Clamping Down on Terrorism in the United Kingdom

Clive Walker*

Abstract

There is a long history of laws responding to terrorism that have been utilized in the United Kingdom. This article outlines the important strands of development, including in the former colonies of the British Empire, in Ireland, and in mainland Britain itself. It offers an overview of contemporary legislation — the Terrorism Act 2000, the Anti-terrorism, Crime and Security Act 2001, the Prevention of Terrorism Act 2005 and the Terrorism Act 2006. These comprise a formidably detailed and complex code of measures, principally concentrating upon special police powers, offences and criminal processes, the proscription of organizations and the restriction of financial flows to the terrorists. The article then considers thematically some of the main controversies surrounding the laws. The discussion is organized around the following binaries: a rational code not panic legislation; a criminal justice model not a war model; the language of rights not the language of balance; international cooperation not unilateralism; appropriate structures not empty acronyms. The conclusions warn against undue optimism about the impact of the special laws and undue reliance upon the laws to an extent which damages the very values that the laws seek to protect.

1. Introduction

The interaction between terrorism and United Kingdom law is a protracted and doleful tale. Unlike many jurisdictions, where no serious attention was accorded to the issue until the shock of 9/11, the United Kingdom has regularly experienced and responded to terrorism for a century or more. The legal results first reflect the experiences of terrorism in colonial conflicts when the bygone era of the British Empire included campaigns of political violence experienced in Palestine, Kenya, Malaysia, Cyprus and Aden.[1] Further legal impact was

* Professor of Criminal Justice Studies, School of Law, University of Leeds. Versions of this article were presented at the International Political Science Association (IPSA), Research Committee for Comparative Judicial Studies, Naples, 2005 and at the Royal United Service Institute, Conference on Politics & Terrorism, 2006. [C.P.Walker@leeds.ac.uk]

1 See F. Kitson, *Low-Intensity Operations* (London: Faber and Faber, 1971).

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achieved by the sporadic campaigns of the Irish Republican Army, as well its emulators, such as the Irish National Liberation Army, and its opponents from the Unionist camp in Northern Ireland, such as the Ulster Volunteer Force. Republicans were able to mount 'the long war' from 1970 until the 1990s both in Ireland itself[2] and in mainland Britain.[3] The inventory of laws responding to this political violence veered from the distinctly militaristic approach that was represented by the Civil Authorities (Special Powers) Acts (Northern Ireland) 1922 (as amended)[4] to a more criminal justice-oriented slant heralded by a review undertaken by Lord Diplock,[5] which formed the basis for the wide-ranging Northern Ireland (Emergency Provisions) Acts 1973–98. This transformation reacted to such horrors as internment without trial, the inhuman treatment of detainees[6] and lethal confrontations such as the Bloody Sunday in 1972 when 13 people in Londonderry were shot dead by the Army.[7] Finally, there has emerged since the 1970s a growing concentration upon the mounting spectre of international terrorism,[8] which takes us full circle back to 9/11 and the legislation it has spawned.

Prior to 9/11, the Terrorism Act 2000 marked an important new phase in the laws against political violence within the United Kingdom. The Act launched a more unified and permanent regime. It also reflected the paramilitary ceasefires in Northern Ireland, which had culminated in the Belfast Agreement signed on Good Friday 1998,[9] with a greater emphasis on international terrorism. The attacks of 9/11 produced the Anti-terrorism, Crime and Security Act 2001, and, since that time, the Prevention of Terrorism Act 2005 and the Terrorism Act 2006 have all struggled with further legal consequences of dealing with Jihadist violence. Beyond these specialist Acts, terrorists may be convicted of age-old offences like murder or the

2 The prime legislation included the Northern Ireland (Emergency Provisions) Acts 1973–1998 and the Criminal Justice (Terrorism and Conspiracy) Act 1998. See G. Hogan and C. Walker, *Political Violence and the Law in Ireland* (Manchester: Manchester University Press, 1989); L.K. Donoghue, *Counter-Terrorism Law* (Dublin: Irish Academic Press, 2001).

3 The prime legislation included the Prevention of Violence (Temporary Provisions) Act 1939 and the Prevention of Terrorism (Temporary Provisions) Acts 1974–1989. See C.P. Walker, *The Prevention of Terrorism in British Law* (2nd edn., Manchester: Manchester University Press, 1992).

4 See K. Boyle, T. Hadden and P. Hillyard, *Law and State: The Case of Northern Ireland* (London: Martin Robertson, 1975), eid., Ten *Years On in Northern Ireland: The Legal Control of Political Violence* (London: Cobden Trust, 1980); Hogan and Walker, *supra* note 2; Donoghue, *supra* note 2.

5 Report of the Commission to consider Legal Procedures to Deal with Terrorist Activities in Northern Ireland (Cm 3420, London, 1972, hereinafter 'Diplock Report').

6 *Ireland v. United Kingdom*, European Court of Human Rights (1978), Application no. 5310/71, Series A, No. 25.

7 Online at: http://www.bloody-sunday-inquiry.org.uk/(visited 13 June 2006).

8 See Report of the Operation of the Prevention of Terrorism (Temporary Provisions) Act 1976 (Cmnd. 8803, London, 1983); Inquiry into Legislation against Terrorism (Cm. 3420, London, 1996); Legislation Against Terrorism (Cm. 4178, London, 1998).

9 British-Irish Agreement reached in the multi-party negotiations (Cm. 3883, London, 1998).

solicitation of murder[10] as well as more targeted provisions such as the Explosive Substances Act 1883.

This article will provide a brief overview of contemporary legal measures so that there can be an understanding of the breadth of laws against terrorism in the United Kingdom. The augmentation of Act upon Act will also be explained. However, rather than providing a tediously intricate shopping list of measures, the bulk of the paper will pick out several policy themes around which many of the controversies and debates concerning the legislation have become entwined. In this way, a dynamic sense of policy development will be conveyed, including the conflict between security policy and normative precepts such as individual rights.

2. Contemporary Terrorism Laws

A. Terrorism Act 2000[11]

The Act is divided into eight parts, with six reflecting its substantive themes: proscribed organizations;[12] terrorist property; terrorist investigations; counter-terrorism powers; miscellaneous offences (such as possession of items useful to terrorism); and extra measures relating to criminal process and policing powers confined to Northern Ireland, including non-jury 'Diplock' trials.[13] Some of the most eye-catching changes are structural rather than substantive. For the first time ever, anti-terrorism laws are stated comprehensively and permanently (save for Part VII relating to Northern Ireland alone) in one code.[14]

B. Anti-terrorism, Crime and Security Act 2001

This substantial supplement, a response to the fears instilled by 9/11, is organized into 14 parts. The first three address the forfeiture of terrorist property and seizure of terrorist cash, replacing and adding to measures in

10 An example is the conviction of Abu Hamza, *The Times*, 8 February 2006, at 1. Abu Hamza is a fundamentalist Islamic preacher who has been associated with the radicalization of his congregation at Finsbury Park which at one time included Zacarias Moussaoui (the '19th hijacker' convicted in the US in 2006) and Richard Reid (the 'shoe bomber' convicted in the US in 2003). As well being convicted in the UK, there is a pending extradition request from the US Government.

11 See C. Walker, *A Guide to the Anti-Terrorism Legislation* (Oxford: Oxford University Press, 2002).

12 For the list of proscribed organizations, see Sched. 1; Terrorism Act 2000 (Proscribed Organizations) (Amendment) Orders 2001 SI no. 1261, 2002 SI no. 2724 and 2005 SI no. 2892.

13 See J.R. Jackson and S. Doran, *Judge without Jury* (Oxford: Clarendon Press, 1995); Diplock Review: Report (Northern Ireland Office, Belfast, 2000). The removal of juries in England and Wales in the face of intimidation is permitted by the Criminal Justice Act 2003, s. 44.

14 Note that Section 76 has ceased to have effect: Terrorism Act 2000 (Cessation of Effect of Section 76) Order 2002 SI no. 2141.

the Terrorism Act. Part III of the Anti-terrorism, Crime and Security Act 2001 treads into new territory, dealing with the freezing of foreign property held by UK institutions.[15]

Part IV addressed immigration and asylum matters. By far, the most controversial element was the detention without trial of 16 foreign persons denied asylum on national security grounds or because of their international crimes.[16] A Privy Counsellor Review Committee depicted the system as objectionable in principle because of the lack of procedural safeguards and also because it provided no protection against resident terrorists.[17] It argued for either a more aggressive criminal prosecution stance (perhaps aided by admissible electronic intercept evidence) or intrusive administrative restraints on movement and communications. The Home Office Consultation Paper in response, regarded Part IV as essential and shelved the alternatives as unworkable.[18] There the matter rested until, as described later in this article, the judges intervened and forced a rethink.

Parts VI to X govern dangerous substances and acute vulnerabilities. The dangerous substances include weapons of mass destruction (Part VI) and pathogens and toxins (Part VII). The acute vulnerabilities are nuclear and aviation facilities (Parts VIII and IX). The measures bolstering their security also encompass the specialist police forces assigned to their protection (Part X, Sections 98–101). Other aspects of Part X (Sections 89–97), as well as extracts from Parts XI (Sections 102–107), mainly consist of amendments to Terrorism Act policing measures as well as pervasive surveillance powers.

Next, there are various new criminal offences spread around the Anti-terrorism, Crime and Security Act 2001. More controversial is the sentencing enhancement in Part V, concerning offences motivated by religious hatred, which were officially depicted as necessary to send a signal that Muslim communities were not to be victimized, a theme now being reinforced by the Racial and Religious Hatred Act 2006.

Finally, incorporated within Parts XIII and XIV of the Act are miscellaneous matters such as the rapid implementation of European Union obligations and structural matters.

C. Prevention of Terrorism Act 2005

The Act replaces the regime of detention without trial under Part IV of the 2001 Act with restriction by way of control orders. The precise reasons for

15 See Privy Counsellor Review Committee, Anti-Terrorism, Crime and Security Act 2001 Review, Report (2003–2004 HC 100), §§ 123, 126, 133; KPMG, Review of the Regime for Handling Suspicious Activity Reports, available at: http://www.ncis.co.uk/kpmgsarreport.asp, 2003 (visited 13 June 2006).

16 For details, see Lord Carlile, Reviews of Pt. IV of the Anti-terrorism, Crime and Security Act 2001 (Home Office, London, 2003–2005).

17 See Privy Counsellor Review Committee, Anti-Terrorism, Crime and Security Act 2001 Review, Report (2003–2004 HC 100), § 193.

18 Home Office, Counter Terrorism Powers (Cm. 6147, London, 2004) Pt. I §§ 8, 34, Pt. II § 31.

that change, triggered by the judicial condemnation of Part IV in 2004, is described later in this article. The effect is that those suspects previously detained have been subjected to this new type of executive order — at least until August 2005, when many were detained again pending deportation. The Act allows for two types of order, depending on their severity, namely derogating orders and non-derogating orders. In both the cases, the order must be confirmed by a court. The orders issued in 2005 fell 'not very short of house arrest'.[19] Though this level of restraint appears to be incompatible with Article 5 of the European Convention on Human Rights,[20] no derogation notice has been issued.

D. Terrorism Act 2006

The origins of the Act can be located in the London bombings of July 2005, which sparked the Prime Minister into presenting a 12 point plan.[21] At the same time, the Act is being used to implement the Council of Europe Convention on the Prevention of Terrorism of 2005,[22] though there are major discrepancies between the Act and the Convention, such as in the new offences against the 'encouragement' of terrorism. The principal offence in Section 1 relates to the publication of statements that are likely to be understood by their audience as a direct or indirect encouragement or other inducement to it to the commission, preparation or instigation of acts of terrorism or specified offences. The publisher must either intend members of the public to be directly or indirectly encouraged or otherwise induced, by the statement to commit, prepare or instigate acts of terrorism or specified offences, or be reckless as to whether members of the public will be so directly or indirectly encouraged by the statement. By subsection (3), the indirect encouragement of terrorism includes a statement that 'glorifies' the commission or preparation of acts of terrorism or specified offences (either in their actual commission or in principle) but only if members of the public could reasonably be expected to infer that what is being glorified in the statement is being glorified as conduct that should be emulated by them. There were furious debates about whether this offence might criminalize anyone who glorified the armed opposition to the Apartheid regime in South Africa (such as the revered Nelson Mandela), and there were calls for the future prosecution of Cherie Booth, the wife of British Prime Minister Tony Blair, for stating in a speech that 'in view of the illegal

19 Lord Carlile, First Report of the Independent Reviewer pursuant to Section 14(3) of the Prevention of Terrorism Act 2005 (Home Office, London, 2006), § 43.

20 See *Guzzardi v. Italy*, European Court of Human Rights (1980), Application no. 7367/76, Ser. A, vol. 39; *Mancini and Mancini v. Italy*, European Court of Human Rights (2001), Application no. 44955/98, Reports 2001-IX; *R (Saadi) v. Secretary of State for the Home Department* [2002] England and Wales High Court (Administrative Division) Reports 670, at § 41. Compare *McDonald v. Dickson, Procurator Fiscal, Elgin* [2003] Scottish Criminal Cases Reports 311.

21 *The Times*, 6 August 2005, at 1.

22 Council of Europe Treaty Series No. 196; see also, in this issue, the contribution of K. Nuotio.

occupation of Palestinian land I can well understand how decent Palestinians become terrorists'.[23]

The 2006 Act further imparts additions to offences of training and preparations, and the widening of proscription powers. The police powers of detention after arrest are also extended — though only by doubling the period to 28 days and not 90 days after Parliament rejected that proposal as an outrageous negation of liberty.

3. Policy Strands and Critique

United Kingdom terrorism laws have been amongst the most extensively and fiercely debated of any devised in the past decade. The controversies being debated involve choices inherent or explicit in the design of the laws and the values they represent or infringe. These choices will now be gleaned in this article.

A. A Rational Code Not Panic Legislation

Terrorism is about political drama. Drama is meant to engender emotions, and, when drama is not confined to the theatre but moves onto the streets, the emotions are to prompt action. Some call this capacity of political violence to skew policy and action 'the politics of the last atrocity'.[24] The resultant danger of ill-considered, ill-defined 'panic' legislation is manifest. Yet, the Terrorism Act 2000 was intended to establish a comprehensive and permanent regime and, therefore, represented an attempt to break away from the cycle of emergency 'laws of the last atrocity'. Given the legislation passed in 2001, 2005 and 2006, it appears hard to break the habit amongst politicians of assuming that the public will always be impressed by reactive legislation. Is it fair to depict this subsequent legislation as 'panic' measures?

In the case of the 2001 Act, it is fair to recognize that the nature and scale of the attacks on 11 September 2001 by Al Qaeda suggested that terrorism had developed a 'Third Millennium' format, characterized by a multifaceted threat, motivated by religious and cultural ideals rather than rooted in nationalist or political ideology. Second, there was some realization even before 11 September 2001 that this new threat was occurring within the United Kingdom for some years. Out of the 19 hijackers, 11 had links with the United Kingdom.[25] The third motivation for action was a more generalized concern to increase security in the face of the inherent destabilization involved in the process of

23 House of Commons Debates, vol. 438, col. 844, 2 November 2005, Bob Marshall-Andrews.

24 See M. Humphrey, *The Politics of Atrocity and Reconciliation: From Terror to Drama* (London: Routledge, 2002).

25 See *The Times*, 15 September 2001, at 1.

'reflexive modernization'.[26] The trend represents a fundamental switch away from reactive policing of incidents to proactive policing and management of anticipatory risk.[27] But having made these excuses, many of the measures in the 2001 Act go well beyond these considerations and represent opportunistic changes that would not have been sustained outside a period of crisis.

One can seek to justify the Prevention of Terrorism Act 2005 by reference to the wish to react to the declaration of incompatibility under Section 4 of the Human Rights Act 1998 by the House of Lords in *A v. Secretary of State for the Home Department*. The controversy in essence surrounded the derogation under Article 15 that was lodged on 18 December 2001[28] concerning the inevitable contravention of Article 5 incurred by the instigation of the power to detain foreign nationals under Part IV of the 2001 Act. Detention without trial had been instituted under Part IV as a direct response to the events of 9/11 and the fear that there were dangerous foreigners at large in the country against whom there was strong intelligence of involvement in terrorism but either not enough evidence for a criminal prosecution or evidence of a very sensitive nature the revelation of which in open court might compromise security techniques or might even put the lives of informants and agents at risk. The detention regime was described as comprising a 'prison with three walls' since the foreign detainees were entitled to leave the prison if willing to travel on to another country. However, this prison turned out to be sturdy enough for most, since only a few were prepared to risk a return to their country of origin and the prospect of prosecution and possibly torture. Therefore, they were held in high security conditions in Belmarsh Prison for around 3 years. The resort to derogation under Article 15 was eventually found to be incompatible with the Human Rights Act 1998 in December 2004.[29] In the leading judgment of Lord Bingham, while there had been shown to be a public emergency sufficient to warrant the issuance and continuance of the derogation notice, detention without trial could not be said to be a proportionate response because of two main features within Part IV.[30] One was that Part IV only applied to deportable aliens but ignored the considerable threat posed by British citizens, a threat that became tragic reality by the bombings in London on 7 July 2005. The other was that the creation of a 'prison with three walls' — the absent fourth wall, allowing foreign terrorists to depart the jurisdiction and plot abroad, likewise made no sense in security terms. Lord Bingham's cogent judgment also addressed the discriminatory impact on nationality of the detention regime, which could either be taken as a further challenge as to proportionality or said to be a challenge under the requirement

26 U. Beck, *Risk Society* (London: Sage, 1992), at 87.

27 See R.V. Ericson and K.D. Haggerty, *Policing the Risk Society* (Oxford: Clarendon Press, 1997).

28 Human Rights Act 1998 (Designated Derogation) Order 2001 SI no. 3644.

29 [2004] United Kingdom House of Lords Reports 56. See further, C. Walker, 'Prisoners of "War All the Time"', 1 *European Human Rights Law Review* (2005) 50.

30 *Ibid.*, § 44.

of Article 15 that there be no inconsistency with other international law obligations (such as Article 14).[31]

After some hesitation, the Government sought both to respond to the (non-binding) declaration of incompatibility and to do so in a way that would not inevitably rely on a notice of derogation. The results are set out as 'control orders' in the Prevention of Terrorism Act 2005. These are certainly preferable to indefinite detention without trial. What should be less the subject of commendation is the dubious way in which the most extensive control orders have been issued without reliance upon derogation, the minimal levels of scrutiny of ministerial orders — described in *Re MB* as no more than a 'thin veneer of legality'[32] and consequently declared to be in breach of Article 6 of the European Convention — and the way in which the subjects of the orders have actually ended back in detention pending deportation without any imminent prospect of deportation in most cases.

Is the Terrorism Act 2006 a panic reaction to the London bombings of July 2005? The European Convention on the Prevention of Terrorism of 2005 could have founded a reason to review. However, the Bill does not closely follow the contours of that international agreement but bears all the hallmarks of a politically driven response — by the Prime Minister in the political stillness of an August day. It may also prove to be a salutary lesson as major parts of it, most notably the 90 day detention period, have rightly proven unpalatable in Parliament. The assumed equation hitherto, that the more draconian the legislation the more political popularity accrues to its sponsor, may now be fading. The public at least may have begun to appreciate, not least with the memory of how the Peace Process in Ireland required dialogue and compromise, that there may be more important avenues to be explored than the endless ratcheting up of repression.

How to avoid 'panic' legislation in the future? To some extent, Parliament (especially through the Joint Committee on Human Rights and the House of Commons Home Affairs Committee) has improved the quality of scrutiny that can regularly command cross-party support. The courts have also signalled a greater willingness to consider these issues, buoyed by the Human Rights Act 1998. But one can easily exaggerate their power. They depend upon litigation that may conclude years after the event. The presence of sensitive information often produces deference; even in the House of Lords' decision, there was no finding against the declaration of emergency, while the disproportionate and discriminatory policies were evident on the face of the Act. The other mechanism by which to seek to ensure rational policy-making and not panic legislation is to give further authority to the form of independent review currently undertaken by Lord Carlile. There should be a panel of multiple reviewers, and they should have explicit statutory foundation with links to Parliament.

31 *Ibid.*, § 68.

32 [2006] England and Wales High Court (Administrative Division) Reports 1000 § 103.

B. A Criminal Justice Model not a War Model

President Bush has invoked 'the first war of the twenty-first century'[33] and, in its name, has permitted the abyss of 'the legal black hole' that is the detention facility at Guantánamo Bay.[34] But the United Kingdom terrorism legislation has, ever since the Diplock Report in 1972,[35] generally adopted a criminal justice not a war model. This approach is the correct policy to sustain a long-term campaign against terrorism consistent with the rule of law and proportionate responses. Rejection of the US war model is to be welcomed, for, like the 'war on drugs' or the 'war on crime', that approach is conducive to a lack of accountability and proportionality and threatens an everlasting departure from civil society.[36]

Yet, there are several tensions in the attainment of this policy. It is evident that measures such as detention without trial and control orders do not reflect the ideal. Whenever invoked, it would be better to signal their extraordinary nature by derogation which would create an impetus to find alternatives — especially prosecution through the use of electronic surveillance evidence.

Another tension concerns the development of 'precursor' offences. These are offences that do not rely upon the *actus reus* of a traditional crime — in other words, harm to a person or damage to property. Instead, they facilitate intervention against risk at an earlier preparatory stage, on the grounds that to await the commission of mass destruction terrorism is too dangerous. Thus, one sees the development of offences such as that in Section 57 of the Terrorism Act 2000, the possession of materials useful to terrorism, or Section 58 of the same Act, the possession of information useful to terrorism, in both cases for purposes that can only be guessed at. Despite the difficulties, the idea is extended by Sections 5–8 of the Terrorism Act 2006. The other development along these lines concerns the development of a war of words with terrorism, now illustrated by the offence of 'encouragement of terrorism' in Section 1 of the Terrorism Act 2006. The problems with these types of offences are manifold. As well as the dangers of over-breadth from vague drafting terms, the offences run the danger of penalizing equivocal actions so that the conviction will not be seen as a legitimate ascription of criminality, but will leave room for claims of people being victimized for their views or even their stupid curiosity. There may also be claims to rights that are being affected, such as free expression. In debates about the offence of encouragement of terrorism (and the same applies to debates about incitement to religious hatred) there has been a woeful failure to understand that offensive speech is a hallmark of free speech.

33 *The Guardian*, 14 September 2001, at 5.

34 J. Steyn, 'Guantanamo Bay', 53 *International & Comparative Legal Quarterly* (2003), at 1; H. Duffy, *The 'War on Terror' and the Framework of International Law* (New York: Cambridge University Press, 2005).

35 Diplock Report, *supra* note 5.

36 See F.A. Allen, *The Habits of Legality* (New York, Oxford University Press, 1996), at 37–40.

A further tension is the reliance upon the terminology of 'terrorism', a useful shorthand but one that is imprecise and value-laden.[37] By Section 1 of the Terrorism Act 2000:

(1) In this Act 'terrorism' means the use or threat of action where
  (a) the action falls within subsection (2),
  (b) the use or threat is designed to influence the government or to intimidate the public or a section of the public and
  (c) the use or threat is made for the purpose of advancing a political, religious or ideological cause.
(2) Action falls within this subsection if it
  (a) involves serious violence against a person,
  (b) involves serious damage to property,
  (c) endangers a person's life, other than that of the person committing the action,
  (d) creates a serious risk to the health or safety of the public or a section of the public or
  (e) is designed seriously to interfere with or seriously to disrupt an electronic system.

The three conjunctive legs in Section 1(1) are intentionally broad, since the definition serves as the platform for investigative police powers where there must be some margin of error. There are dangers enough in that application of the term, as exemplified by complaints about the use of stop and search powers under Section 44 of the Terrorism Act 2000 against young males of Asian ethnicity.[38] Since this usage now seems irreversible, and will grow with the Terrorism Act 2006, the definition should be reformed. In terms of *definition* in Section 1(1), relevant measures should be designed around a combination of the types of seriously threatening and destabilizing offences being perpetrated; and in terms of *context and remit as* in Section 1(2), what is important is the presence of collectives that carry them out and that render less capable normal criminal justice processes. In this way, the emphasis should be upon severe and collective political violence, rather than terrorism per se.

The enforcement of the precept of the criminal justice model has begun to be implemented. Thus, Section 8 of the Prevention of Terrorism Act 2005 requires, before the issuance of control orders, the Secretary of State to confirm that the police have established that prosecution is not realistic. It would be useful to see that instruction repeated elsewhere.

C. The Language of Rights Not the Language of Balance

A persistent policy strand especially relevant to the invocation of law as part of counter-terrorism strategy adverts to a conflict between public safety and

37 On the definition of terrorism, see generally the contributions of G.P. Fletcher, T. Weigend and A. Cassese in this issue.

38 See Home Affairs Committee, *Counter-terrorism and Community Relations in the Aftermath of the London Bombings* (2004–2005 House of Commons Paper 165-I).

individual rights to liberty, privacy and expression. Lord Lloyd in his review of the legislation in 1996 sought a balance as follows:[39]

> (i) Legislation against terrorism should approximate as closely as possible to the ordinary criminal law and procedure; (ii) Additional statutory offences and powers may be justified, but only if they are necessary to meet the anticipated threat. They must then strike the right balance between the needs of security and the rights and liberties of the individual; (iii) The need for additional safeguards should be considered alongside any additional powers; (iv) The law should comply with the UK's obligations in international law.

The demand to take rights seriously is not wholly captured by point (ii) above. If the argument is pitched in terms of a balance of rights rather than a balance of values — rights versus security — more principled and sustainable decisions will ensue. A language of rights and not the language of the balance of values produces at least three conclusions.

The first is that this balance within rights discourse is wholly feasible as there are important rights to security, including the right to life under Article 2 of the European Convention.

The second conclusion is that absolute rights are indeed absolute. This observation applies with special force to rights against ill-treatment under Article 3, despite the musings by some commentators that the ticking bomb justifies torture[40] and despite apparent official willingness to abandon suspects to their fate in the clutches of regimes wedded to torture with the flimsy device of a diplomatic assurance. Absolute rights mean that states should never plan to sacrifice absolute rights, though one can understand that in the heat of battle, people might get killed or hurt.[41]

The third conclusion is certainly not that respect for rights demands that special laws against terrorism should not exist at all but the opposite. Validations for distinct anti-terrorist laws can be mounted at three levels. The first level recognizes that it is justifiable for liberal democracies to defend their existence and their values, as reflected in Articles 15 (derogation) and 17 of the European Convention of Human Rights. Aside from the power to take action, there is a state duty to act against political or paramilitary violence and to safeguard the right to life of its citizens (as under Article 2 of the European Convention). In addition, states should more generally ensure the enjoyment of rights and democracy (under Article 1) and under

39 Inquiry into Legislation against Terrorism (Command Paper 3420, London, 1996) § 3.1.

40 See A. Dershowitz, *Why Terrorism Works* (New Haven: Yale University Press, 2002); A. Etzioni, *How Patriotic is the Patriot Act?* (New York: Routledge, 2004); M. Ignatieff, *The Lesser Evil* (Edinburgh: Edinburgh University Press, 2004). For a critical view see F. Jessberger, 'Bad Torture – Good Torture? What International Criminal Lawyers May Learn from the Recent Trial of Police Officers in Germany' 3 *Journal of International Criminal Justice* (2005), at 1059; P. Rumney, 'The effectiveness of coercive interrogation: Scholarly and judicial responses', 44 *Crime Law and Social Change* (2006), at 465.

41 See, for example, *McCann, Savage and Farrell v. UK*, European Court of Human Rights (1995) Application no. 18984/91, Series A, vol. 324.

United Nations instruments must also not harbour or condone terrorism.[42] The second level of justification points to the illegitimacy of terrorism as a mode of political expression — the fact that many of its emanations are almost certainly common crimes, crimes of war or crimes against humanity, even if the political cause of the terrorist is deemed legitimate. Thirdly, terrorism is a specialized form of criminality that presents peculiar difficulties in terms of policing and criminal process arising from its transnational organization, capacity to intimidate, and sophistication. Just as variations have been successively adopted against, for example, rapists, serious fraudsters and drug traffickers, so terrorists warrant different treatment because of atypical methods and targets.

D. Appropriate Structures Not Empty Acronyms

Terrorism has long shaped policing organizations in the United Kingdom. Within the Metropolitan Police, a Special Branch was then formed in 1883 to respond to an Irish bombing campaign.[43] Now, the pressures of terrorism have sparked the reorganization of the local police Special Branches into regional clusters[44] and even provoked the insistence that local police forces should be merged so as to cope with the threats from organized criminality, international terrorism and domestic extremism.[45] Other aspects of terrorism policing, most notably the consolidation of border security, remains to be tackled.

The overt step in allowing secret agents into the world of terrorism policing was taken in 1992,[46] when the Security Service took over the Metropolitan Police Special Branch's role as the main Irish Republican terrorism intelligence-gathering agency. These trends away from local policing towards national agencies and, increasingly, away from policing to intelligence agencies have implications for democratic accountability.[47] Another concern is the observance of individual rights; for example, will privacy be properly respected either during surveillance or in data retention?[48] The other issue is of efficiency and whether the distribution of intelligence work across three major units is helpful. If policing is too fragmented in the view of the Home Secretary, should there be one not three security services? Is the Joint

42 See United Nations GA Resolutions 40/61 of 9 December 1985 and 49/60 of 9 December 1994.

43 See R. Allason, *The Branch: A History of the Metropolitan Police Special Branch 1883–1983* (London: Secker & Warburg, 1983).

44 H.M. Inspectorate of Constabulary, *A Need to Know: HMIC's Thematic Inspection of Special Branch and Ports Policing* (London, 2003).

45 H.M. Inspectorate of Constabulary, *Closing the Gap* (London, 2005).

46 House of Commons Debates, vol. 207, col. 297, 8 May 1992. See further Security Service Act 1996; Anti-terrorism, Crime and Security Act 2001, s.116.

47 Home Affairs Committee, *Accountability of the Security Service* (1992–1993 House of Commons Paper 265) and reply at Command Paper 2197.

48 See *R v. Secretary of State for the Home Department, ex parte Ruddock*, 1 *Weekly Law Review* (1987) 1482.

Terrorism Analysis Centre (JTAC),[49] formed in 2003 and dealing with threat intelligence assessment and processing, adequately overcoming the tensions and rivalries that have existed for decades and producing quality in intelligence products? Have the problems uncovered by the Butler Report[50] in the grand strategy of war been averted in the smaller skirmishes over the repression of individuals? Independent inquiries, going beyond the provision of a 'narrative' about incidents such as the bombings of 7 July 2005,[51] should be held in order to test these structures.

It has also been suggested that there be government departmental reform in the shape of a consolidating Department for Homeland Security (DHS). Of course, the DHS is controversial in its own polity, having botched the response, through its federal emergency Management Agency, to Hurricane Katrina in New Orleans in 2005.[52] Next, the holders of intelligence, the Federal Bureau of Investigation (FBI) and the Central Intelligence Agency (CIA) might not trust such an outsized entity with the sensitive intelligence needed to found anticipatory action. May be what the United Kingdom lacks is not a Department for Homeland Security but an agency to lead in emergency planning and to report on it. The Civil Contingencies Act 2004 has addressed issues of reliance but primarily at a local authority level, thereby allowing an apparent abeyance at the core of government.[53]

E. International Cooperation Not Unilateralism

There is a substantial body of international laws against terrorism, much of which has been implemented by municipal law.[54] It relates to hijacking and attacks upon aircraft and ships (the Aviation Security Act 1982, and the Aviation and Maritime Security Act 1990), diplomats (the Internationally Protected Persons Act 1978), hostages (the Taking of Hostages Act 1982), nuclear installations and materials (the Nuclear Material (Offences) Act 1983) as well as dealing with procedural issues such as extradition (the Suppression of Terrorism Act 1978). This list has now been supplemented by the United Nations Convention for the Suppression of Terrorist Bombings[55] and the United Nations Convention for the Suppression of the

49 See Intelligence and Security Committee, Annual Report 2002–2003 (Cabinet Office, London, 2003), § 62.

50 Committee of Privy Counsellors, Review of Intelligence on Weapons of Mass Destruction (2003–2004 House of Commons Paper 898), chapter 4.

51 See Report of the Official Account of the Bombings in London on the 7 July 2005 (2005–2006 House of Commons Paper 1087), *The Times*, 14 December 2005, at 2.

52 See Select Bipartisan Committee to Investigate the Preparation for and Response to Hurricane Katrina, A Failure of Initiative (Washington, 2006).

53 See C. Walker and J. Broderick, *The Civil Contingencies Act 2004: Risk, Resilience and the Law in the United Kingdom* (Oxford: Oxford University Press, 2006).

54 See J.P. Sterba, *Terrorism and International Justice* (New York: Oxford University Press, 2003); see also, in this issue, the contribution of K. Nuotio.

55 A/RES/52/164 (Cm. 4662, London, 1997).

Financing of Terrorism.[56] Most recently of all has been the European Convention on the Prevention of Terrorism 2005.[57]

At European Union level, the Council Framework Decision on Combating Terrorism[58] has been considered officially 'not go further than existing UK legislation, which is considered to be adequate and not to require change'.[59] In contrast, the Council Framework Decision on a European arrest warrant,[60] was implemented by the Extradition Act 2003. In addition to the two Framework Decisions, the Justice and Home Affairs Council set a whole range of other work in motion in September 2001, including a Council Framework Decision on joint investigation teams.[61] There have also been successive declarations of the involvement in terrorism of specified individuals and organizations under Council Regulation 2580 (2001),[62] amounting to a form of international outlawry.

Three difficulties abound in this field. The first is that politicians seem to favour signing new documents but are far less assiduous at following-up and ensuring there is universal implementation. The second is that too much of the negotiations remains hidden and secret. An example concerns the shadowy forms of cooperation against terrorism via the ESCHELON interception system headed by the US.[63] But the third problem is perhaps the most serious — that when international agreement is problematic, unilateral or bilateral action will be taken, such as the 2003 war in Iraq, the consequences of which are still unfolding.

4. Security and Society

Terrorism legislation will continue both to proliferate and to generate controversies along the foregoing binaries. Its impact will also remain peripheral. More important factors comprise normal police powers and criminal offences and regular techniques of investigation and securitization. These must operate alongside cooperation and vigilance on the part of the public who

56 A/RES/54/109, (Command Paper 4663, London, 1999). For a discussion of this Convention, see also the contribution of M. Pieth in this issue.

57 Council of Europe Treaty Series No. 196. See also the Convention on Cybercrimes (Council of Europe Treaty Series 185, 2001).

58 Proposed Framework Decision on Terrorism from the Commission, COM (2001) 521; Framework Decision, OJ 2002 L 164/3.

59 House of Lords Committee on the European Union, UK Participation in the Schengen Acquis (1999–2000 HL 34) Appendix 3.

60 Proposed Framework Decision on a European Arrest Warrant from the Commission, COM (2001) 522; Framework Decision, OJ 2002 L 190/1.

61 See OJ L 162/1, 13 June 2002. See M. Placher, 'Joint investigation teams', 13 *European Journal of Crime, Criminal Law & Criminal Justice* (2005), at 284.

62 See also UN Security Council Resolution 1267 (1999).

63 See European Parliament, Report on the existence of a global system for the interception of private and commercial communications (2001/2098(INI)).

provide much of the policing capability of society. Given this dependence of democracies upon the mobilization of the masses, both at political and practical levels, care must be taken to avoid alienating the public by counter-terrorism measures that appear disproportionate or senseless. According to the characteristically exaggerated words of Lord Hoffman in the case of *A v. Secretary of State for the Home Department*: 'The real threat to the life of the nation, in the sense of a people living in accordance with its traditional laws and political values, comes not from terrorism but from laws such as these'.[64] So, perhaps, the greatest challenge is to maintain the trust of the public not only through fostering the values of a vibrant and inclusive democracy and a legal system that shines with justice but also through securing the right to live an ordinary life free from the fear of violent attack. The precepts of a rational code, a criminal justice model, the value of rights, sound institutions and international cooperation are broadly appreciated. But even after a century or more of the endurance of terrorism, the attainment of these precepts can still be blown off course by the difficulties experienced by the Government in holding firm to its nerve and its cherished values in the face of the distress and emotion of the terrorist spectacular.

64 [2004] United Kingdom House of Lords Reports 56 § 97.