

THE MEANING OF TERRORISM
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TERRORISM IN 1996

1. 16 years ago on the 9th February , just across South Quay from here, the IRA ended a long ceasefire by giving 90 minutes' warning of a bomb which killed two people in the newsagents opposite, 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 bus on Aldwych, a similar distance from my Chambers.
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. And 15 deaths were caused by the security situation in Northern Ireland, to add to the approximately 3,500 such deaths over the previous 28 years.
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); 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.¹ There were not the frequent hijackings of the early 70s, or the embassy hostage-takings that were prevalent 10 years after that. So why do I single out 1996?

The 21st CENTURY GROWTH OF ANTI-TERRORISM LAW

6. Because 1996 is the year in which a report was written by the distinguished Law Lord Lord Lloyd of Berwick, with the expert assistance of Professor Paul Wilkinson.² 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

¹ US Department of State, *Patterns of Global Terrorism*.

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

anti-terrorism law to replace the temporary statutes, applicable largely to Northern Ireland, which had been subject to annual parliamentary renewal since 1974.

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 very much a fact of life on this island. 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.
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.
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: 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, begin to reverse the direction of travel.

WHY DO WE NEED ANTI-TERRORISM LAWS?

12. More than twelve years on, we 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.
13. The case for special terrorism powers, I would suggest, should be approached with a measure of scepticism. Many advanced countries managed until recently without special terrorism laws of any kind. And 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. Young 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 politicians, police officers, lawyers and academics. It swells the budgets of military, intelligence, security and police forces, publishers and film studios. The police officer transferred to a counter-terrorism unit can walk that bit taller. The provider of security fences or CCTV can profit from the stardust that comes from appearing with 400 other exhibitors and 8000 delegates at an “*operationally critical two-day event*”.³ Even a humble reviewer of the law may, if he is lucky, be given a distinguished platform such as this – and by dropping the word into his lecture title, as have three of the past eight Clifford Chance lecturers, may hope to attract an equally distinguished audience.
16. All these people are by the mere use of the T-word taken out of the normal vocabulary of crime, government or commerce into a mental space that is inhabited by Robespierre, Irish dynamiters, Russian anarchists, Olympic hostage-takers, mujahideen, desert bandits and on the other side of the fence, Special Branch, undercover agents, Navy seals and drones. There are all sorts of mutually reinforcing relationships here – the strongest being 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. Indeed the word has such magnetic qualities that ordinary compasses are not to be trusted anywhere near it. I sometimes wish it had never found its way into the law. For our more sober purposes, something more prosaic – politically motivated violent crime, perhaps – might have been more suitable.
18. 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 what the justification for all these special laws might be.

FOUR PARTIAL JUSTIFICATIONS

19. May I suggest four commonly advanced reasons. There is something in most of them, but none of them takes us all the way there.

³ Counter-Terror Expo 2013, London.

20. 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 will we ever forget the 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. I mean no disrespect to those victims or their relatives when I 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 remain 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.*”⁴ 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 deficiency in the law needs to be identified.
21. The second reason sometimes heard for the special status of terrorism in our law is that it poses an ***existential threat***. It is quite true that 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. I was over at the Council of Europe with a monitoring team when the news came through, and I remember the sense of shock and disappointment: what will happen when other states follow suit? But not one of the other 40-odd members did. Our Government’s judgment on this matter was respected both by our courts – though with the dissent of Lord Hoffman and with what Lord Bingham has described as “*varying degrees of enthusiasm*”⁵ – and in Strasbourg. Whether the Government continues to assert that we face an emergency threatening the life of the nation, I am not sure: the point will only arise for decision if and when we once more seek to derogate from the Convention. But no such derogating laws are currently in force. It is not, I think, suggested, 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.
22. The third reason sometimes advanced is that ***only the terror label will do*** to mark public revulsion at a particularly unpleasant offence. This one, I think we can say, has been disproved by experience. James McArdle, the South Quay 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*

⁴ Mansion House speech, June 2012.

⁵ T. Bingham, *The Rule of Law*(2010), p. 148.

proved within the jurisdiction".⁶ It is the origin of the continuing requirement to empty your water bottle 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. Indeed convictions for the specialist offences tend to be reserved, as we shall see, for plots detected at an earlier stage, or for those whose involvement in terrorism is more peripheral.

23. What, finally, 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. Well the al-Qaida franchise has been 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".⁷ And the identification of religiously-inspired plotters with foreign powers and foreign training goes further back than that: several of the Gunpowder plotters were educated by foreign Jesuits; while the 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 20th 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, which has been described as "*a lot of people watching, not a lot of people dead*".⁸ 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.

⁶ Enriques J, quoted by Silber J in *SSHD v AY* [2012] EWHC 2054 (Admin) at §46.

⁷ C. Campbell, *Fenian Fire* (2002), chapter 1.

⁸ Brian Jenkins.

24. 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 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

25. So I propose to adopt a different approach. Looking at the various specific powers that our law now provides for dealing with terrorism, let us ask to what specific problems are they addressed.

26. Some of them leave me baffled. 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 is of the common or garden kind?⁹ More substantively, 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?¹⁰

27. But most of the rest can be linked to two operational requirements.

28. The first is a perceived need, in a phrase equally beloved of football managers and spies, to *defend further up the field*: a consequence of the 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.

29. 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

30. The first of those features – defending further up the field – is behind most of the elements of our terrorism laws.

31. 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 – attempt, conspiracy and what we used to call incitement – 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. A few examples:

⁹ 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.

¹⁰ 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 you know 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, or so it is said on the street, to encourage people to talk.¹¹
 - 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.¹²
 - c. The 2006 Act 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.¹³
 - 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.¹⁴
 - 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.
32. The same justification lies behind the **special stop and search powers** that exist 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, 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.
33. 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 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

¹¹ TA 2000, section 38B.

¹² TA 2000, Part II.

¹³ TA 2006, section 5.

¹⁴ TA 2006, sections 1 and 2.

jurisdictions, provides a rare example of detention periods which ran right up to the 28-day limit before charging decisions were made.

34. 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 controversial 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.¹⁵

Intelligence that cannot be disclosed

35. Also preventative in their intention are the most controversial features of our anti-terrorism laws: the constraints that the executive may place on people who are suspected or believed to be dangerous terrorists, but who cannot be deported or placed on trial.
36. Mark 1, made possible by that 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.¹⁶ 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 2004.¹⁷
37. The Mark 2 constraint, which replaced it, 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, who 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.
38. 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.

¹⁵ See CONTEST: The United Kingdom's Strategy for Countering Terrorism, July 2011.

¹⁶ 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.

¹⁷ *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.

39. 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.
40. These measures defended up the field, in the sense that they sought to neutralise the threat from people who were thought still 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. But they are also a response to the second problem that I mentioned: *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. Others had not been put on trial, for the same reason.
41. By resorting to control orders, and indeed their less onerous Mark 3 successor, 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 the 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.

WHERE ARE THE SAFEGUARDS?

43. So those were the principal features of our anti-terrorism law, at least as it stood until recently. I have tried to indicate how most of the major elements of that law can 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. to the point where a remedy is only accepted if it is capable of addressing a specific problem.
44. But the fact that a specific operational objective is being pursued does not mean that each measure operates in a just or acceptable manner. Indeed with such broad powers, the *potential* for abuse is rarely absent.

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, its 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 thankfully 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, and continues to flourish in academic life.
46. The ***proscription of national separatist organisations*** may be justified as a way of preventing fund-raising: but as I have recounted in my reports 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, as one Tamil put it to me, “*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.
47. With ***control orders*** and now TPIMs, the 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, and I do not suggest that it has been, people could be detained under excessively strict controls for appreciable periods of time without any proper basis for doing so.
48. My concern for the purposes of this evening is not whether these various powers are properly operated, or whether their use can be counterproductive: that is for my regular reports. But I do want to ask 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 28th 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. But 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.¹⁸
 - 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 terrorism, and applied it in interpreting domestic terrorism offences under Lebanese law. But its conclusions have been highly controversial.¹⁹

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 new book *Liberty and Security*, Professor Conor Gearty cites the definition adopted in October 2011 by the Standing Committee of the National People’s Congress is as follows:

“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*.”

¹⁸ R.Jackson, L.Jarvis, J. Gunning and M. Breen Smyth, *Terrorism – a critical introduction* (2011) at p. 164, citing Foucault, *The Order of Things* (1970).

¹⁹ 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.

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.*”²⁰

54. Countries all over the world were given 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, no less, to prevent terrorist acts, coupled with a liberty to define terrorist acts in whatever way they wanted. And to attack 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?²¹ 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.²²
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 terrorism undermined the moral stance against terrorism and called the adoption of such a definition a “political imperative”.²³

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 influential on others, particularly in the Commonwealth²⁴ but also at the level of the European Union.²⁵

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

²⁰ C. Gearty, *Liberty and Security* (2013), p.52.

²¹ Terrorism Act 2006, section 1.

²² M. Scheinin, *Protection of human rights and fundamental freedoms while countering terrorism*, Report to UN General Assembly of 3 August 2009, A/64/211.

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

²⁴ 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).

²⁵ Council Framework Decision on combating terrorism 2002/475/JHA.

endanger life, create a serious risk to health or safety, or are designed seriously to interfere with or seriously to disrupt an electronic system.²⁶

- 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.²⁷

58. There is plenty of room for argument about how that definition is formulated. I want to look at 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*”.²⁸ Countries such as Canada and New Zealand only include property 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, I suspect, of little significance to the manner in which our laws are applied.
- b. One might ask 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 currently goes on in Northern Ireland: vicious but targeted attacks on police officers and other representatives of the State.

Target and 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

²⁶ TA 2000 sections 2(1)(a),2(2).

²⁷ Terrorism Act 2000, section 1.

²⁸ *Suresh v Canada* [2002] 1 SCR 3, §98.

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.²⁹ And even by our Terrorism Act 2000, which 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 Court,³⁰ 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.³¹ As Professor 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.*"³²

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*":

²⁹ 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*".

³⁰ *R v Khawaja* [2012] SCC.

³¹ *R v Khawaja* [2006] OJ 4245, §73 (Rutherford J).

³² "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*, 2007, p. 39.

“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.*”³³

64. Change along these lines would do nothing, therefore, to guarantee the limited application of our 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.”³⁴

66. Whether directed at our Government or that of Syria, whether an evil attack on civilians or a reaction to extrajudicial murder by the state, terrorism is terrorism. We might wish it otherwise, particularly in relation to national separatist struggles where one would prefer not to take sides. But Parliament in the 2000 Act 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.³⁵ An amendment to that effect is also being considered by a senior Australian review body, which will report shortly.³⁶

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.³⁷ The Supreme Court has been asked to imply just such an exclusion into the law: Mr Gul’s case will be heard there later this year.

³³ *The People v Edgar Morales*, No 186, 11 December 2012.

³⁴ *R v F* [2007] EWCA Crim 243; [2007] QB 960, §32.

³⁵ SA: Protection of Constitutional Democracy against Terrorism and Related Activities Act 2004.

³⁶ COAG Review, March 2013.

³⁷ [2012] EWCA Crim 280; TA 2006 section 2.

Summary – definition of terrorism

69. So amending the definition of terrorism, while possibly desirable in some respects, is never going to guarantee our anti-terrorism laws against abuse. 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. What then are we left with? Two things, as it seems to me.

Discretion

71. First, the need for wise exercise of some very broad discretions by decision-makers: the police, the Home Secretary, the Crown Prosecution Service, the Director of Public Prosecutions³⁸ and where it is wished to prosecute offences allegedly committed abroad, the Attorney-General.³⁹ As my predecessor Lord Carlile said in his essential report on the 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.*”

Constitutionalism

72. But principally, we have to rely on constitutionalism: the checks and balances supplied by our unwritten constitution.
73. It is neither fashionable nor wise to congratulate ourselves as a country – save perhaps on the organisation of international sporting events. But in relation to anti-terrorism law, under the extreme pressures of the past twelve years, the case can be made that our constitutional controls have not worked so badly after all.
74. **Parliament** resisted giving 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 House of Lords – to Bills concerning asset-freezing and TPIMs. Its committees, increasingly influential, provide an increasing degree of meaningful scrutiny.
75. **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 by an active legal profession, knocked many rough edges off the control order system and insisted that the asset-freezing rules be properly compliant with the rule of law. They have demonstrated the wisdom, in our constitutional settlement, of a Human Rights Act that gives them the power to warn but not to override.

³⁸ TA 2000, section 117(2).

³⁹ TA 2000, section 117(2A).

76. Without I hope being too controversial, I unhesitatingly include the European Court of Human Rights in that appreciation. Its interventions have been few, but important. In *Gillan and Quinton*, 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 to be not very much missed. Let us hope that this case, which was supported by Liberty, is not an example of the sort of case which, in the words of the current judicial review consultation, has “*developed far beyond the original intentions of this remedy*”.⁴⁰

77. And 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. Despite forebodings at the time, 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.

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 do better. I end with the words of the distinguished American Professor David Cole, from an article entitled “English lessons”:

“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.”⁴¹

Thank you.

⁴⁰ *Judicial Review: proposals for reform*, CP 25/2012, December 2012, §26.

⁴¹ D. Cole, “English lessons: a comparative analysis of UK and US responses to terrorism” (2009) 62 *Current Legal Problems* 136-167, p. 167.