

# SHIELDING THE COMPASS: HOW TO FIGHT TERRORISM WITHOUT DEFEATING THE LAW

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## A LATE 20<sup>TH</sup> CENTURY SNAPSHOT

1. On 9<sup>th</sup> February 1996, the IRA ended a long ceasefire by giving 90 minutes' warning of a bomb near Canary Wharf in London which killed two people, wounded 39 and caused more than £100 million pounds worth of damage.
2. A few days later, a smaller bomb went off prematurely, killing its bearer and destroying a double-decker bus on Aldwych in the centre of London.
3. They were followed, during the football tournament Euro 96, by the biggest peacetime explosion England has ever seen. The bomb injured 200 people and flattened £700 million pounds worth of Manchester City Centre - the remarkable exception being the Victorian pillar box standing no more than 5 metres from the bomb itself, which survived unscathed and is still there today. A further 15 deaths were caused that year by the security situation in Northern Ireland.
4. Further afield, the same year saw 90 killed and 1400 injured in a single Sri Lankan bomb; at least 6 hijackings (one diverted to Stansted Airport); a suicide bomb campaign in Israel; the Olympic Park bombing in Atlanta, which wounded more than 100 people but failed to achieve the cancellation of the Games; and the Khobar Towers bombing in Saudi Arabia, injuring 500 and killing 19 US servicemen.
5. That year was not unusually violent: indeed the number of terrorist attacks, globally, was assessed by the US Department of State as the lowest for 25 years.<sup>1</sup> There were not the frequent hijackings of the early 70s, the embassy hostage-takings that were prevalent 10 years after that or the Northern Irish death tolls of more than 50 per year, most of them civilian, that characterised the 1980s and early 1990s.
6. 1996 is chosen simply because it was the year in which an influential report was written by the distinguished Law Lord Lord Lloyd of Berwick, with the expert assistance of Professor Paul Wilkinson.<sup>2</sup> The purpose of the report, commissioned by the Home Secretary and the Secretary of State for Northern Ireland, was to advise the Government whether the United Kingdom needed a permanent anti-terrorism law to replace the temporary statutes, applicable largely to Northern Ireland, which had been subject to annual parliamentary renewal since 1974.

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<sup>1</sup> US Department of State, *Patterns of Global Terrorism*.

<sup>2</sup> Rt.Hon. Lord Lloyd of Berwick, *Inquiry into legislation against terrorism*, October 1996, Cm 3420.

7. As we have seen, this report was written not in some pre-lapsarian age of terroristic innocence – but rather at a time when both international terrorism and Northern Ireland-related terrorism, as they are now referred to, were murderous and ever-present realities. Nor was any improvement being counted upon. Lord Lloyd, advised by Professor Wilkinson, warned of what he called “*the worrying trend towards the use by terrorists of more and more deadly methods*”, noted that “*the hijacking of aircraft has given way to their destruction in mid-air*”, and drew attention to what he called “*the spectre of the possible use by terrorists of nuclear, chemical and biological materials*” – a risk fresh in his mind after the deadly sarin gas attack on the Tokyo subway in the previous year, but one which since then has thankfully, and perhaps surprisingly, remained more spectral than real.

### **The 21<sup>st</sup> CENTURY GROWTH OF ANTI-TERRORISM LAW**

8. Lord Lloyd advised that a permanent law was needed. First the Government and then Parliament agreed, taking his report as a template for the comprehensive code of anti-terrorism legislation that, after careful debate, turned into the seven parts, 16 schedules and more than 300 pages of the Terrorism Act 2000. That Act in turn was to influence the laws adopted by other countries in the succeeding years.<sup>3</sup>
9. Much of what became the 2000 Act was taken from the Northern Irish legislation and given general application; other elements were new. The 2000 Act was, or appeared to be, a comprehensive code.
10. In the following year, the Home Affairs Select Committee remarked that “*this country has more anti-terrorist legislation on its statute books than almost any other developed democracy*”. But it did so as it began its consideration of another Bill, prompted this time by the attacks of 9/11.
11. Today, the Act of 2000 has many new and unpredicted companions on the United Kingdom statute book: in particular, the Anti-Terrorism Crime and Security Act 2001, passed in the weeks after 9/11; the Criminal Justice (International Cooperation) Act 2003; the Prevention of Terrorism Act 2005; the Terrorism Act 2006, giving effect to Tony Blair’s declaration, shortly after the London attacks of 7/7, that “*the rules of the game have changed*”; the Counter-Terrorism Act 2008; the Terrorist Asset-Freezing Act 2010; the Terrorism Prevention and Investigation Measures Act 2011 and the Protection of Freedoms Act 2012. (Though the last three, as we shall see, gently reversed the direction of travel.)

### **ARE ANTI-TERRORISM LAWS A GOOD IDEA?**

12. An eighth of the way into the new century, one might ask whether – and if so why – this bewildering range of terrorism-specific powers is considered necessary: particularly those added after the clear-sighted assessment of risk that lay behind the Terrorism Act 2000.

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<sup>3</sup> See, generally, K. Roach, *The 9/11 Effect: Comparative Counter-Terrorism* (Cambridge University Press 2011); and [], below.

13. The case for terrorism-specific powers should be approached with a measure of scepticism. Many advanced countries managed until recently without special terrorism laws of any kind. The terror label – evocative as it is – risks distorting anything to which it is attached by its sheer emotional power. Terrorism stands for everything that is extreme, dangerous, frightening and secret – qualities which render it glamorous to all who associate with it.
14. Seasoned criminals in Northern Ireland, chiefly concerned with enriching themselves by the smuggling of tobacco or of diesel, may profit from the status of terrorist to improve their standing in the sub-communities of sympathisers – thankfully, now small and local ones – to which they belong. British Muslims travel to lawless parts of the world, seduced as young men have always been by the certainties of strong belief and the romance of hardship, comradeship and conflict.
15. Terrorism can make the careers of political leaders, prosecutors, journalists, lawyers and activists. It swells the budgets of military and intelligence services, publishers, universities and film studios. The police officer transferred to a counter-terrorism unit walks that bit taller. The provider of security fences or CCTV profits from the stardust that comes from appearing with 400 other exhibitors and 8000 delegates at an “*operationally critical two-day event*”.<sup>4</sup>
16. All these people are by the mere use of the T-word taken out of the normal vocabulary of crime, government, commerce or academe into a mental space that is inhabited by Robespierre, Irish dynamiters, Russian anarchists, Olympic hostage-takers, mujahideen, desert emirs and on the other side of the fence, Special Branch, undercover agents, Navy seals and drones. All have a shared interest in the problem being a serious and frightening one. Mutually reinforcing relationships are legion – not least between the terrorists themselves, who rely on publicity to promote fear, and the media which knows from experience that there is no better word than terror with which to invigorate the front page.
17. The very word has such magnetic qualities that ordinary compasses are not to be trusted anywhere near it. It might have been preferable if it had never found its way into the law. For our more sober juridical purposes, something more prosaic – politically motivated violent crime, perhaps – might have been more suitable. But it is too late for that. The concept is now considered to be a legal one, for better or worse. We need to shield our compasses and try to work out how (if at all) these special laws are to be justified..

#### **FOUR PARTIAL JUSTIFICATIONS**

18. Four such justifications are commonly advanced. There is something in most of them, but none of them takes us all the way there.
19. The first is the suggestion that terrorism is ***uniquely great threat to our lives and wellbeing***. The shadow of the 9/11 attacks, with their 2,800 dead, is inescapable. Nor can we forget the

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<sup>4</sup> Promotional material for Counter-Terror Expo 2013, London.

52 killed and almost 800 injured in the 7/7 attacks, or the 3,500 killed over the 30 years of the Troubles in Northern Ireland. In the first two cases, the horror was increased, as the perpetrators intended, by the collective impact of all those simultaneous deaths; and in the third by the long period over which the threat persisted. It is no disrespect to those victims or their relatives to point out that 180,000 Americans have been murdered other than by terrorists in the years since 9/11, and that the 7/7 victims remained, at least until May 2013, the only people ever to have been killed by al-Qaida inspired terrorism on United Kingdom soil. That nothing worse has happened since has at least something to do with the tireless work of the intelligence services: for it is undoubtedly true, as the Director General of MI5 said in a rare public speech last year, that “*Britain has experienced a credible terrorist attack plot about once a year since 9/11.*”<sup>5</sup> But, despicable as these major attacks were, all were criminal acts under the ordinary law. Their existence, and the public reaction to them, cannot of itself justify the tearing up of longstanding freedoms and protections. Some more specific need must be identified.

20. The second reason sometimes heard for the special status of terrorism in our law is that it poses an ***existential threat***. In the weeks after 9/11, the United Kingdom declared the existence of a “*public emergency threatening the life of the nation*” as a justification for derogating from Article 5 of the ECHR: as both the United Kingdom and Ireland had done in the past in relation to the Northern Irish conflict. This uninspiring lead was followed by not one of the other 40-odd members of the Council of Europe. The Government’s judgment on this matter was respected both by the domestic courts – though with the dissent of Lord Hoffman and with what Lord Bingham has described as “*varying degrees of enthusiasm*” among his colleagues<sup>6</sup> – and in Strasbourg. Whether the Government continues to assert that we face an emergency threatening the life of the nation is unclear: the point will only arise for decision if and when the United Kingdom once more seeks to derogate from the Convention. But in any event, no such derogating laws are currently in force. It cannot therefore be suggested that the general run of anti-terrorism laws is justified only in the case of a public emergency or threat to the nation’s life. A permanent emergency would be a contradiction in terms; permanent anti-terrorism law, as we have seen since 2000, is not.
21. The third justification sometimes advanced is that ***only the terror label will do*** to mark public revulsion at a particularly unpleasant offence. This one, we can say with some confidence, has been disproved by experience. James McArdle, the Canary Wharf bomber, was charged with murder and convicted of conspiracy to cause explosions. The four men whose rucksacks failed to explode in London two weeks after the 7/7 bomb were convicted of conspiracy to murder, as were the eight men accused of the airline liquid bomb plot of 2006. That plot was described by one of the trial judges as the “*most grave and wicked conspiracy ever proved within the jurisdiction*”.<sup>7</sup> It is the origin of the continuing requirement to empty water bottles before getting on a plane. In none of those cases was it suggested that a specialist terrorist offence would more effectively have marked the public mood.

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<sup>5</sup> Mansion House speech, June 2012. Details are given in D. Anderson, *The Terrorism Acts in 2012*, July 2013, chapter 2.

<sup>6</sup> T. Bingham, *The Rule of Law*(2010), p. 148.

<sup>7</sup> Enriques J, quoted by Silber J in *SSHD v AY* [2012] EWHC 2054 (Admin) at §46.

Indeed convictions for the specialist offences tend to be reserved for plots detected at an earlier stage, or for those whose involvement in terrorism is more peripheral.

22. What, fourthly, of the argument that specialist laws are justified by the existence of al-Qaida: the paradigm of the so-called “**new terrorism**”, characterised by transnational networks, suicide bombers who strike without warning and the deliberate causing of mass civilian casualties?
- a. The al-Qaida franchise is unique in terms of the number of countries from which its adherents have been drawn, the number of countries in which it has launched attacks and the ambition of some of its adherents to establish a pan-Islamic or even global caliphate, however absurd and impracticable that may seem. **Transnational networks** are indeed a function of modern Islamist terrorism, as they are of almost every other aspect of modern life. Just as with cross-border fraud or organised crime, they require an enhanced international response. But they have not been unknown in the past. The Fenian bombing campaign in London of the 1880s depended upon its foreign training camp – the Brooklyn Dynamite School – and the propaganda produced under First Amendment freedoms including that notable New York periodical, “Ireland’s Liberator and Dynamite Monthly”.<sup>8</sup> The identification of religiously-inspired plotters with foreign powers and foreign training goes further back than that: several of the Gunpowder plotters of 1605 were educated by foreign Jesuits; while their explosives expert Guy Fawkes was recruited for the task in Flanders, where he had learned his skills as a mercenary, originally for the same King of Spain – Philip II – who had recently launched the Spanish Armada.
  - b. **Suicide attacks** are currently common in Afghanistan, Pakistan and Iraq. But they have a long history in warfare, have accounted for many world leaders in the past, including Alexander II of Russia in 1881, the Tsar who freed the serfs, and were much practised during the late 20<sup>th</sup> century in the Lebanese Civil War and by the Tamil Tigers.
  - c. Al-Qaida operatives tend not to subscribe to the classic aim of terrorism, memorably described by Brian Jenkins in 1975 as “*a lot of people watching, not a lot of people dead*”. They have never restricted themselves to national security targets, as is currently the practice of dissident republicans in Northern Ireland. But they were certainly not the first to aim for **mass civilian casualties**, as the Air India bombing of 1985 and the Lockerbie bombing of 1988 bear witness.
23. All these features of modern terrorism go some way towards explaining why special anti-terrorism laws may be necessary. But there are great dangers in such a generalised approach. To take an understanding of terrorism that is derived from history or social science, and allow it to serve as a justification for any number of specific legal powers, is a dangerous course. However serious or unique the problem of “*terrorism*”, it does not follow

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<sup>8</sup> C. Campbell, *Fenian Fire* (Harper Collins, 2002), chapter 1.

merely from its seriousness or uniqueness that special powers are necessary to combat it. If special powers are to be justified, it must be by reference to the particular demands of policing and prosecuting terrorism.

## TWO OPERATIONAL JUSTIFICATIONS

24. A different approach is therefore in order. Looking at the various specific powers that our law now provides for dealing with terrorism, it may be productive to ask to what specific problems they are addressed.
25. In some cases, the answer is not clear. Why, for example, should it be necessary to punish breach of a police cordon with up to three months in prison when the cordon was imposed around a suspicious package suspected of being related to terrorism, but with a maximum of one month when the suspicious package – though equally likely to be explosive – is not associated with terrorism?<sup>9</sup> More centrally, why is police bail available in appropriate cases to those suspected of violent crime, including some terrorists, but not to those arrested under the Terrorism Act 2000, however minor their alleged involvement?<sup>10</sup>
26. However most of the special powers, as it seems to me, can be linked to at least one of two operational requirements.
27. The first is a perceived need, in a footballing phrase beloved also of spies, to *defend further up the field*. That is a consequence of the highly destructive potential of single, concentrated terrorist attacks; the dangers of allowing such a plot to run; and so the resulting need to intervene at an earlier stage.
28. The second is the need to rely on *intelligence that cannot be disclosed* – either from abroad, from human intelligence sources or from technical surveillance.

### Defending further up the field

29. The first of those features – defending further up the field – is the principal justification that can be advanced for the terrorism-specific elements of UK law.
30. There is a whole range of ***special criminal offences***, whose effect is to make criminals out of people on the periphery of plots. We already have the inchoate offences to criminalise behaviour that is a prelude to an illegal act. But these precursor offences go further back still: they penalise a range of actions that fall short of constituting attempt, conspiracy or incitement. For example:

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<sup>9</sup> Terrorism Act 2000, section 33. Much may depend on methods of classification: D. Anderson, *Report on the operation in 2010 of the Terrorism Acts 2000 and 2006*, July 2011, 6.14. Like all the reports of the independent reviewer, this is freely downloadable from my website: <http://terrorism-legislation-reviewer.independent.gov.uk>.

<sup>10</sup> D. Anderson, *The Terrorism Acts in 2011*, June 2012, 7.71-7.74.

- a. Anyone with information which they know or believe could help prevent terrorism or apprehend a terrorist is under a duty to **disclose it to the police**. This statutory duty to tell what one knows has been used to convict family members and associates of the 21/7 bombers and one of the Glasgow airport bombers. It is also much mentioned by the police, or so it is said on the street, to encourage people to talk.<sup>11</sup>
  - b. Mere membership of a **proscribed organisation** is a criminal offence, as has long been the case in Northern Ireland, whether or not one has supported specific acts of terrorism.<sup>12</sup>
  - c. The Terrorism Act 2006 criminalised **acts preparatory to terrorism** – a way of catching the person who cannot be shown to be part of any conspiracy but who has been sending equipment to insurgents in Afghanistan, or assembling bomb-making ingredients in Northern Ireland.<sup>13</sup>
  - d. It also created offences for those who have **published** statements likely to be understood as an encouragement to terrorism, or **disseminated** terrorist publications, whether in a bookshop or over the internet.<sup>14</sup>
  - e. It was made an offence merely to attend a place that a person knows is being used for **terrorist training**, regardless of what the person was actually doing there.<sup>15</sup>
31. The same justification lies behind the **special stop and search powers** that have existed where terrorism is concerned. The most widely used and the most resented of these was section 44 of the Terrorism Act 2000, which allowed any person to be stopped in designated areas or on the rail network and searched for articles which could be used in connection with terrorism. Though this has now been repealed,<sup>16</sup> the power to stop, examine and if necessary detain port and airport travellers under Schedule 7 to the 2000 Act still remains, and is also exercisable without the need for suspicion. Its statutory purpose is to determine whether people are terrorists: in practice, it is valued also for its ability to contribute to the intelligence “*rich picture*” of the terrorist threat.
32. Defending further up the field means, in addition, that **arrests may need to be made before the investigation is complete**. So an arrest under the Terrorism Act 2000 requires reasonable suspicion of the commission, preparation or instigation of terrorism, but not of any specific terrorist act. And if the court agrees to give it to them, the police have longer to question the suspects: up to 14 days under the current law, down from a maximum of 28

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<sup>11</sup> TA 2000, section 38B.

<sup>12</sup> TA 2000, Part II.

<sup>13</sup> TA 2006, section 5.

<sup>14</sup> TA 2006, sections 1 and 2.

<sup>15</sup> TA 2006, section 8.

<sup>16</sup> The replacement power (TA 2000 section 47A) can operate only in unusual circumstances, and has not yet been used outside Northern Ireland.

days prior to 2011. The airline liquid bomb plot, which was intercepted before it was ripe and which required a vast quantity of evidence to be assessed from a number of jurisdictions, provides a rare example of detention periods which ran right up to the 28-day limit before charging decisions were made.

33. The ultimate example of defending further up the field, indeed so far up the field as to be outside the criminal justice context altogether, is **Prevent**, a programme of engagement in particular with Muslim communities, whose objectives include responding to the ideological challenge of terrorism and ensuring that people vulnerable to terrorism are given appropriate advice and support.<sup>17</sup>
34. Also preventative in their intention are the most powerful features of United Kingdom anti-terrorism laws: the **executive constraints** that may be placed on people who are suspected or believed to be dangerous terrorists, but who cannot be deported or placed on trial.
35. The first 21<sup>st</sup> century example of this, made possible by the controversial derogation from Article 5 of the European Convention on Human Rights, was Part 4 of the Anti-Terrorism Crime and Security Act 2001, which provided for the **indefinite detention** of non-British nationals who were suspected of terrorism but could not be deported because of the risk of torture.<sup>18</sup> Fifteen such men were kept in Belmarsh prison. In one of the most resounding blows for liberty in the global jurisprudence of the past ten years, that regime was famously declared incompatible with the Human Rights Act 1998 by the judicial House of Lords, in December 2004.<sup>19</sup>
36. The measure of constraint which replaced it, less extreme but potentially wider in its application, was the system of **control orders** under the Prevention of Terrorism Act 2005. Between 2005 and 2011, a total of 52 control orders were imposed upon men suspected of terrorism-related activity and considered to be dangerous to the public. The men were not imprisoned, as had been the case under the previous regime, but were required to reside in a place of the Home Secretary's choosing. They were tagged, had curfews of up to 16 hours and were subject to reporting obligations. Particularly in the later years, after no fewer than seven had absconded, they were subject to further onerous restrictions on where they could go and whom they could meet and talk to. Almost half of them were subjected to involuntary relocation to another city, so as to separate them from their former associates.
37. At the start of that period, all were foreign nationals; by the end, all were British. So the focus shifted from the undeportable to the untriable: the last controlled persons were British citizens who had either been acquitted of terrorist offences or had never been put on trial because the Crown Prosecution Service had advised that there was insufficient evidence, capable of being deployed in open court, for a jury to convict.

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<sup>17</sup> See CONTEST: The United Kingdom's Strategy for Countering Terrorism, July 2011.

<sup>18</sup> Classically, because of the judgment of the European Court of Human Rights in *Chahal v UK* (1996) 23 EHRR 413, establishing the principle that foreign nationals could not be deported to countries where there was a real risk that they would be tortured or mistreated.

<sup>19</sup> *A v SSHD* [2004] UKHL 56; see also the judgment of the European Court of Human Rights in *A v United Kingdom*, 19 February 2009.

38. Though control orders were executive orders, imposed by the Home Secretary, they required the prior permission of a judge and were subject after imposition to a quasi-automatic process of review by the High Court. In most cases, though not all, the courts upheld both the control orders and their individual components, including – in all but four cases – the relocation requirement. At the beginning of 2012, control orders were replaced by the less onerous Terrorism Prevention and Investigation Measures or TPIMs.<sup>20</sup>

#### **Intelligence that cannot be disclosed**

39. These executive constraints could all be said to defend up the field, in the sense that they sought to neutralise the threat from a range of people who were not prosecutable but who were still considered to pose a terrorist threat to the population. In that regard, they had some success: at any rate, no controlled person was ever detected engaging in terrorism, despite the fact that many of them were identified as dangerous not only by the Home Secretary but by the High Court judges who reviewed the national security cases against them.

40. They are also, however, a response to the second operational requirement identified above: reliance on intelligence that cannot be disclosed in open court. The views reached by the Home Secretary could potentially derive from a number of sensitive sources: human agents, whose cover had to be retained and personal safety ensured; foreign intelligence agencies, concerned as to how their information would be used; technical surveillance; and lastly phone-tap evidence, which controversially is not admissible in a United Kingdom criminal court. Some of these men had been put on trial and acquitted, it was said because some of the intelligence that would have established their guilt could not be divulged to them or to a jury made up of members of the public.<sup>21</sup> Others had not been put on trial, for the same reason.

41. By resorting to **control orders**, and now **TPIMs**, these difficulties were bypassed. The High Court heard reviews and appeals so far as possible in open court: but the national security evidence against the controlled person, which was generally the heart of the case, was adduced in a closed material procedure from which the controlled person was excluded, his interests being represented so far as possible by a security-cleared special advocate who could see the evidence but who could not take instructions on it.

42. Similar issues arose in relation to the **freezing of assets** of a suspected terrorist in circumstances where this was deemed necessary to protect the public, either by order of the UN or the European Union, or on the initiative of the Treasury.<sup>22</sup>

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<sup>20</sup> See D. Anderson, *Control Orders in 2011* (March 2012) and *TPIMs in 2012* (March 2013).

<sup>21</sup> Four of the ten men placed under TPIM notices in 2012 had been unsuccessfully prosecuted prior to that point.

<sup>22</sup> See D. Anderson, *First Report on the operation of the Terrorist Asset-Freezing Etc. Act 2010*, December 2011, and the supplementary report of December 2012.

## WHERE ARE THE SAFEGUARDS?

43. Most of the major elements of United Kingdom anti-terrorism law can thus be linked to a special characteristic of terrorist crime, whether it be the need to intervene earlier than would normally be the case so as to pre-empt the possibility of a catastrophic incident, or the difficulties of turning national security intelligence into evidence admissible in open court. This enables a more nuanced defence of the law than the over-simple argument that terrorism is a scourge and that special measures are therefore justified to counter it.
44. The fact that a specific operational objective is being pursued does not however mean that each measure operates in a just or acceptable manner. Indeed with such broad powers, the *potential* for abuse is rarely absent.<sup>23</sup>
45. Take the ***precursor offences***. By seeking to extend the reach of the criminal law to people who are more and more on the margins, and to activities taking place earlier and earlier in the story, their shadow begins to loom over all manner of previously innocent interactions. The effects can, at worst, be horrifying for individuals and demoralising to communities. A well-known example, though not a typical one, is of Rizwaan Sabir, the University of Nottingham student who in 2008 downloaded the Al-Qaida training manual from the US Justice Department website in order to research his choice of thesis, and found himself detained for several days in a police station, along with a University employee, on suspicion of the commission, preparation or instigation of acts of terrorism. He eventually won his action for false imprisonment.
46. The ***proscription of national separatist organisations*** may be justified as a way of preventing fund-raising. Yet it can also impinge upon the everyday life of those who are not members of the organisation, but merely of the ethnic community from which the organisation derives its support. Contact in the form of overt surveillance, evening visits at home from the police and persistent pressure to inform, in the words of one Tamil, “*shapes what it is possible to say .. silences those who take up one position, and emboldens those on the other side*”. Added to which, condemnation by the United Kingdom as a terrorist organisation can be of useful propaganda value, both domestically and internationally, to governments which seek to repress the organisation in question or the population that it claims to represent, perhaps by violent and unsavoury means of their own.<sup>24</sup>
47. With ***control orders*** and now ***TPIMs***, severe restrictions on everyday life are coupled with a procedure for judicial review that is not only imperfect, because of the subject’s inability to see evidence against him, but unavoidably slow in its operation. Were it ever to be unscrupulously exercised, which has not been the case to date, people could be detained

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<sup>23</sup> That is particularly so as the nature of the threat changes: measures that might have been justifiable in the face of highly-organised al-Qaeda plots to kill hundreds or thousands of people may be more difficult to defend in a world where the likely threat is smaller in scale. These issues must however be looked at in a realistic time-scale: it is not feasible for the law to change so as to reflect each temporary variation in threat levels.

<sup>24</sup> D. Anderson, *The Terrorism Acts in 2011*, June 2012, chapter 4.

under excessively strict controls for appreciable periods of time without any proper basis for doing so.

48. My concern for present purposes is not whether these various powers are properly operated, or whether their use can be counterproductive: these subjects are addressed in my regular reports. Rather, it must be asked what mechanisms exist to *restrict* the operation of the anti-terrorism law to those situations where it is properly required on operational grounds.
49. The obvious place to start is with the ***definition of terrorism***. Surely, it may be thought, if the concept of terrorism is defined with sufficient rigour, the special laws will be applied only where that is merited, and much of the potential for abuse will be removed.

## THE DEFINITION OF TERRORISM

50. The problem of defining terrorism is a notoriously tricky one, made more complex by its intractable international dimension.

### The international dimension

51. Just two and a half weeks after 9/11, on 28<sup>th</sup> September 2001, the United Nations Security Council issued a binding resolution under Chapter VII of the UN Charter, no 1373, requiring all States to criminalise the funding of terrorism, to freeze without delay the assets of terrorists and to “*take the necessary steps to prevent the commission of terrorist acts*”.
52. The implementation of this and other Resolutions was hindered by the fact that there is no internationally agreed definition of terrorism.
- a. There are certainly ***ingredients***: the dozen or so multinational conventions that outlaw specific acts such as hostage taking, hijacking, and terrorist financing; and the non-binding Security Council Resolution 1566 of 2004, which builds upon them.
  - b. But there is far from being a ***consensus*** in the United Nations, which has been trying to draft a comprehensive Convention on Terrorism since 1996. Disputes over whether to acknowledge state terrorism, and whether national separatist movements should be exempted from the definition, suggest that attempts to devise a category called “terrorism” tell us more about the categoriser than the categorised.<sup>25</sup>
  - c. Nor has ***international jurisprudence*** yet been able to provide a consensus. The Special Tribunal for Lebanon in 2011, chaired by Professor Antonio Cassese, identified what it considered to be a customary international crime of transnational

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<sup>25</sup> R.Jackson, L.Jarvis, J. Gunning and M. Breen Smyth, *Terrorism – a critical introduction* (Palgrave Macmillan, 2011) at p. 164, citing Foucault, *The Order of Things* (Tavistock, 1970).

terrorism, and applied it in interpreting domestic terrorism offences under Lebanese law. But its conclusions have been highly controversial.<sup>26</sup>

### Consequences of international deadlock

53. In the absence of a binding international definition, *individual states* have not been slow to fill the vacuum. In his *Liberty and Security*, Professor Conor Gearty cites the definition adopted in October 2011 by the Standing Committee of the National People's Congress of China:

“Activities that severely *endanger society* that have the goal of creating terror in society, endangering public security, or threatening state organs and international organisations and which, by the use of violence, sabotage, intimidation, and *other methods*, cause or are intended to cause human casualties, great loss to property, damage to public infrastructure, and *chaos in the social order*, as well as activities that incite, finance, or assist the implementation of the above activities *through any other means*.”

As the Global Legal Monitor of the Law Library of Congress explains, this remarkably broad definition was defended by the Chinese Government on the basis that the previous absence of a clear definition had “*hampered international co-operation in anti-terrorism efforts*.”<sup>27</sup>

54. Resolution 1373 gave countries all over the world a new and respectable weapon for fighting separatist or nationalist movements within their borders, be it in Tibet, Chechnya, Kurdistan or Tamil Eelam: an international obligation to prevent terrorist acts, coupled with a liberty to define terrorist acts in whatever way they wanted. With it comes the opportunity to claim international support for attacking not only those who take up arms, but those who promote ideas. After all, does not the United Kingdom punish the glorification of past or future acts of terrorism with up to seven years in prison?<sup>28</sup> The proviso that such glorification is illegal only when likely to be understood as an inducement to terrorist acts is a subtlety sometimes lost in the translation. In such ways, the language of terrorism may, as Professor Gearty says of one Russian statute, provide both “*rhetorical cover*” and a *strong legal basis*” for “*the continuation of the old habits of an authoritarian political culture*”. Martin Scheinin, the UN Special Rapporteur, reported in 2009 that counter-terrorism laws were being used in a number of countries to justify the arrest and persecution of homosexuals, to attack human rights defenders and to suppress the claims of indigenous groups for economic, social and cultural rights.<sup>29</sup>

55. Small wonder, then, that the UN High Level Panel on Threats, Challenges and Change noted that the norms covering the use of force by non-State actors have not kept pace with those pertaining to the use of force by States, reported that the absence of a definition of

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<sup>26</sup> See, e.g., B. Saul, *Legislating from a Radical Hague: the United Nations Special Tribunal for Lebanon Invents an International Crime of Transnational Terrorism*, Leiden J. Int. Law.

<sup>27</sup> C. Gearty, *Liberty and Security* (Polity, 2013), p.52.

<sup>28</sup> Terrorism Act 2006, section 1.

<sup>29</sup> M. Scheinin, *Protection of human rights and fundamental freedoms while countering terrorism*, Report to UN General Assembly of 3 August 2009, A/64/211.

terrorism undermined the moral stance against terrorism and called the adoption of such a definition a “political imperative”.<sup>30</sup>

### **The United Kingdom definition**

56. The United Kingdom’s definition has been influential. Lord Lloyd took his inspiration from a working document used by the FBI. The resulting definition, in section 1 of the Terrorism Act 2000 as amended, has been affected others, particularly in the Commonwealth<sup>31</sup> but also at the level of the European Union.<sup>32</sup>

### **The three elements**

57. There are three elements to the definition, each of which must be satisfied.

- a. The **actions** (or threats of actions) that constitute terrorism, which encompass serious violence against a person; serious damage to property; and actions which endanger life, create a serious risk to health or safety, or are designed seriously to interfere with or seriously to disrupt an electronic system.<sup>33</sup>
- b. The **target** to which those acts must be directed: in short, to *influence* a government or international organisation, or to *intimidate* the public or a section of the public.
- c. The **underlying purpose** that must be present: advancing a political, religious, racial or ideological cause.<sup>34</sup>

58. There is plenty of room for argument about how that definition is formulated. I examine those arguments not in the abstract but in the light of their ability to minimise the potential for abusive use of our anti-terrorism laws.

### **Actions**

59. In relation to the prohibited actions:

- a. One might question the emphasis on **property damage**. The 1999 UN Convention on the Suppression of Financing of Terrorism speaks only of “*an act intended to cause death or serious bodily injury*” – words which, according to the Canadian Supreme Court conveyed “*the essence of what the world understands by terrorism*”.<sup>35</sup> Countries such as Canada and New Zealand only include property

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*A more secure world: our shared responsibility*, Report of the UN High Level Panel on Threats, Challenges and Change, December 2004, §159.

<sup>31</sup> Anti-Terrorism Act 2001, Criminal Code s83.01(1) (Canada); Security Legislation Amendment (Terrorism) Act 2002, Criminal Code Division 100 (Australia); Terrorism Suppression Act 2002 (NZ).

<sup>32</sup> Council Framework Decision on combating terrorism 2002/475/JHA.

<sup>33</sup> TA 2000 sections 2(1)(a),2(2).

<sup>34</sup> Terrorism Act 2000, section 1.

<sup>35</sup> *Suresh v Canada* [2002] 1 SCR 3, §98.

damage when it is likely to result in serious harm or risk to persons. However, since it is nowadays rare to encounter a plot which is aimed solely at damaging property, the point is of little significance to the manner in which the law is applied.

- b. It might also be asked whether “*serious violence against a person*” sets the bar too low. Cases of serious violence against the person are heard every day, in every Crown Court in the land. The view could be taken that special arrest powers, precursor offences and so on are only really justified in a case liable to lead to mass atrocities, or at least the murder or maiming of civilians. This could make a difference: but one must be careful what one wishes for. In particular, to restrict “*persons*” to civilians could remove from the scope of terrorism much of what is currently so regarded in Northern Ireland: vicious but targeted attacks on police officers and other representatives of the State. Recent al-Qaida inspired attacks and attack-planning on the military in England prompt the same reflection.<sup>36</sup>

### ***Target and underlying purpose***

60. In relation to ***target*** and ***underlying purpose***, the radical question is whether these conditions are required at all. For the historian or the psychologist, it may well be part of the essence of terrorism that it has a target other than the immediate victims, and perhaps a political purpose as well. But from an operational point of view, it is difficult to see why these factors should be relevant. After all, the ability to defend further up the field is justified, if at all, by the potentially lethal effects of terrorism rather than by the mental element behind it. If a mass hostage-taking is on the cards, what matters from the operational point of view is what the perpetrators plan to do, and what is necessary to stop them. Whether their motives are personal, financial or political; whether they seek to influence the government or to intimidate people whom they have not captured; are questions which may be of significance to their ultimate sentence, but which scarcely seem to have much bearing on the availability of precursor offences, or the Terrorism Act arrest power.
61. The point is underlined by the specific anti-terrorism Conventions governing hostage-taking, hijacking and so on, some of which require no mental element at all other than that which is inherent in the performance of the prohibited act.<sup>37</sup> Even our Terrorism Act 2000 provides that where the chosen means of attack is firearms or explosives, the requirement of an intention to influence or intimidate others does not apply.
62. Particularly controversial is the requirement of ***underlying purpose***, which is used by all the old Commonwealth countries, and recently survived challenge in the Canadian Supreme

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<sup>36</sup> Notably, the 2007 plot to capture and behead a Muslim soldier, and the plan targeting a Territorial Army base in Luton to which guilty pleas were entered in 2013.

<sup>37</sup> Though the Terrorist Financing Convention of 1999 does prohibit the financing of certain acts where their purpose is “*to intimidate a population or to compel a government ... to do or abstain from doing any act*”.

Court,<sup>38</sup> but does not feature in any of the UN definitions, the EU definition or the formulation of the Lebanon Tribunal. Some believe that it has the undesirable effect of focussing on a defendant's religion and politics, chilling free speech, prolonging cases and even encouraging racial or ethnic profiling by governmental authorities.<sup>39</sup> As Kent Roach has put the point: "*the political, religious or other motives of the perpetrators should not excuse terrorism; conversely they should also not constitute part of the crime of terrorism.*"<sup>40</sup>

63. Such arguments have been considered in the past, and may have to be considered again. But one should have no illusions as to what their effect would be. The target and purpose requirements in our current law have the function not of *expanding* but of *restricting* the definition of terrorism. To remove even just the motive requirement could put our courts in the sort of difficulties recently experienced by the New York Court of Appeals: struggling to avoid affixing the terrorism label to a gang shooting aimed at intimidating Mexican Americans in the Bronx. As the court nobly held, in a classic application of the age-old principle "*I know it when I see it*":

"the concept of terrorism has a unique meaning and its implications risk being trivialized if the terminology is applied loosely in situations that do not match *our collective understanding of what constitutes a terrorist act.*"<sup>41</sup>

64. Change along these lines, whatever its merits, would not therefore guarantee the limited application of special anti-terrorism laws: on the contrary, it would expand the area for discretionary enforcement.

### ***International elements***

65. The most striking feature of our definition of terrorism is that it catches ***actions taken against all governments in the world***, irrespective of their nature. As the Court of Appeal has explained:

".. the terrorist legislation applies to countries which are governed by tyrants and dictators. There is no exemption from criminal liability for terrorist activities which are motivated or said to be morally justified by the alleged nobility of the terrorist cause."<sup>42</sup>

66. Whether directed at the Government of the United Kingdom or of Syria, whether an evil attack on civilians or a reaction to extrajudicial murder by the state, the relevant threats and activities constitute terrorism. We might wish it otherwise, particularly in relation to

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<sup>38</sup> *R v Khawaja* [2012] SCC.

<sup>39</sup> *R v Khawaja* [2006] OJ 4245, §73 (Rutherford J).

<sup>40</sup> "The case for defining terrorism with restraint and without reference to political or religious motive", ch. 4 in A. Lynch, E. MacDonald and G. Williams, *Law and Liberty in the War on Terror* (Federation Press, 2007), p. 39.

<sup>41</sup> *The People v Edgar Morales*, No 186, 11 December 2012, emphasis added.

<sup>42</sup> *R v F* [2007] EWCA Crim 243; [2007] QB 960, §32.

national separatist struggles in which one would prefer not to take sides. But Parliament in the Terrorism Act 2000 tried and failed to come up with a workable system for distinguishing freedom-fighters from terrorists, and the Court of Appeal has also, unsurprisingly, declined the invitation to do so. In any event, since the great majority of terrorism prosecutions in our courts concern actions threatening the UK, the consequences of such a change would be limited.

67. A linked issue is whether the definition of terrorism should be read as excluding ***acts which occur in armed conflict and are lawful according to the laws of war***. Such actions are specifically excluded from the reach of the terrorism laws in Canadian, New Zealand and South African law.<sup>43</sup> An amendment to that effect is also being considered by a senior Australian review body, which will report shortly.<sup>44</sup>
68. Such an exclusion would remove from the scope of the criminal law a man such as Mohamed Gul, the law student who posted videos on YouTube showing attacks on allied forces in Iraq and Afghanistan, and was convicted of the offence of disseminating terrorist publications with intent to encourage acts of terrorism.<sup>45</sup> The Supreme Court has been asked to imply just such an exclusion into the law: Mr Gul's case is to be heard there.

#### **Definition of terrorism - summary**

69. It follows that amending the definition of terrorism, while possibly desirable in some respects, is never going to provide a guarantee that anti-terrorism laws will not be abused. One frequently-suggested change, the removal of the motive requirement, would actually increase rather than reduce the scope of the laws. Others – a narrowing of the range of actions capable of constituting terrorism, and a possible exemption for lawful actions in the course of armed conflict, could have beneficial effects in some cases but will leave the great majority untouched.
70. Other mechanisms for restricting the application of anti-terrorism laws must therefore be considered. Two in particular are important: wise discretion in their exercise, and the application of such checks as are afforded by constitution.

#### **Discretion**

71. Wide-ranging laws call for the exercise of some very broad discretions by decision-makers: the police, the Home Secretary, the Crown Prosecution Service, the Director of Public Prosecutions<sup>46</sup> and where it is wished to prosecute offences allegedly committed abroad, the Attorney-General.<sup>47</sup> As my predecessor Lord Carlile said in his essential report on the

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<sup>43</sup> SA: Protection of Constitutional Democracy against Terrorism and Related Activities Act 2004.

<sup>44</sup> COAG Review, March 2013.

<sup>45</sup> [2012] EWCA Crim 280; TA 2006 section 2.

<sup>46</sup> TA 2000, section 117(2).

<sup>47</sup> TA 2000, section 117(2A).

definition of terrorism, the exercise of such discretion “*is a precious and key exercise; and [ ] the heaviest responsibilities lie upon those in whom it is vested.*”

72. The restraint with which such discretions are exercised, particularly where big decisions over prosecution and the use of executive orders are concerned, can be impressive. Sensible people of good will in our public institutions, advised where appropriate by members of the independent Bar, do much to ensure that powers are applied in a proportionate manner. But as Lord Bingham wrote of prosecutorial discretion:

“The rule of law is not well served if a crime is defined in terms wide enough to cover conduct which is not regarded as criminal and it is then left to the prosecuting authorities to exercise a blanket discretion not to prosecute to avoid injustice.”<sup>48</sup>

Furthermore, where the regular exercise of smaller discretions is concerned, under pressure of time and circumstance – for example, a police decision whether to stop a person for questioning at a port or airport – it would be foolish to suppose that every decision will be a good one. The dangers of excessive reliance on the wise exercise of discretions are self-evident. A culture of restraint, precious asset though it is, cannot be considered sufficient.

### Constitutionalism

73. We are left therefore with constitutionalism: the checks and balances supplied by our unwritten constitution. Self-congratulation in such respects is neither fashionable nor wise. But in relation to anti-terrorism law, under the extreme pressures of the past twelve years, the case can be made that our patchwork of constitutional controls has worked better than is often supposed.
74. This is not the place for a comprehensive assessment of those controls (or, indeed, of the influence that is exerted by the fourth and fifth estates: investigative journalists and NGOs). My annual reports contain elements of such an assessment. Some broad points may however be made in relation to the role of the legislature and of the judiciary in the 21<sup>st</sup> century fight against terrorism.
75. **Parliament** never gave (indeed was not asked to give) the Executive the sort of sweeping powers that enabled the American war on terror to be run from the White House. It did not swallow everything it was asked to accept, voting down, for example, the proposal for 90-day detention in 2005 and 42-day detention in 2008, and making significant amendments – particularly in the unelected House of Lords – to Bills concerning asset-freezing, TPIMs and procedures for hearing national security-sensitive civil claims. Its committees, growing in influence, provide an increasing degree of meaningful scrutiny.
76. **The courts** have faithfully enforced the law but also succeeded in improving it. Having declared detention in Belmarsh to be incompatible with human rights, the courts, abetted

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*R v K* [2001] UKHL 41, paragraph 24.

by an active legal profession, knocked many rough edges off the control order system<sup>49</sup> and insisted that the asset-freezing rules be properly compliant with the rule of law.<sup>50</sup> They have demonstrated the wisdom, in our constitutional settlement, of a Human Rights Act that gives them the power to warn Parliament but not to override it.

77. I would unhesitatingly include the European Court of Human Rights in that appreciation. Its interventions have been few, but important.

- a. In *Gillan and Quinton*,<sup>51</sup> it gently administered the death-blow to a stop and search power that, though used over quarter of a million times in the single year 2009, seems not to be very much missed.
- b. In the case of *A*, while accepting closed material proceedings, the Court of Human Rights insisted on the vital principle that where the liberty of the subject was at stake, he must be given sufficient information about the allegations against him to enable him effectively to instruct his counsel.<sup>52</sup> Despite forebodings at the time,<sup>53</sup> the upshot has been an improvement in the fairness of such proceedings, with only a very limited loss of capacity to impose control orders and TPIMs.
- c. In *Othman v UK*, the case in which the Fourth Section held that Abu Qatada could not be deported to face a flagrant denial of justice in Jordan, the former Director of Justice, Roger Smith, may have been right to say that the judgment, whilst logical, was “close to the boundary of how far the court can reasonably go”.<sup>54</sup> Significantly, however, its conclusions were little different from those previously reached by the English Court of Appeal;<sup>55</sup> and the judgment has been followed by intensive pressure on Jordan, culminating in the signature and ratification of a Mutual Assistance Treaty, to disclaim reliance in certain cases on evidence obtained by torture. The case may be seen as an illustration of one of the most important functions of the European Court: the export of sound democratic values to all parts of Europe and indeed beyond.

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<sup>49</sup> See, in particular, *SSHD v MB* [2007] QB 415 and [2008] 1 AC 440; *SSHD v J* [2008] 1 AC 385; *SSHD v AF No. 3* [2010] 2 AC 269; and *SSHD v AP* [2011] 2 AC 1: D. Anderson, *Control Orders in 2011* (March 2012), 3.82-3.83.

<sup>50</sup> *Ahmed and others v HM Treasury* [2010] 2 AC 534.

<sup>51</sup> *Gillan and Quinton v UK*, Application no. 4158/05, judgment of 12 January 2010.

<sup>52</sup> *A v UK* (2009) 49 EHRR 625.

<sup>53</sup> Expressed by members of the House of Lords in *SSHD v AF (No. 3)* [2009] UKHL 28.

<sup>54</sup> R. Smith, “Human Rights and the Next Election”, 23 March 2013, <http://www.rogersmith.info/human-rights-and-the-next-election/>, commenting on the judgment of 17 January 2012.

<sup>55</sup> [2008] EWCA Civ 290. The House of Lords of course took a different view (or no ruling on the point would have been necessary from Strasbourg): [2009] UKHL 10.

## CONCLUSION

78. It is possible to acknowledge that the United Kingdom has made many errors in seeking to reconcile those awkward bedfellows, terrorism and law, while still appreciating its capacity to learn and to do better. In the words of David Cole:

“The UK’s experience .. suggests that it is possible for nations to learn from their prior mistakes. Its response to Islamic terrorism today seems, at least in part, to be tempered by the lessons it learned in fighting the IRA. An irreversible downward spiral in rights protections is not inevitable. The learning process must of course be an ongoing one, and does not by any means guarantee that mistakes will not be repeated. But it helps.”<sup>56</sup>

The distortive effects of terrorism are undeniable: but they need not disable our compasses. Special rules must be reserved for those circumstances in which they are operationally or procedurally necessary; the protections provided by our constitution and by civil society must continue to evolve; and an intangible but largely healthy culture of executive restraint must continue to be fostered. If all this can be achieved – and why should it not be – we may keep our bearings in spite of all.

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<sup>56</sup> D. Cole, “English lessons: a comparative analysis of UK and US responses to terrorism” (2009) 62 *Current Legal Problems* 136-167, p. 167.