary criminal law does not offer the range of options necessary to deal with the need for prophylaxis and pre-emption.
39. Of course, it would be possible to extend what are currently special terrorism powers to deal with the whole range of criminal activity along the lines currently available for terrorism. This would remove the complaint that terrorism is treated in a discriminatory way as a special subset of crime, and might help to reduce other serious criminal offences such as street robbery and drugs dealing. Of course, the consequence would be a general reduction of rights and protections.
40. That there are other subsets of crime with special provisions, including drug dealing and serious fraud, has assisted me in my conclusion that terrorism too is a special category; and that its circumstances require the enactment of particular provisions such as those summarised above and for the reasons given.
41. It follows that I reject proposition 1, and conclude that a definition of terrorism is required to describe and circumscribe the circumstances in which the special provisions may be used.
42. I should add that I have considered carefully the scheduling approach urged upon me by a small number of commentators. This takes the approach of *Terrorism Act 2000 Part VII*, applicable to Northern Ireland (at the time of writing the subject of

probable imminent repeal). It is suggested that there be a schedule of offences that could be categorised as potentially terrorist, and that special powers be applied to those offences. This, it is said, would avoid the pitfalls of a definition as such of terrorism.

43. The main problem with the schedule approach is illustrated by the Northern Ireland provisions. Such a wide range of offences is included in the material *Schedule 9* that it proves less restrictive than even the current definition of terrorism. Given the many manifestations of terrorist activity, it is difficult to see how a schedule much narrower than that would be appropriate. For example, the financing of terrorist cells can occur through large numbers of small but fraudulent credit card transactions. Or the arming of terrorists may include the theft or obtaining by deception of laboratory or agricultural material of use in explosions. The ordinary range of sentence for such offences may be relatively low, whereas if the purpose is for terrorism the level of criminality may be high. In the new Northern Ireland Bill¹⁹ the proposed public order provisions designed to replace the Diplock Courts system of judge only courts abandons the use of a schedule. It is plainly a matter of opinion, but I do not agree that the schedule approach would create greater legal certainty than a definition fit for purpose.

44. It follows too that I reject the first part of proposition 2. However, during the course of my inquiry I received many powerful representations that the provision of special sentencing powers for apparently ordinary offences connected with terrorism would be a useful addition to the criminal law. I agree, and so recommend.

¹⁹*Justice and Security (Northern Ireland) Bill 2006-7*; to be found via www.parliament.uk

45. The framework I have in mind for this purpose is that any non-terrorist offence punishable by 5 years imprisonment or more should be susceptible to an additional term of up to 5 years if the offence was aggravated by the intention to facilitate or assist a terrorist, a terrorist group, or a terrorist purpose. By analogy with *Newton* hearings, in which judges assess disputed facts founding pleas of guilty, the trial judge could safely be given the jurisdiction to determine the aggravation issue, to the criminal standard of proof.
46. I do not intend in this report in any way to supplant the role of parliamentary counsel, the expert drafters of legislation. Any suggestions for statutory provisions additional to those in force would require the attention of those experts. What I advise above is descriptive of what I perceive to be required. The additional period of imprisonment should be subject to normal reduction by way of remission.
47. Having concluded that a definition of terrorism is required, I turn now to its terms and requirements, and to deal with propositions 3 and 4 in Table 3 above.
48. I have received several broad propositions as to what should not be included in such a definition. These include:
- Offences against property should not be included in a definition of terrorism
 - Offences for a religious purpose should be excluded, as religion is a diffuse concept incapable of clear definition
 - There should be exclusion of offences akin to terrorism, but not really terrorist in anything more than means of perpetration, i.e. lacking a sufficient political or ideological component/motive

- Mere preaching or glorification should not be capable of being regarded as terrorist offences
- Terrorism in a just cause, on the basis that what is terrorism against an oppressive regime may be justifiable if to assist freedom fighters

49. On the last of those points I have received strong representations, not least from Members of Parliament, that to act in a just cause should be a defence in law to acts of terrorism, on the basis that there is no real difficulty in showing a clear distinction between freedom fighters and terrorists.

50. So far as offences against property are concerned, I have no doubt that these and threats to damage property should be included in any definition. Damage to property can induce a real sense of terror for the future. There is no difficulty in producing examples. A threat to explode bombs on the London Underground would produce both physical fear and practical difficulty for commuters and severe economic consequences. The bombing of schools at weekends or in the school holidays, accompanied by a threat that future bombings might not be limited to out of school times, would hold the pupils of those schools and everybody else associated with them in a state of terror for a considerable time, even if nothing more happened. The major disruption by damage of the gas or electricity systems of cities and towns would cause a risk to the lives of those exposed to danger by sudden power losses, as well as widespread economic damage to the nation. All these are real examples of terrorism.

51. The issue of the exclusion of a religious cause from the definition of terrorism is difficult. There is no significant argument to the effect that a political cause should be excluded from the definition. The same applies to an ideological cause. Can there be a religious cause which is neither political nor ideological? If so, should it be under the terrorism umbrella?

52. It is worth reminding oneself of the two great guarantees of religious freedom applicable in the modern age, *Article 18 of the United Nations Universal Declaration of Human Rights* [1948], and *The First Amendment to the Constitution of the United States of America*. The UN document provides:

“Everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief, either alone or in community with others and in public or private, to manifest his religion or belief in teaching, practice, worship and observance.”

And the US Constitution:

“Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances.”

53. Neither of those short but profound texts contemplates the use of religion for any violent end or its justification. It is just foolish to suggest that there is some form of discrimination against any religious group, expressly or by implication, in the criminalisation of the use of religion for, or as a justification of, violence. Further, it

would be unwise to ignore the view expressed by Lord Lloyd in 1996 that the previous definition was too restrictive, not least because it failed to include single issue or religious terrorism²⁰.

54. My conclusion that a religious cause should be included is consistent with the views expressed recently by the *Review of Security and Counter Terrorism Legislation* by the Parliamentary Joint Committee on Intelligence and Security of the Australian Parliament²¹. This is consistent too with the *Terrorism Suppression Act 2002* of New Zealand²², and the *Protection of Constitutional Democracy Against Terrorism and Related Activities Act 2003* of South Africa, and some international treaties to which the UK is a signatory²³. In Canada however, where there is a similar provision, a recent decision²⁴ in the Superior Court of Justice of Ontario has held that the inclusion in the criminal law as part of the definition of terrorism of “*a political, religious or ideological objective or cause*” constitutes an infringement of certain fundamental freedoms guaranteed in the *Charter of Rights and Freedoms*²⁵: this remains to be resolved finally by the Canadian Federal jurisdiction²⁶.

55. In relation to the components of terrorist activity, I agree with the view that the true and definable characteristics of terrorism are to be found in the combination of motive and means of perpetration.

²⁰ *Inquiry into Legislation against Terrorism [1996] Cm3420 para 5.22.*

²¹ Chaired by The Hon David Jull M.P. Report published December 2006; available via www.aph.gov.au

²² *Section 5.*

²³ *UN Resolution 15666 [2004] and Council of Europe Convention on the Prevention of Terrorism [2005].*

²⁴ *The Queen v Mohammed Momin Khawaja [16th December 2006] Court file no: 04-G30282.*

²⁵ Specifically *section 2, which guarantees rights of religion, thought, belief, opinion, expression and association.*

²⁶ The UN Human Rights Committee has suggested that Canada should refine its terrorism definition to ensure that individuals are not targeted on political, religious or ideological grounds: see *Concluding Observations of the Human Rights Committee Canada CCPR/C/CAN/CO/5, 2nd November 2005.*

56. Motive or design is currently part of the UK definition found in *Terrorism Act 2000* section 1(1)

(b) *the use or threat is designed to influence the government [or an international governmental organisation] or to intimidate the public or a section of the public, and*

(c) *the use or threat is made for the purpose of advancing a political, religious or ideological cause.*

57. I have received argument that on the one hand the reference to *a section of the public* is too broad (as it might involve a very small group of people); and on the other hand that the italicised words are no more than tautology (as *the public* includes all). Discretion and caution lead me to the conclusion that those words are best left alone. Consistency with the *Council of Europe Convention on Terrorism* would favour the removal of the words "*or a section of the public*". However, I am persuaded by contrary arguments that the removal of that phrase might have the effect of excluding acts of terrorism directed against a small religious group or other minority.

58. A connected issue raised concerns the use in the UK legislation of *influence*. International comparison reveals variations on the quality of the intention that is required. The range includes *coerce, compel, intimidate* and *subvert*.

59. In my view there is force in the argument that the 'bar' is set rather low by the use of the word *influence* in the definition. Of all the words available that would raise the bar to a more appropriate level, I suggest that *intimidate* has a clear meaning, entirely referable to the most easily understood notions of what terrorism is. It would have the effect too of applying the same standard to government as to the public whose embodiment a government should be. This would be consistent with the *Council of Europe Convention on Terrorism*.

DISCRETION AS PROTECTION

60. At this point in the report it may be useful if I make some remarks about the exercise of the discretion to prosecute or use special powers available only against suspected terrorists. There is no doubt that non-terrorist activities as illustrated in paragraph 34 above could fall within the definition as currently drawn. This raises the question of whether it is enough to rely on the discretion of the police and the Crown Prosecution Service in order to ensure that the definition is applied appropriately. If we are to continue to rely as strongly as hitherto on discretion, it is on the basis that it is a precious and key exercise; and that the heaviest of responsibilities lie upon those in whom it is vested.
61. Many serious offences, including several under the *Terrorism Act 2000*, require the consent of the Director of Public Prosecutions before a prosecution may take place.²⁷ Some prosecutions sanctioned by the Director fail, including terrorism prosecutions. However, I know of no case in modern times in which the decision to permit a prosecution has been held to be founded on political bias, bad faith or dishonesty on the part of the Director for the time being, or the Attorney General. I am aware that prosecutions are not permitted to proceed from time to time on the grounds of national security, though this is rare.
62. The fundamental tests applied are to be found in the 24 pages of the Code of Practice for Crown Prosecutors²⁸. It is possible, though far from easy, to challenge some prosecutorial decisions by judicial review. The continuation of jury trial provides an important protection against prosecutions the public find unreasonable or arbitrary²⁹. Current dilution of jury trial is understandable where there is a real

²⁷ See *Terrorism Act 2000 section 117*.

²⁸ www.cps.gov.uk and follow publications link.

²⁹ Perhaps the most notable is the acquittal of civil servant Clive Ponting on the 11th February 1985.

risk of the jury process being contaminated by corruption or intimidation, infection of the jury process itself. Otherwise the jury remains the jewel in our criminal justice system. Mistakes will occur from time to time in that system, including decisions to prosecute. However, the discretion exercised by the prosecutor should not be discarded lightly on the basis that one day a seriously malign government may come to power and arbitrariness will become the order of the day. That view, expressed to me occasionally by sophisticated commentators, is one I reject.

63. The Director of Public Prosecutions is answerable in managerial and political terms to the Attorney General. The Attorney is both independent adviser to the government on legal matters, and a member of the governing party holding senior Ministerial office. This makes for a challenging and difficult balancing act by the office-holder, of whatever political party. As a Parliamentarian, I have observed at close quarters six Attorneys General, three Conservative and three Labour³⁰. Of those and their modern predecessors there has been plenty of political criticism, the stuff of robust debate, but no serious sense of impropriety. Each has been capable of control by Parliament. The debates on the *Terrorism Act 2006*³¹ demonstrated most recently in this context that a government even with a significant working majority in the House of Commons may from time to time be defeated on issues connected with the liberty of the individual.

64. I conclude that, in our perhaps idiosyncratic Parliamentary system with its unwritten constitution, the exercise of the discretion to or not to prosecute or to use special legislative powers should be regarded as constitutionally important. The strong, indeed incontrovertible convention against arbitrariness has a decent and respectable history. It provides too a flexible response to concerns about inappropriate prosecution of those struggling against oppressive regimes.

³⁰ Attorneys General Havers, Mayhew, Lyell, Morris, Williams and Goldsmith.

³¹ Available via www.parliament.uk

MOTIVE/DESIGN

65. Given my conclusions about the utility and protections provided by the discretion, I see the *section 1(1)* motive test as neither better nor worse than the best available in comparable jurisdictions. I see no demanding reason for change. However, for consistency with the *UN Resolution 1566 [2004]* and *Council of Europe Convention on the Prevention of Terrorism 2003*³², consideration should be given to the possibility of replacing *section 1(1)(c)* with the words

“the use or threat is made for the purpose of advancing a political, philosophical, ideological, racial, ethnic, religious or other similar cause”

66. A change of that kind, in addition to the advantage of consistency, would cement into the law clarity that terrorism includes campaigns of terrorist violence motivated by racism. I believe that these are covered by the current law. However, given the increasing debate in Western Europe about ethnic and religious customs (including modes of dress), the amendment proposed might be seen as providing a positive message as well as some increase in legal clarity.

³² See Table 2 above.

MEANS OF PERPETRATION

67. The means of perpetration are set out in *Terrorism Act 2000 Section 1(2)-(5)*, which I repeat for convenience

(2) Action falls within this subsection if it—

(a) involves serious violence against a person,

(b) involves serious damage to property,

(c) endangers a person's life, other than that of the person committing the action,

(d) creates a serious risk to the health or safety of the public or a section of the public, or

(e) is designed seriously to interfere with or seriously to disrupt an electronic system.

(3) The use or threat of action falling within subsection (2) which involves the use of firearms or explosives is terrorism whether or not subsection (1)(b) is satisfied.

(4) In this section—

(a) "action" includes action outside the United Kingdom,

(b) a reference to any person or to property is a reference to any person, or to property, wherever situated,

(c) a reference to the public includes a reference to the public of a country other than the United Kingdom, and

(d) "the government" means the government of the United Kingdom, of a Part of the United Kingdom or of a country other than the United Kingdom.

(5) In this Act a reference to action taken for the purposes of terrorism includes a reference to action taken for the benefit of a proscribed organisation.

68. The *Terrorism Act 2006* extends the range of terrorism offences. Most controversial has been the offence provided by *section 1*, which contains the term "*glorifies*", a novel word for a criminal offence in the UK.

Encouragement of terrorism

- (1) This section applies to a statement that is likely to be understood by some or all of the members of the public to whom it is published as a direct or indirect encouragement or other inducement to them to the commission, preparation or instigation of acts of terrorism or Convention offences.*
- (2) A person commits an offence if—*

 - (a) he publishes a statement to which this section applies or causes another to publish such a statement; and*
 - (b) at the time he publishes it or causes it to be published, he—*

 - (i) intends members of the public to be directly or indirectly encouraged or otherwise induced by the statement to commit, prepare or instigate acts of terrorism or Convention offences; or*
 - (ii) is reckless as to whether members of the public will be directly or indirectly encouraged or otherwise induced by the statement to commit, prepare or instigate such acts or offences.*
- (3) For the purposes of this section, the statements that are likely to be understood by members of the public as indirectly encouraging the commission or preparation of acts of terrorism or Convention offences include every statement which—*

 - (a) glorifies the commission or preparation (whether in the past, in the future or generally) of such acts or offences; and*
 - (b) is a statement from which those members of the public could reasonably be expected to infer that what is being glorified is being glorified as conduct that should be emulated by them in existing circumstances.*
- (4) For the purposes of this section the questions how a statement is likely to be understood and what members of the public could reasonably be expected to infer from it must be determined having regard both—*

 - (a) to the contents of the statement as a whole; and*
 - (b) to the circumstances and manner of its publication*

69. Given the need for a definition of terrorism, there is plainly no objection to *Terrorism Act 2000 subsection (2)(a)* and *(c)*. In relation to *(b)*, damage to property, I have dealt with this in paragraph 50 above: I favour its inclusion, for the reasons given there.
70. In relation to *section 1(2)(d)*, the apparently non-terrorist murder of Alexander Litvinenko on the 23rd November 2006 by the use of a minute quantity of radioactive poison has brought home the range of possibilities for serious risk to the health or safety of the public. Numerous other possibilities can be foreseen for terrorism motivated attacks on the health of the public. The Home Office and other control authorities recently have increased resources for the defence of the public against chemical, biological, radiological and nuclear attack. This is an accurate response to the threat. Terrorism with these designs should be included in the definition.
71. *Section 1(2)(e)* deals with the design seriously to interfere with or seriously disrupt an electronic system. This has the potential to include internet service providers, financial exchanges computer systems, controls of national power and water, etc. The huge damage to the economy of the nation, and the potential for injury as a result, are self-evident. This category too should be included in the definition. I have concluded that the provision remains justified.
72. On preaching and glorification, I agree with the view that mere preaching and glorification should not be capable of being regarded as terrorist offences. That Parliament and especially the House of Lords was troubled by *section 1 Terrorism Act 2006* should have surprised no-one. Even King Henry II's actions against his

“troublesome priest” Becket caused open concern to the barons of as long ago as 1164. However, amendments made to the 2006 Act during its passage through Parliament need to be read carefully: they do not criminalise mere preaching and glorification, as subsections 2 and 3 illustrate. No prosecutions have yet been brought under the section, and it is of course to be hoped that none will be needed. For the time being at least, I see no need to amend the existing law in that regard.

FIREARMS AND EXPLOSIVES

73. So far as *section 1(1)(3)* is concerned, this has the effect of including within the definition the use or threat of action involving the use of firearms or explosives - subject to political purpose existing, but irrespective of design to influence government etc. Is there continuing reason for this difference?

74. With the experience of the six intensive years since the enactment of the 2000 Act, it has been suggested to me that it is difficult to envisage terrorism that at the very least is not designed to intimidate a section of the public. On the other hand, I can envisage the example of hostage taking designed not so much to intimidate as to extract money, or weapons, or material with explosive potential. On balance, it is sensible to retain the additional provision in respect of firearms and explosives.

EXTRA-TERRITORIALITY AND OPPRESSIVE REGIMES

75. *Section 1(4)* has caused intense debate during the course of my inquiry. It provides for extraterritoriality for every part of the Act. To be clear, this means that a terrorist action falling within the definition is equally criminal whether it is intended to take place in the UK or elsewhere. Elsewhere includes, for example, Burma/Myanmar, France, Germany, Iran, Iraq, Ireland, Italy, Somalia, Zimbabwe.
76. Governments are obliged under international humanitarian law to ensure the safety of civilians and non-combatants. They are obliged too to protect the rights to freedom of expression, assembly, and association. Every party to the *UN Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment* has an obligation to ensure that law enforcement personnel and others involved in any form of arrest or detention are trained in the prevention of torture; to investigate any allegation of torture; and to ensure that victims of torture can seek and obtain redress. Many people have represented to me that it should not be an offence to plot and perpetrate terrorism against oppressive regimes which act in breach of their international obligations, subject to the proviso that civilians and non-combatants are not deliberately targeted or foreseen as victims.
77. An informal group of Members of Parliament is included in those who have suggested that there should be a statutory defence to the effect that agreements and actions designed to further international humanitarian law should be excluded from the definition of terrorism, or at least provided with a statutory defence. They cite examples of historic freedom fighters who were at one time regarded as terrorists, with Nelson Mandela often quoted as the paradigm³³.

³³ See Nielsen K *On the Moral Justifiability of Terrorism (State and Otherwise)* [2003] 41 *Osgoode Hall Law Journal* 427.

78. Attractive though the above proposition undoubtedly is at first encounter, it raises real difficulties. The first is that in itself it is contrary to international treaty obligations summarised in *Table 2* above, notably the *Council of Europe Convention on the Prevention of Terrorism [2005]* and the *UN Global Counter Terrorism Strategy [2006]*. It contradicts international commitments to zero tolerance of terrorism as a political tool. The second difficulty arises from the undoubted fact that there is far from total international or domestic agreement as to which regimes are/are not in breach of international humanitarian law. Who would decide which were the ‘bad’ regimes against which terrorist acts were permissible? If the decision was by a Minister of the Crown, would it be appropriate for the Courts to review the certification? What if Parliament were to pass a resolution in disagreement with the Minister’s decision? What would be the consequences of a domestic law that so contradicted the United Kingdom’s international treaty obligations as to be well outside the appropriate national margin of appreciation? How wide is that margin? An attempt in Parliament in 2000 to adopt a ‘designated countries’ approach failed³⁴ in debate.

79. *European Convention on Human Rights Articles 9-11, Anti-Terrorism Act 2002 section 83.01 [Canada] and Terrorism Suppression Act 2001 section 5(5) [New Zealand]* are all emphatic provisions in favour of freedom of religion, association, expression and belief. Whilst I can see no objection to the inclusion in legislation of provisions similar to those in Canada and New Zealand, there is no evidence of their having made any significant difference to the decisions of Ministers or Courts in those countries. The *ECHR*, together with the *Human Rights Act 1998 section 3* provide the material guarantee for the United Kingdom³⁵.

³⁴House of Commons Debates, Standing Committee D, 18th January 2000, col. 26 and following.

³⁵Useful judicial comments can be found in, for example, *R v DPP ex parte Kebilene [2000] 2 AC 326* per Lord Cooke.

80. The considerations outlined in the previous paragraph leave me in no doubt that there is really no practical way of introducing the kind of statutory defence suggested, and at the same time remain within international legal obligations.
81. However, I suggest that a new statutory obligation be inserted within the definition section to strengthen confidence that the discretion for or against the use of the *Terrorism Act 2000* is exercised correctly in relation to actions outside the United Kingdom and persons and property outside the United Kingdom. The new obligation might require all uses of the Act in relation to extraterritorial matters to be subject to the approval of the Attorney General having regard to (a) the nature of the action or threat of action under investigation (b) the target of the action or the threat of action, and (c) international legal obligations.
82. It should remain clear that actions such as the attempted smuggling of prohibited and potentially terrorist material from this country to other countries, whatever their political complexion, are domestic crimes within the UK.

STATE ACTORS

83. I have received several representations to the effect that the definition should make it clear that State actors are just as liable to be caught by the definition of terrorism as anyone else. Thus if the heads of government of countries perceived by some or many to be guilty of state terrorism were to enter our jurisdictions they would be liable to prosecution.
84. I can see the attraction of the argument. Nobody should be above the law, however exalted their status, be they foe or ally. However, I have concluded that this is not an issue of definition, but one of jurisdiction. Diplomatic immunity ensures that diplomats and Ministers are given safe passage and are considered not susceptible to prosecution under the host country's laws. Currently founded on the *Vienna Convention on Diplomatic Relations [1961]*, it has a much longer history in international law. This report is not the appropriate place for recommending change to a doctrine fundamental to relations between sovereign states.
85. Diplomatic immunity as an institution has developed to allow for the maintenance of government relations, including during periods of difficulties and even armed conflict. The importance of such channels continuing even between sworn enemies and to a background of disapproval probably outweighs the morality based desire to make no difference between state and non-state actors.

MAIN CONCLUSIONS

86. My main conclusions are as follows:

- (1) There is no single definition of terrorism that commands full international approval.
- (2) The risks posed by terrorism and its nature as crime are sufficient to necessitate proportional special laws to assist prevention, disruption and detection.
- (3) A definition of terrorism is useful as part of such laws.
- (4) The current definition in the *Terrorism Act 2000* is consistent with international comparators and treaties, and is useful and broadly fit for purpose, subject to some alteration.
- (5) Idiosyncratic terrorism imitators should generally be dealt with under non-terrorism criminal law.
- (6) The discretion vested in the authorities to use or not to use the special laws is a real and significant element of protection against abuse of rights.
- (7) The exercise of such discretion requires especial care by those in whom the discretion is vested.
- (8) New sentencing powers should be introduced to enable an additional sentence for ordinary criminal offences, if aggravated by the intention to facilitate or assist a terrorist, a terrorist group or a terrorist purpose.
- (9) Offences against property should continue to fall within the definition of terrorist acts.
- (10) Religious causes should continue to fall within the definition of terrorist designs.
- (11) The existing law should be amended so that actions cease to fall within the definition of terrorism if intended only to *influence* the target audience; for terrorism to arise there should be the intention to *intimidate* the target audience.

- (12) The existing definition should be amended to ensure that it is clear from the statutory language that terrorism motivated by a racial or ethnic cause is included.**
- (13) Extra-territoriality should remain within the definition in accordance with international obligations.**
- (14) A specific statutory defence of support for a just cause is not practicable.**
- (15) A new statutory obligation should require that the exercise of the discretion to use special counter-terrorism laws in relation to extra-territorial matters should be subject to the approval of the Attorney-General having regard to (a) the nature of the action or the threat of action under investigation, (b) the target of the action or threat, and (c) international legal obligations.**
- (16) The law should not be amended to enable the use in the United Kingdom of the special laws against persons subject to diplomatic immunity.**

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