



The Definition of 'Terrorism' in UK Law

**JUSTICE's Submission to the Review
by Lord Carlile of Berriew QC**

March 2006

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Introduction

1. Founded in 1957, JUSTICE is a UK-based human rights and law reform organisation. Its mission is to advance justice, human rights and the rule of law. It is also the British section of the International Commission of Jurists.
2. We welcome the review of the definition of terrorism in UK law. Notwithstanding the seriousness of the terrorist attacks of 9/11 and 7/7, we consider that the current definition is too broad. In this submission, we set out the reasons for our view that a narrower and more perspicacious definition of terrorism would lead to both more effective counter-terrorism legislation and better protection for fundamental rights in the UK.

Summary

3. This submission is divided into 5 parts. First, we analyse the concept of terrorism, its relationship with the rule of law in democratic societies, and the distinction between terrorism and the legitimate use of force in non-democratic ones (paras 8-17; pp 2-5).
4. Secondly, we set out the issues relating to a legal definition of terrorism (as opposed to a non-legal one) including, in particular, the importance of legal certainty (paras 18-26; pp 6-8).
5. Thirdly, we examine existing definitions of terrorism in international law and in other common law jurisdictions based on the survey in Appendix B, attempting to identify common elements and key features of those definitions (paras 27-45; pp 9-14).
6. Fourthly, we consider the existing definition of terrorism in UK law as set out in section 1 of the Terrorism Act 2000 and identify several problems with it, including the broad scope for interference with fundamental rights (paras 46-62; pp 15-20).
7. Lastly, we recommend a series of changes to the existing definition in section 1 in order to make it compatible with the protection of basic rights (paras 63-64; pp 20-21). Our alternative draft definition of terrorism is set forth in Appendix A (pp 22-24).

The concept of terrorism

8. Among the definitions of 'terrorism' offered by the Oxford English Dictionary is:
 2. *gen.* A policy intended to strike with terror against whom it is adopted; the employment of methods of intimidation

9. At its core, the OED definition suggests, terrorism is intimidation, i.e. the threat or infliction of harm to coerce others. What is missing from the above definition is what distinguishes terrorism from other kinds of intimidation such as extortion, blackmail or kidnapping, which is the use of intimidation for some political or ideological purpose. Similarly, the OED definition fails to capture what seems most characteristic of terrorism as a modern phenomenon: the infliction of civilian casualties for a political end.
10. It is this sense of terrorism as violence *for a political purpose* which marks it out as profoundly anti-democratic, in a way that ordinary crimes are not. In a democracy, laws are the outcome of a process in which all participate and by which all are bound:¹

The citizen gives his consent to all the laws, including those which are passed in spite of his opposition, and even those which punish him when he dares to break any of them.

11. Participants in a democracy have a duty to support just institutions even where they, as individuals, favoured a different outcome than that of the majority.² In turn, individuals' human rights impose a series of constraints upon the state, preventing a majoritarian government from imposing rules that violate their fundamental interests in 'life, freedom and well being'.³
12. Of course any law-breaking, however minor, is a transgression of this democratic order but terrorism involves a more fundamental violation of basic rights: threatening human life to subvert the democratic process itself. This use of violence – and, increasingly, the infliction of mass casualties – also marks terrorism out from other crimes that seek to affect the integrity of the democratic process, e.g. electoral fraud. In addition, modern advances in firearms, explosives and biological, chemical, nuclear and radiological weapons make it possible for smaller groups of individuals to inflict greater numbers of casualties – and hence present a greater threat to public safety and the democratic process – than in times past.
13. It would be wrong to assume, however, that any use of violence for a political end is always terrorism or that every use of force by the state itself is necessarily legitimate. First, many states are not democratic and/or lack respect for fundamental rights. Of the 191 member states of the United Nations in 2006, at least 16 countries – representing a combined

¹ Rousseau, *The Social Contract*, trans GDH Cole (London: Everyman, 1993) 274-275.

² Rawls, *A Theory of Justice* (New York: Oxford University Press, 1972) 355.

³ Waldron, 'Unintentional Legislation' in A. Marmor (ed.), *Law and Interpretation* (Oxford: Clarendon Press, 1997) at 2.

population approaching 1.7 billion people⁴ – entirely lack functioning democratic institutions. Of the remaining 175 member states, a substantial number have only limited democratic institutions and an unhappy record of widespread and systemic violations of human rights.⁵ In this context, it is instructive to recall the historical origin of the concept of terrorism:⁶

1. *Government* by intimidation as directed and carried out by the party in power in France during the Revolution of 1789-94; the system of the 'Terror' (1793-4);

This governmental origin of the term 'terrorism' reminds us that the state's monopoly on the use of force,⁷ necessary to ensure the rule of law in democratic societies, can itself become an obvious instrument of coercion and repression.

14. Secondly, it is widely accepted that where a government is sufficiently arbitrary or oppressive, the use of force against that government is justified in order to effect change, i.e. the introduction or restoration of democratic institutions and the protection of fundamental rights. As Locke wrote in his *Second Treatise of Government*:⁸

[W]hensoever the legislators endeavour to take away and destroy the property of the people, or to reduce them to slavery under arbitrary power, they put themselves into a state of war with the people, who are thereupon absolved from any farther obedience, and are left to the common refuge which God hath provided for all men against force and violence. Whensoever, therefore, the legislative shall transgress this fundamental rule of society, and either by ambition, fear, folly, or corruption, endeavour to grasp themselves, or put into the hands of any other, an absolute power over the lives, liberties, and estates of the people, by this breach of trust they forfeit the power the people had put into their hands for quite contrary ends, and it devolves to the people, who have a right to resume their original liberty, and by the establishment of a new

⁴ The countries and their approximate populations are as follows: Bhutan (2.2 million), Burma (42.9 million), Cuba (11.3 million), Eritrea (4.5 million), People's Republic of China (1.3 billion), Laos (6.2 million), Libya (5.7 million), Iran (68 million), Nepal (27.6 million), North Korea (22.9 million), United Arab Emirates (2.5 million), Vietnam (83.5 million), Saudi Arabia (26.4 million), Sudan (40.1 million), Syria (18.4 million), Turkmenistan (4.9 million). Source: CIA World Factbook 2005.

⁵ Prominent examples include such countries as Egypt, Uzbekistan and Zimbabwe.

⁶ Oxford English Dictionary, p 820. Emphasis added. See e.g. Schama, *Citizens: A Chronicle of the French Revolution* (London: Penguin, 1989) at 792, discussing the effects of the Terror on the population of the Vendée in 1794: 'whatever claims on political virtue the French Revolution may make on the historian's sympathy, none can be so strong as to justify, to any degree, the unconscionable slaughters of the winter of the year II [of the Revolutionary Calendar]'.

⁷ See e.g. Nozick, *Anarchy, State and Utopia* (Oxford: Blackwell, 1974), at 23: 'A state claims a monopoly on deciding who may use force when; it says that only it may decide who may use force and under what conditions; it reserves to itself the sole right to pass on the legitimacy and permissibility of any use of force within its boundaries; furthermore it claims the right to punish all those who violate its claimed monopoly'.

⁸ (1690) Bk 2, Ch 19, para 222, *Two Treatises of Civil Government* (London: Everyman, 1924) p 229.

legislative (such as they shall think fit), provide for their own safety and security, which is the end for which they are in society.

15. Or, as was more famously articulated 86 years later:⁹

We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty and the pursuit of Happiness.--That to secure these rights, Governments are instituted among Men, deriving their just powers from the consent of the governed, -- That whenever any Form of Government becomes destructive of these ends, it is the Right of the People to alter or to abolish it, and to institute new Government, laying its foundation on such principles and organizing its powers in such form, as to them shall seem most likely to effect their Safety and Happiness.

16. The precise conditions under which it is legitimate to use force to achieve such ends has been the subject of several centuries of debate,¹⁰ of which the current debate over the definition of terrorism appears to be but a continuation. Nevertheless, it is a matter of historical fact that many if not most democratic institutions in place today owe their introduction to some prior use of force that, at the time, was undoubtedly unlawful and arguably terroristic in the eyes of the governments against whom it was used.¹¹ Moreover, given the significant proportion of the world's population that currently live under repressive governments,¹² the view expressed by the Home Secretary that he could not 'think of a state of affairs in the world today where violence would be justified as a means of bringing about change'¹³ seems, at best, hopelessly optimistic and, at worst, wilfully naive.

17. If it is to command broad support, therefore, a definition of terrorism must be capable of distinguishing between those kinds of political violence which seek to establish democracy and/or the protection of fundamental rights where they are absent and those kinds which seek to subvert and destroy them where they are present.

⁹ US Declaration of Independence, 1776.

¹⁰ See e.g. Rawls, *Theory of Justice*, n2 above, at 368. In the context of his discussion of civil disobedience, Rawls grants that 'in certain circumstances militant action and other kinds of resistance are surely justified', although he does not discuss examples.

¹¹ See e.g. Gearty, 'Terrorism and Human Rights' [2005] 1 EHRLR 1 at 2: 'practically all the institutions that we value, and the esteem of many of the historic leaders that we revere, are rooted in foundations that overflow with innocent blood, shed for political ends'.

¹² See e.g. notes 4 and 5 above.

¹³ Q21, evidence of Rt Hon Charles Clarke MP, Secretary of State for the Home Department, to the House of Commons Home Affairs Committee inquiry on the Draft Terrorism Bill (HC 515, 11 October 2005).

Considerations concerning a legal definition of terrorism

18. The natural and ordinary meaning of words often bears little relation to how they are defined in law. For a variety of reasons, a legal definition of terrorism need not resemble its definition in everyday language.
19. Indeed, it is appropriate to question whether a legal definition of terrorism is even necessary. The mere fact that some idea or thing is important (e.g. poses a serious threat to public safety or raises some urgent social problem) does not mean that it must therefore given a legal definition. In both statute and common law, many key legal terms are often left undefined, e.g. 'reasonableness'. In a different way, a concept may be both important and yet irrelevant to the operation of the law. For example, evidence of a suspect's motives or reasons for acting may be extremely important in the detection and investigation of crime, as well as central to a jury being satisfied that the suspect in question possessed the necessary *mens rea* for the commission of an offence. Nonetheless, 'motive' is itself not an element of criminal responsibility under UK law, and indeed expressly so.¹⁴
20. It therefore seems relevant to note that any conceivable terrorist act is already an offence under UK criminal law, e.g. murder and attempted murder, conspiracy to cause explosions, unlawful possession of firearms and ammunition, etc. Accordingly, it seems doubtful that a legal definition of 'terrorism' should be necessary in order to assign criminal liability to the activities of terrorists. Strictly speaking, such a definition would be required only to the extent that it was thought necessary to provide aggravated offences, e.g. conspiracy to cause explosions for a terrorist purpose (because violence for the purpose of political intimidation attracts particular moral opprobrium).
21. Beyond this, a legal definition of terrorism – and, by extension, the justification for a special legal framework to combat terrorism – seems more a matter of utility rather than necessity. We do not doubt that terrorism presents distinct operational challenges for law enforcement agencies above and beyond most ordinary crime. In particular, the risk of mass casualties suggests that a proportionately greater emphasis on detecting and preventing terrorist activity is required than might normally be the case.¹⁵ Similarly, the complex and increasingly

¹⁴ See e.g. *Seventh Report of Her Majesty's Commissioners on Criminal Law* (Cmd 448: March 1843), vol 19, p 1: 'The motive by which an offender was influenced, as distinguished from his intention, is never material to an offence. If the prohibited act be done, and done with the intention by law essential to the offence, it is complete, without reference either to any ulterior intention or to the motive which gave birth to the intention'.

¹⁵ As one legal academic noted, 'Lawyers need abstract definitions – the famous definition of 'pornography' by Justice Potter Stewart of the US Supreme Court being the exception which confirms the rule. The rule [with terrorism] is, unfortunately, that we have to know it, *before* we see it. Therefore, although we may all agree with the Representative of the United Kingdom to the United Nations that 'what looks, smells and kills like terrorism is terrorism', as lawyers we still have to work

transnational nature of terrorist organisations and the sophistication of their techniques means that investigating and prosecuting terrorist offences often involves significant evidential difficulties. But such evidential difficulties are not unique to terrorist prosecutions (indeed, they are strikingly similar to those found in respect of serious organised crime). And to overly-dramatise the risks to public safety posed by terrorism may distort rational assessment of the risks posed by other kinds of criminality.

22. Nonetheless, although we do not think a definition is strictly required, we recognise that a legal definition of terrorism would serve as a useful shorthand or trigger for an array of special measures, e.g. proscription of terrorist groups, restrictions on terrorist financing and property, etc, that may be justified in combating terrorism. In such circumstances, though, the utility of having a legal definition of terrorism must be weighed against other considerations, specifically:

- the principle of equality before the law;
- the principle of legal certainty, especially in the criminal law; and
- the importance of fundamental rights.

As noted above, it must also have regard to the need to distinguish terrorism from the legitimate use of force against repressive governments in other parts of the world.

23. First, the principle of equality before the law – treating like cases alike and different cases differently¹⁶ – is a core principle of justice and the rule of law. It applies generally to all legislation, but is particularly important to consider whenever legislation seeks to address some special case or circumstance (e.g. a terrorist threat). Fairness and consistency demand that, since the essence of terrorism is a breach of the criminal law, those suspected of terrorist offences should enjoy the same rights and procedural guarantees as those suspected of other kinds of criminal offences.

on an abstract definition of what should legally constitute terrorism': Walter, 'Defining Terrorism in National and International Law' in Walter, Vöneky, Röben, and Schorkopf (eds), *Terrorism as a Challenge for National and International Law: Security versus Liberty?* (Berlin: Springer-Verlag, 2004) at 25.

¹⁶ See Aristotle, *Ethics*, Bk V, 1131a10-b15. See e.g. most recently *R v Secretary of State for Work and Pensions ex p Carson* [2005] UKHL 37 per Lord Hoffman at para 10: 'The principle that everyone is entitled to equal treatment by the state, that like cases should be treated alike and different cases should be treated differently, will be found, in one form or another, in most human rights instruments and written constitutions. They vary only in the generality with which the principle is expressed'.

24. Secondly, the principle of legal certainty – another core principle of the rule of law – requires that any law providing a criminal offence should be clearly defined,¹⁷ so that individuals may know in advance whether their conduct is likely to breach it. Consequently, insofar as the definition of terrorism forms an element of criminal liability under counter-terrorism legislation, it is essential that ‘terrorism’ itself be defined as precisely and unambiguously as possible.

25. Thirdly, the definition of terrorism should be drawn in such a way that it does not authorise, through the operation of special counter-terrorism laws, unnecessary and disproportionate interference with fundamental human rights.¹⁸ We provide a more detailed analysis of the human rights considerations in relation to the current definition at 46–62 below.

26. Accordingly, we continue¹⁹ to endorse the analysis of Lord Lloyd of Berwick in his 1996 review of counter-terrorism legislation, that:²⁰

- (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.

¹⁷ The principle of *nullum crimen, nulla poena sine lege* is expressed in Article 7(1) ECHR (‘No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence under national or international law at the time when it was committed’). See also the speech of Lord Bingham of Cornhill in *R v Wilmington* [2005] UKHL 63, para 36, expressing the view that a criminal offence should be ‘clear, precise, adequately defined and based on a discernible rational principle’.

¹⁸ In addition to the requirements of section 3 of the Human Rights Act 1998, it is a principle of statutory construction that the provisions of any Act must be read narrowly where fundamental rights are engaged. See e.g. *R v Secretary of State for the Home Department, ex parte Daly* [2001] UKHL 26 per Lord Bingham at para 5: ‘Such rights may be curtailed only by clear and express words, and then only to the extent reasonably necessary to meet the ends which justify the curtailment’. See also *R v Secretary of State for the Home Department, ex parte Simms* (1999) 3 WLR 328 (HL), 340G-H per Lord Steyn. See further see Cross, *Statutory Interpretation*, 3rd ed. (1995) 165-166; *Halsbury’s Laws of England*, 4th ed. reissue, vol. 8(2), (1996), p 13, para 6.

¹⁹ See JUSTICE briefing for second reading of the Terrorism Bill in the House of Lords (March 2000), para 1.5.

²⁰ *Inquiry into Legislation Against Terrorism* (Cm 3420, October 1996), para 3.1. See also para 94 of the Privy Counsellors Review Committee chaired by Lord Newton, *Anti-Terrorism Crime and Security Act 2001 Review: Report* (HC100: 18 December 2004).

Definitions of terrorism in international law and other common law jurisdictions

27. As the Newton Committee noted in its 2004 report, 'there is no universally accepted definition of terrorism'.²¹ It instead offered the following summary:²²

There are broadly two points of view. One is that violence against the public and against public institutions is terrorism, irrespective of the merits of the objectives of the perpetrators, and the other is that it is possible to distinguish terrorists from 'freedom fighters' – those pursuing the right to self-determination in societies where there are no legitimate means of securing change – by the merits of their objectives.

28. In this section, we briefly analyse the key elements of the various definitions of terrorism found in international law and those of other common law jurisdictions.²³ By and large, the approach in other common law jurisdictions has been to define terrorism by reference to the *intention* of those committing certain offences, e.g. 'to intimidate or coerce a civilian population'.²⁴ By contrast, the typical approach at the international and regional level has been to eschew references to intentions and purposes and instead define terrorism by incorporating reference to specific acts which are *intrinsicly* terrorist in nature,²⁵ irrespective of the intention behind them, e.g. placing or causing to be placed 'on an aircraft in service, by any means whatsoever, a device or substance which is likely to destroy that aircraft'.²⁶

Violence or the threat of violence

29. Unsurprisingly, offences against the person are the core of all common law definitions and most international definitions of terrorism. A fairly typical example is that found in the Canadian Anti-Terrorism Act 2001, prohibiting any act or omission which intentionally:²⁷

- (a) causes death or serious bodily harm to a person by the use of violence,
- (b) endangers a person's life, [or]

²¹ See Newton Committee report, n19 above, para 79.

²² Ibid, fn11.

²³ See Appendix for the text of the definitions.

²⁴ 50 United States Code §1801(c)(2)(A), as amended by section 802 of the Patriot Act.

²⁵ This is the approach adopted most recently in Article 1(1) of the Council of Europe Convention on the Prevention of Terrorism 2005, which defines a 'terrorist offence' as 'any of the offences within the scope of and as defined in one of the treaties listed in the appendix'.

²⁶ Article 1(c), Montreal Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation 1971.

²⁷ Section 83.01(1)(b)(i).

(c) causes a serious risk to the health or safety of the public or any segment of the public...

30. The exceptions are those international counter-terrorism instruments focusing on terrorist actions in particular contexts, e.g. the Rome Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation 1988. In such contexts, the kinds of actions prohibited are typically those which 'endanger safety', e.g. the safe working of a ship, aircraft, airport, etc.

With the intent to intimidate or cause fear or terror

31. As noted above, the intentional element of intimidation is a central feature of most common law definitions of terrorism. It was also a key element of the first attempt to define terrorism at international law, the 1937 League of Nation's Convention for the Prevention and Punishment of Terrorism:²⁸

All criminal acts directed against a State and *intended or calculated to create a state of terror* in the minds of particular persons or a group of persons or the general public.

32. References to 'the public' or 'population' are typically qualified by reference to 'sections of the public'.²⁹ More recently, attempts at definitions at the international level have included explicit reference to acts which seek to 'compel a Government *or an international organisation* to do or to abstain from doing any act'.³⁰ Interestingly, both the 2002 EU Council Framework Decision on combating terrorism³¹ and New Zealand's Terrorism Suppression Act 2002³² restrict this to acts committed with the aim of '*unduly compelling*' such outcomes.

For a political, ideological or religious purpose

33. Again, this purposive element is standard among definitions of terrorism in most common law jurisdictions but absent from most international definitions. It is meant to encompass political intimidation but exclude, presumably, intimidation of governments or the public for merely

²⁸ Article 1(2). Emphasis added. The Convention apparently failed to enter into force due to lack of sufficient ratification.

²⁹ See e.g. Hong Kong United Nations (Anti-Terrorism Measures) Ordinance 2002, section 2(3)(a): 'intended to compel the Government or to intimidate the public or a section of the public'.

³⁰ Emphasis added. See e.g. UN Security Council Resolution 1566 (2004). See also Article 2(1)(b)(iii) of the International Convention on Combating Acts of Nuclear Terrorism 2005: 'With the intent to compel a natural or legal person, an international organization or a State to do or refrain from doing an act'.

³¹ 13 June 2002 (2002/475/JHA), Article 1. Emphasis added.

³² Section 5(2)(b).

criminal purposes, e.g. serious organised crime. The broadest purposive element is that found in the UN General Assembly Resolution 51/210.³³

criminal acts intended or calculated to provoke a state of terror in the general public, a group of persons or particular persons for political purposes are in any circumstance unjustifiable, *whatever the considerations of a political, philosophical, ideological, racial, ethnic, religious or other nature that may be invoked to justify them.*

Damage to property and other kinds of harm

34. The inclusion of property damage as a potential terrorist act is not uncommon as a feature of both common law jurisdictions and international definitions, but is almost always qualified by the requirement to demonstrate some sufficient nexus with public safety. For example, the Canadian definition includes any act or omission which:³⁴

- (c) causes a serious risk to the health or safety of the public or any segment of the public;
- (d) causes substantial property damage, whether to public or private property, if causing such damage is likely to result in the conduct or harm referred to in any of clauses (a) [death or serious bodily harm] to (c); or
- (e) causes serious interference with or serious disruption of an essential service, facility or system, whether public or private

35. The 1997 International Convention for the Suppression of Terrorist Bombings³⁵ provides, among other things, that a terrorist offence is committed where an explosive is detonated 'into or against a place of public use, a State or government facility, a public transportation system or an infrastructure facility' with the intent to:³⁶

cause extensive destruction of such a place, facility or system, where such destruction results in or is likely to result in *major economic loss*.

36. Article 1(3) of the African Convention on the Prevention and Combating of Terrorism includes reference to terrorist acts which:

³³ 17 December 1996, based on para 3 of the General Assembly's 1995 Declaration on Measures to Eliminate International Terrorism (A/RES/49/60). Emphasis added.

³⁴ Section 83.01(1)(b)(i).

³⁵ Adopted by the UN General Assembly, 15 December 1997.

³⁶ Article 2(1)(b). Emphasis added. Reference to property damage causing economic loss is also found in article 2 of the Draft Comprehensive Convention on International Terrorism Annex I A/57/37 (Report of the Ad hoc Committee established by General Assembly Resolution 51/210 1996).

cause damage to public or private property, natural resources, environmental or cultural heritage ...

37. A terrorist act under the Suppression of Terrorism Act 2002 (New Zealand) includes the:³⁷

introduction or release of a disease-bearing organism, if likely to devastate the national economy of a country ...

38. Article 2(1)(a)(i) of the 2005 International Convention on Combating Acts of Nuclear Terrorism,³⁸ includes among its definition of terrorist offences possession of radioactive material or use of a radioactive device 'with the intent to cause substantial damage to property or to the environment'.

Targeting of civilians

39. References to the targeting of civilians are prominent in some international definitions but absent from most domestic ones. For example, the 1999 International Convention for the Suppression of the Financing of Terrorism includes reference to:³⁹

Any other act intended to cause death or serious bodily injury to a civilian, or to any other person not taking an active part in the hostilities in a situation of armed conflict.

40. Paragraph 3 of UN Security Council Resolution 1566 (2004) similarly defines terrorism as:⁴⁰

any action ... that is intended to cause death or serious bodily harm to civilians or non-combatants...

41. References to 'civilian populations' appear in the domestic law definitions of the US⁴¹ and New Zealand,⁴² but are absent from those of Australia, Canada, Hong Kong and India.

³⁷ Section 5(3)(e).

³⁸ New York, 13 April 2005.

³⁹ New York 9 December 1999. Article 2(1)(b).

⁴⁰ Para 3.

⁴¹ See n23 above.

⁴² See n31 above.

Limitations and exceptions

42. Article 2 of the 1998 Arab Convention for the Suppression of Terrorism provides that:⁴³

All cases of struggle by whatever means, including armed struggle, against foreign occupation and aggression for liberation and self-determination, in accordance with the principles of international law, shall not be regarded as an offence. This provision shall not apply to any act prejudicing the territorial integrity of any Arab State.

43. The Canadian Anti-Terrorism Act 2001 provides an exception to acts causing 'serious interference with or serious disruption of an essential service, facility or system' where it is:⁴⁴

a result of advocacy, protest, dissent or stoppage of work that is not intended to result in the conduct or harm referred to in any of clauses (a) to (c);

44. Similar exceptions are found in the statutory definitions of Australia, New Zealand and Hong Kong.⁴⁵ The New Zealand definition, moreover, also provides that an act is not a terrorist act:⁴⁶

if it occurs in a situation of armed conflict and is, at the time and in the place that it occurs, in accordance with rules of international law applicable to the conflict.

45. Lastly, Article 187A(8) of the Greek Penal Code provides that an act shall not constitute a terrorist act:⁴⁷

⁴³ Article 2(1) of the 1999 Convention of the Organisation of The Islamic Conference on Combating International Terrorism similarly provides: 'Peoples' struggle including armed struggle against foreign occupation, aggression, colonialism, and hegemony, aimed at liberation and self-determination in accordance with the principles of international law shall not be considered a terrorist crime'.

⁴⁴ A similar limitation was contained in the South African Anti-Terrorism Bill 2002. The Bill was nonetheless shelved following strong domestic opposition from trade unions and other civil society groups. The former characterisation of the ANC as a terrorist organisation by the Apartheid government also undoubtedly played an important part in popular resistance to the definition.

⁴⁵ Section 100.1(2A) of the Security Legislation Amendment (Terrorism) 2002 (Australia) exempts 'advocacy, protest, dissent or industrial action' where those actions are not intended to cause the specified harm. Section 5(5) of the Terrorism Suppression Act 2002 (NZ) stipulates that 'the fact that a person engages any protest, advocacy, or dissent, or engages in any strike, lockout, or other industrial action is not, by itself, a sufficient basis for inferring that the person' has an intention to commit a terrorist act. Section 2(b) of the United Nations (Anti-Terrorism Measures) Ordinance 2002 (HK) provides that threats of disruption or interference do 'not include the use or threat of action in the course of any advocacy, protest, dissent or industrial action'.

⁴⁶ Ibid, section 5(4).

⁴⁷ Article 187A(8), as originally provided by Legislative Decree 53/1974 and as amended by Article 40 of Law 3251/2004.

if it is manifested as an effort for the establishment of a democratic government or for the safeguarding or restoration thereof or as an activity in favour or freedom within the meaning of article 5 paragraph 2 of the constitution or if it aims at exercising a fundamental individual, political or trade union freedom or another right laid down in the Constitution or in the European Convention on Protection of Human Rights and Fundamental Liberties.

The existing definition of terrorism in UK law

46. The current definition of terrorism in section 1 of the Terrorism Act 2000 informs virtually all criminal offences in which 'terrorism' is an ingredient. It also acts as a trigger to the exercise of a broad array of counter-terrorism powers contained not only in the 2000 Act itself, the Anti-Terrorism Crime and Security Act 2001, the Prevention of Terrorism Act 2005, and the Terrorism Bill currently before Parliament.⁴⁸ The definition has also been incorporated by reference into several other Acts of Parliament, see e.g. the Civil Contingencies Act 2004. As the amount of counter-terrorism legislation introducing new powers and offences grows, so too does the potential scope for the current definition of terrorism to interfere with the exercise of fundamental rights.

The broadening definition of terrorism

47. In his 1996 review of counter-terrorism legislation, Lord Lloyd recommended the adoption of the FBI definition of terrorism:⁴⁹

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

48. At the time the Terrorism Act 2000 was being passed, it was noted that the definition was in several respects broader than that recommended by Lord Lloyd, broader than the previous

⁴⁸ As Lord Cope of Berkeley noted during the parliamentary debates on the 2000 Act: 'the Bill does not create an offence of terrorism in itself, but the definition is the key that allows the police, the courts, the Government, and so on, to use the special anti-terrorist measures provided by the legislation, some of which contain reference to offences which were thought necessary to their proper operation. Therefore, from the point of view of offences, but also in a much wider sense, the definition is vital to the success of the Bill' (Hansard, HL Debates, 16 May 2000, col 214).

⁴⁹ Lloyd, *Inquiry into Legislation Against Terrorism*, n20 above.

definition in the Prevention of Terrorism (Temporary Provisions) Act 1989,⁵⁰ and broader even than that suggested by the government's own consultation paper which had preceded the Bill's introduction in Parliament.⁵¹ In particular:

- the formulation 'to intimidate or coerce a government, public, or any section of the public' was altered to 'to *influence* the government or to intimidate the public or a section of the public' (section 1(1)(b)), 'influence' being an obviously wider term than 'intimidate';
- the language of 'serious *violence* against ... property' became 'serious *damage* to property' (section 1(2)(b));
- terrorism includes an action which 'creates a *serious risk to the health or safety* of the public or a section of the public' (section 1(2)(d));⁵²
- terrorism includes any act which is 'designed seriously to interfere with or seriously to disrupt an electronic system' (section 1(2)(e)); and
- the use or threat of any action within subsection 2 'which involves the use of firearms or explosives' is by definition terrorism, even if there was no intention to influence the government or intimidate the public (section 1(3)).

The relatively low threshold for damage to property

49. In our briefings on the 2000 Terrorism Bill,⁵³ we expressed concern that the definition in clause 1 was 'so broad as to lack certainty'. Given, for instance, the scope for such counter-terrorism measures as proscription and stop and search to interfere with rights of free association and liberty respectively, we predicted that 'the wide definition of terrorism, coupled with its broad powers, may create human rights problems in practice' and that 'there is a danger that [the definition] does not strike the right balance between the needs of security and the rights and liberties of the individual'.⁵⁴ In particular, we argued that the equivalence between serious

⁵⁰ Section 20 of the 1989 Act defined terrorism as 'the use of violence for political ends, and includes any use of violence for the purpose of putting the public or any section of the public in fear'. We fully accept, however, that the exclusion of domestic (i.e. non-Irish and non-international) terrorism from the 1989 definition was unsustainable for the reasons set out by Lord Lloyd.

⁵¹ The government consultation paper, *Legislation Against Terrorism* (Cmd 4178, December 1998), para 3.15 favoured specifying that 'serious violence' would need to be defined so that it included 'serious disruption, for instance resulting from attacks on computer installations or public utilities'.

⁵² The other change in section 1(2)(d) was arguably implicit in the previous definition of the threat or use of serious violence.

⁵³ See e.g. n19 above.

⁵⁴ *Ibid*, para 2.16.

violence against persons and serious damage to property set the threshold for terrorism too low.⁵⁵

The definition has ... removed the distinction usually made in the criminal law between acts which injure people and actions which damage property. The rationale behind such a distinction is the deterrence of acts which threaten life. Thus crimes that injure or endanger life normally carry higher penalties than those that damage property. No such distinction is made in the definition of terrorism adopted by the present Bill. Therefore, there is a risk that there will be no incentive, under the scheme of the Bill, for a terrorist to choose targets which do not endanger other people.

Serious interference with or disruption to an electronic system

50. Similarly we note that, under the current definition, terrorism includes acts 'designed seriously to interfere with or seriously to disrupt an electronic system' (section 1(2)(e) even where such disruption poses no serious risk to any individual person, public safety in general, or major damage to property, e.g. a computer virus that caused significant disruption to email traffic. The absence of any requirement in section 1(2)(e) to show a sufficient nexus between disruption of an electronic system, on the one hand, and an actual risk or threat of serious harm to others seems to us plainly disproportionate. In our view, the interests of counter-terrorism are not served by criminalizing the actions of computer hackers and the like unless it can be shown that their actions involved the threat or risk of serious harm to others.

51. This failure to define terrorism in terms of the threat or use of serious violence recalls the criticisms of the definition of 'emergency' in the Draft Civil Contingencies Bill made by the Joint Committee on the Draft Bill. Noting that 'an exceptionally wide range of events or situations may give rise to a threat within the meaning of the draft Bill',⁵⁶ the Committee criticised the definition as 'drawn too widely'.⁵⁷ It said:⁵⁸

We consider that the core of an emergency, particularly one meriting substantial emergency powers, is the threat to human welfare. We cannot envisage justifying the use of potentially draconian emergency powers if there was no demonstrable threat to human welfare.

⁵⁵ Ibid, para 2.4.

⁵⁶ Report of the Joint Committee on the Draft Civil Contingencies Bill (HL 184; HC 1074, 28 November 2003), para 8.

⁵⁷ Ibid.

⁵⁸ Ibid, para 47.

Accordingly, the committee recommended that ‘the definition of an emergency is re-drafted to reflect that an emergency is a situation which presents a threat to human welfare’.⁵⁹ We consider that the same considerations should apply to the definition of terrorism. As the government itself recognised in its 1998 consultation on counter-terrorism legislation, it is important not to have a definition of terrorism that is too wide, ‘which might be taken to include matters that would not normally be labelled ‘terrorist’.⁶⁰

Violence that can be described as ‘politically motivated’ may arise in the context of demonstrations and industrial disputes. The Government has no intention of suggesting that matters that can properly be dealt with under normal public order powers should in future be dealt with under counter-terrorist legislation.

Use of firearms or explosives

52. We have already noted the provision in section 1(3) that the use or threat of any action within subsection 2 ‘which involves the use of firearms or explosives’ is by definition terrorism, even if there was no intention to influence the government or intimidate the public. Although we agree that the use of firearms or explosives causing serious violence or property damage for some political or ideological cause is a serious crime, we have difficulty apprehending why such actions are always *terrorist* in character as a matter of logical necessity.

53. In the case of damage to property, for example, it would be possible to conceive of activities involving the use of explosives that would nonetheless fall short of terrorism as commonly understood, e.g. crop protestors destroying a warehouse containing GM seeds in circumstances which made clear that their intention was only to destroy the seeds themselves but not to risk any other kind of harm to those involved in GM crops (e.g. evidence of stringent precautions taken to avoid harm to others). While such activities are undoubtedly criminal, it seems doubtful that those involved should *automatically* fall within the scope of counter-terrorism legislation by the operation of section 1(3). Instead, we would favour either a rebuttable evidential presumption that actions within the scope of subsection 2 are terrorist, unless shown otherwise. An alternative means of addressing this issue would be to make clearer the difference in threshold between the threat or use of violence against persons and that against property. In our view, a presumption of terrorist intent would only be sustainable where firearms or explosives are used against individuals, not property.

⁵⁹ Ibid, para 48. C.f. sections 1(1)(a) and 19(1)(a) of the Civil Contingencies Act 2004, defining ‘emergency’ as, in the first instance, ‘an event or situation which threatens serious damage to human welfare’.

⁶⁰ See n50 above, para 3.18.

Extraterritorial scope of counter-terrorism legislation

54. Perhaps the greatest scope for serious interference with fundamental rights is the increasingly extra-territorial extent of UK counter-terrorism legislation. For instance, clause 1 of the Terrorism Bill currently before Parliament provides that it is an offence to publish or cause to be published any statement which is 'likely to be understood by some or all of the *members of the public* to whom it is published'⁶¹ as an encouragement to terrorism, whether intentionally or recklessly. Clause 20(3)(a) provides that references to the public in Part 1 of the Bill are:

references to the public of any part of the United Kingdom *or of a country or territory outside the United Kingdom*, or any section of the public;

55. Moreover, clause 17 of the Bill provides that the offences of encouragement of terrorism (clause 1), training for terrorism (clause 6), and attendance at a place used for terrorist training (clause 8), among others, shall have full extra-territorial effect.

56. We have no objection in principle to giving extra-territorial effect to terrorist offences where persons abroad are planning to commit offences in the UK or against UK nationals abroad. Similarly, we see no difficulty with criminalizing the activities of UK nationals who use violence against civilians or democratic governments in other countries. Indeed, if it is possible to have universal jurisdiction for offences such as piracy or torture, we can see strong arguments for making terrorist crimes punishable on a similar basis.

57. Our main objection, therefore, is linked to the profound difficulties associated with applying the current definition of terrorism on an extra-territorial basis. Unlike piracy, there is a lack of clear consensus at the international level as to whether violence against nondemocratic or repressive governments (as opposed to civilians) constitutes terrorism *per se*. Although attacks against innocent civilians for a political purpose are obviously and undeniably terroristic in nature, there is much less agreement as to whether attacks by non-state actors against totalitarian or authoritarian regimes, for example, can be described as such.

58. The broad definition of terrorism in section 1 of the Terrorism Act 2000 draws no distinction between the use of violence against such liberal democratic states as the UK or the US, for instance, or that against such totalitarian regimes as North Korea or Saddam Hussain's Iraq. For example, under the terms of the draft offence of encouragement to terrorism, it would be lawful to publish statements encouraging governments to employ repressive methods against their citizenry, e.g. Tiananmen Square, but unlawful to publish statements commending the example of the American Revolution to those living in nondemocratic countries.

⁶¹ Clause 1(1).

59. Indeed, the combined scope of clauses 1 and 17 would criminalise not only the publication of such statements in the UK, but their publication anywhere in the world. Similarly, the extraterritorial scope of clauses 6 and 8 would prohibit foreign nationals training abroad to attack government troops of a repressive regime in a foreign country. We do not think it is sensible to extend the scope of our counter-terrorism legislation in this way. Accordingly, if it is necessary to give extra-territorial effect to terrorist offences in UK law, we urge that the definition of terrorism be qualified in such a way as to avoid criminalizing the legitimate use of force against nondemocratic or repressive governments, as well as the legitimate debate, discussion and exchange of information and ideas concerning such acts.

60. To do otherwise would, in our view, pose a severe interference with the right to free expression in the UK and fatally undermine the cause of democracy and fundamental rights abroad.⁶² As UN Security Council Resolution 1456 declared:⁶³

States must ensure that any measure taken to combat terrorism comply with all their obligations under international law, and should adopt such measures in accordance with international law, in particular international human rights, refugee, and humanitarian law;

61. Similarly, the International Commission of Jurists' 2004 Berlin Declaration on Upholding Human Rights and the Rule of Law in Combating Terrorism states, among other things, that:⁶⁴

In the implementation of counter-terrorism measures, states must respect and safeguard fundamental rights and freedoms, including freedom of expression, religion, conscience or belief, association, and assembly ...

62. This concern that counter-terrorism measures should not be implemented in a way that interferes with fundamental rights is also increasingly recognised in international counter-

⁶² See e.g. the conclusion of the Joint Committee on Human Rights, *Counter-Terrorism Policy and Human Rights: Terrorism Bill and related matters* (HL 75; HC 561), 5 December 2005, para 13: 'we believe that the definition of terrorism—for the purposes of the [clauses 1, 2 and 8 of the Terrorism Bill]—needs to be changed in order to avoid a high risk of such provisions being found to be incompatible with Article 10 of ECHR and related Articles'. See also the observation of the UN High Commissioner for Human Rights, Ms Louise Arbour, concerning the scope of the offence of encouragement to terrorism in her letter to the UK's Permanent Representative to the UN Office and other international organisations in Geneva, 28 November 2005: 'The draft offence contained in clause 1 fails to strike a balance between national security considerations and the fundamental right of freedom of expression'.

⁶³ UNSCR 1456 (2003), para 6.

⁶⁴ Article 8.

terrorism instruments themselves. For example, Article 12 of the 2005 Council of Europe Convention on the Prevention of Terrorism states:

(1) Each Party shall ensure that the establishment, implementation and application of the criminalisation under Articles 5 to 7 and 9 of this Convention are carried out while respecting human rights obligations, in particular the right to freedom of expression, freedom of association and freedom of religion, as set forth in, where applicable to that Party, the Convention for the Protection of Human Rights and Fundamental Freedoms, the International Covenant on Civil and Political Rights, and other obligations under international law.

(2) The establishment, implementation and application of the criminalisation under Articles 5 to 7 and 9 of this Convention should furthermore be subject to the principle of proportionality, with respect to the legitimate aims pursued and to their necessity in a democratic society, and should exclude any form of arbitrariness or discriminatory or racist treatment.

A proposed draft definition of terrorism in UK law

63. In conclusion, we recommend that – in the event that a legal definition of terrorism is thought necessary or desirable – the definition in section 1 of the Terrorism Act 2000 should be amended as follows:

- the quality of intention needed for an act of terrorism against the government under section 1(1)(b) should be more narrowly defined, i.e. ‘compel’, ‘coerce’ or ‘intimidate’ instead of ‘influence’. This would more accurately reflect the essence of terrorism as a form of intimidation and would also bring the UK definition into line with those of other common law jurisdictions;
- a clearer distinction should be drawn in section 1(2) between actions involving violence against persons and those which negatively effect other interests, e.g. damage to property, disruption of an electronic system, etc. In our view, actions which do not involve direct threats to physical integrity should not be considered terrorist acts unless they involve some major threat to human welfare. This is because many kinds of political activity may otherwise fall within the definition of terrorism as currently defined, e.g. protests involving criminal damage, strikes or demonstrations which involve disruption to services, etc. A specific exemption for ‘advocacy, protest, dissent or industrial action’ should be considered as per the definition of terrorism in Australian, Canadian, New Zealand and Hong Kong law.

- in particular, serious interference or disruption to an electronic system within section 1(2)(e) should only be considered a terrorist act where that disruption endangers human life or creates a serious risk to public health or safety;
- actions involving the use of firearms or explosives as set out in section 1(3) should not automatically constitute terrorist acts. Instead, there should either be a rebuttable presumption that such acts are terrorist or, alternatively, section 1(3) should only apply to actions involving violence against persons;
- where the definition of terrorism in UK law is given extraterritorial effect, either the operation of the provision in question or the definition itself should be qualified in such a way as to avoid criminalizing the legitimate use of force against nondemocratic governments as discussed in paras 12-17 above.

64. In Appendix A, we set out our proposed alternative to section 1 of the Terrorism Act which incorporates our recommendations above. Our aim has been to provide a definition that is both effective and proportionate, while retaining the structure of the existing definition in section 1. Having regard to the inherent difficulties of defining such a contested concept, we doubt that any definition could be described as ideal. Nonetheless, we consider that the alternative we have suggested offers a useful starting point for identifying the relevant issues at stake.

ERIC METCALFE
Director of Human Rights Policy
JUSTICE
3 March 2005

Appendix A: JUSTICE's proposed definition of terrorism

- (1) In this Act, 'terrorism' means the use or threat of action where –
 - (a) the action falls within subsections (2) or (3),
 - (b) the use or threat is designed to –
 - (i) coerce or compel the government or an international governmental organisation to do or refrain from doing any act, or
 - (ii) intimidate the public or any section of the public, and
 - (c) the use or threat is made with the purpose of advancing a political, religious or ideological cause.
- (2) Action falls within this subsection if it involves serious violence against a person.
- (3) Action falls within this subsection if it –
 - (a) involves serious damage to property,
 - (b) involves serious damage to the environment, or
 - (c) is designed seriously to interfere with or seriously to disrupt an electronic system or system of communication,

and the damage, interference or disruption is of a kind likely to endanger human life or pose a serious risk to the health or safety of the public, or a section of the public.
- (4) Subject to subsections (5) and (6) below, the use or threat of action falling within subsection (2) which involves the use of firearms or explosives is terrorism whether or not subsection (1)(b) is satisfied.
- (5) Subsection (6) applies if an action falls within subsections (2) or (3) and –
 - (a) takes place outside the United Kingdom,

- (b) is committed for a purpose wholly or partly connected with the affairs of a country other than the United Kingdom,
 - (c) does not involve harm or the threat of harm to a national of the United Kingdom, and
 - (d) is not designed to intimidate the public or any section of the public.
- (6) The use or threat of an action to which this subsection applies shall not be considered terrorism where it is undertaken solely for the purpose of establishing or restoring democratic government.
- (7) In this section –
- (a) ‘action’ includes action outside the United Kingdom,
 - (b) a reference to any person or to property is a reference to any person, or to property, wherever situated,
 - (c) a reference to the public includes a reference to the public of a country other than the United Kingdom, and
 - (d) ‘the government’ means the government of the United Kingdom or of a country other than the United Kingdom.

Explanatory notes

1. In place of the reference to the use or threat of action designed to ‘influence the government’ in section 1(1)(b), the draft subclause (1)(b)(i) adopts the formulation ‘coerce or compel the government ... to do or refrain from doing any act’ that is standard in most recent domestic and international definitions. Draft clause (1)(b)(i) also includes reference to actions directed against international governmental organisations, as is currently provided by the 1999 New York Convention for the Suppression of the Financing of Terrorism, the 2002 EU Framework Decision on Combating Terrorism, the recital to the 2005 Council of Europe Convention on the Prevention of Terrorism, and clause 34 of the Terrorism Bill.
2. Subclauses (2) and (3) replace the existing structure of section 1(2), separating out actions involving violence against persons from those which pose indirect threats to human welfare and public safety. The structure of subclause (3) in particular provides that actions that do *not* involve violence against persons only fall within the definition where they are of a ‘kind likely to endanger human life or pose a serious risk to the health or safety of the public, or a section of the public’. This is because actions beneath this threshold do not appear to us to reach the appropriate

degree of intensity to count as terrorist acts. We consider this form of drafting is marginally preferable to the alternative approach taken in Australia, Canada, Hong Kong and New Zealand, which is to provide a specific exception for serious damage and disruption caused by 'advocacy, protest, dissent or industrial action'.

3. At the same time, subclause (3) also broadens the existing grounds beyond disruption to electronic systems, to include serious damage to the environment and serious disruption to systems of communication as well.
4. Subclause (4) retains the existing absolute rule in section 1(3) that actions involving the use of firearms or explosives are automatically terrorist acts. However, due to the altered structure of subclauses (2) and (3), this is strictly limited to only those actions involving serious violence against persons and not damage to property, etc.
5. Subclauses (5) and (6) offers one attempt at excluding extraterritorial jurisdiction for actions involving the legitimate use of force against nondemocratic governments as discussed in paras 12-17 above. The key conditions to be met are that the action in question:
 - does not involve intimidation of the public anywhere in the world, (i.e. does not involve attacks against civilians);
 - does not take place in the UK;
 - does not relate to the UK's affairs;
 - does not involve threat or harm to a UK national (including UK soldiers); and
 - is undertaken solely for the purpose of establishing or restoring democratic government.

In our view, any attack on a civilian population anywhere in the world for a political purpose is necessarily intimidation and thus terrorism. Based upon the language of Article 187A(8) of the Greek Penal Code, the exception outlined above would only cover those actions occurring outside the UK directed against the purely military targets of nondemocratic governments. Attacks against democratic governments would fall outwith the exception. We recognise, however, that such an exception presents severe difficulties, not least the challenge for the UK's foreign relations with nondemocratic governments. For this reason, we offer subclauses (5) and (6) as only a tentative solution. However, we remain of the view that the legitimate exercise of fundamental rights must in the final analysis trump the interests of diplomatic harmony.