

Preventive Terrorism Offences

*The extension of the ambit of inchoate liability in criminal law as a
response to the threat of terrorism*

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Abstract

The aim of this thesis is to assess the justifications for various extensions of the criminal law introduced to combat terrorism, in particular those extensions that go beyond the existing remit of inchoate offences and extend liability to earlier acts and intentions. Its method is to begin by exploring the principles of criminal law theory that ought to apply to such extensions; to interrogate the definition of terrorism; and then to examine four recent classes of offence in counter-terrorism legislation that extend the criminal law beyond its legitimate boundaries. These offences are collectively referred to in this thesis as 'preventive terrorism offences' to reflect the fact that the primary rationale for their enactment is to prevent terrorism. The thesis concludes by assessing the place of these offences within the government's overall counter-terrorism strategy, focusing in particular on the *Prevent* leg of the strategy, which aims to reduce extremism and tackle the root causes of terrorism.

The preventive terrorism offences display several very troubling features, most notably that they have the potential to criminalise non-wrongful conduct. It is argued that by virtue of their ability to criminalise non-wrongful conduct the offences under examination diminish the legitimacy and moral force of the criminal law. Furthermore, by extending inchoate liability to very remote acts of preparation, possession, encouragement, and association, the criminal law occupies the same operational space as measures under the *Prevent* strategy that are intended to be reintegrative. This overlap has the potential to render the offences counterproductive to the larger counter-terrorism endeavour by creating the perception that the *Prevent* strategy is in fact a covert surveillance mechanism to gather intelligence for future prosecutions. This perception leads to further mistrust and alienation of individuals and communities who feel disproportionately targeted by these measures. Thus, the offences not only offend criminal law principles and values, but also have the potential to offend the very preventive justification that is given for their enactment.

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1. Prevention through prosecution

1.1 Overview

This thesis examines the extension of inchoate liability in criminal law as a response to the threat of terrorism. The thesis undertakes a critical analysis of offences that extend inchoate liability in counter-terrorism legislation enacted in the United Kingdom since 2000 in order to determine whether such offences are justifiable instances of criminalisation. This enquiry aims to determine whether these offences can properly be justified as being concerned with the punishment of culpable wrongdoing or whether they should be regarded as falling outside of this paradigmatic understanding of the criminal law. The thesis posits that these offences may be better understood as a means of enhancing the state's policing and investigative powers on the basis of prevention, as an adjunct to a broader counter-terrorism strategy, thus raising larger and more general questions as to the appropriate role and limits of the criminal law.

Counter-terrorism legislation pushes back the boundaries of inchoate liability by criminalising conduct that is remote, both temporally and causally, from the commission of the ultimate harm that it is designed to prevent. The general inchoate offences of attempt, conspiracy and

encouragement (formerly incitement)¹ have long been accepted as a part of the criminal law, whereby criminal responsibility can be attributed to one who attempted, assisted, encouraged or conspired to commit criminal activity even though the ultimate act or consequence that was intended was not achieved and no apparent harm was caused.² These general inchoate offences are regarded and prosecuted as crimes in themselves, independent of the ultimate crimes that are intended. However, over the last fifteen years a raft of new legislative measures aimed at countering the threat of terrorism have been introduced that extend the boundaries of inchoate liability.³ Broadly, these measures can be split into four groups: preparatory, encouragement, possession and associative offences.⁴ Section 5(1) of the Terrorism Act 2006 sets out that a person commits an offence if he or she engages in conduct in preparation for giving effect to an intention to commit acts of terrorism or assist another to commit such acts, the penalty for which is life imprisonment.⁵ The effect of this provision is to extend the scope of attempts liability to the early stages of preparation, contrary to long established principles of attempts liability. Sections 1 and 2 of the Terrorism Act 2006 create two new offences prohibiting direct or indirect encouragement of

¹ The general inchoate offence of incitement was abolished in English law by the Serious Crime Act and replaced by a number of 'encouraging or assisting offences'. Serious Crime Act 2007, ss 44, 45 and 46.

² Andrew Ashworth, *Principles of Criminal Law* (6th edn, Oxford University Press 2009), 437. See also A. P. Simester and others, *Simester and Sullivan's Criminal Law : Theory and Doctrine* (Fifth edition. edn, Hart Publishing 2013), ch 9.

³ This trend is not limited to counter-terrorism legislation. The tendency to create offences that are drafted in the inchoate mode is evident in many recently created statutory offences, for example offences under the Fraud Act 2006. See Ashworth, 437. However, it is particularly pronounced in the counter-terrorism legislation, both in terms of the range and number of offences and the extension of liability.

⁴ See Annexure 1 for a full list of all preventive terrorism offences grouped into these four categories.

⁵ Terrorism Act 2006, section 5(1).

terrorism, extending the inchoate offence of encouragement.⁶ Sections 6 and 8 of the same Act criminalise the giving or receiving of training in terrorist activities and being at a place where training is taking place.⁷ These considerable extensions of criminal liability contained in the Terrorism Act 2006 build upon the Terrorism Act 2000, which had already pushed back the boundaries of inchoate liability. The Terrorism Act 2000 includes broad offences of possession,⁸ omission,⁹ providing financial support to a terrorist organisation,¹⁰ and belonging to, supporting, or wearing the uniform of proscribed organisations.¹¹

While a significant driver behind the enactment of these new offences was the radically increased threat of a terrorist attack after the attack on the World Trade Centre in New York on 11 September 2001 and the 7 July 2005 bombings in London, and the perceived need to strengthen the ability of the security and police services to prevent acts of terrorism, these can not be seen to be the sole reason for the offences. It is important to note that the Terrorism Act 2000 predates 9/11 and cannot be said to be a product of this attack.¹² Furthermore, offences resembling some of these new offences can be seen in legislation, dating from the 1970s, that had been introduced to tackle

⁶ Ibid, sections 1 and 2.

⁷ Ibid, sections 6 and 8.

⁸ Terrorism Act 2000, sections 57 and 58.

⁹ Ibid, section 38B

¹⁰ Ibid, sections 15 and 16.

¹¹ Ibid, sections 11, 12 and 13.

¹² See sections 1.2 and 1.3 of this chapter for a discussion of the motivations for the enactment of the Terrorism Act 2000.

terrorism in Northern Ireland.¹³ However, the attacks in 2001 and 2005 certainly bolstered the case for enacting and expanding offences extending inchoate liability. The rationale for enacting such offences is that by targeting conduct that threatens or risks acts of terrorism, in advance of an actual terrorist attack, the likelihood of an attack occurring is significantly reduced. The offences anticipate the perpetration of harm and seek to criminalise any act that may lead to, or that risks, the commission of such harm. While this focus on the prevention of harm by the criminalisation of conduct that precedes such harmful conduct exists throughout the criminal law, it is particularly far-reaching in the counter-terrorism context. Due to centrality of the preventive rationale in the enactment of offences extending inchoate liability in counter-terrorism legislation, these offences are referred to as 'preventive terrorism offences' throughout this thesis.

Since 9/11, there has been significant academic, political, media and public attention focused on the criminal law's ability to prevent acts of terrorism. Controversy and debate has also centred on preventive measures that exist outside the ordinary criminal process, such as Terrorism Prevention and Investigation Measures (TPIMs) and control orders before them, indefinite detention, targeted killing, administrative or immigration regulation and detention. There has been considerable concern about the

¹³ See section 1.2 for a brief overview of the history of UK counter-terrorism legislation in Northern Ireland.

erosion of civil liberties in the pursuit of security.¹⁴ However, an area that has, until recently, received less critical attention is the use of the criminal law to enact new inchoate offences, subject to prosecution and all of the attendant procedural protections of due process and fair trial rights, as a means of preventing terrorism.¹⁵ It is often argued that prosecution is the preferred way of dealing with terrorists as it avoids the problems associated with other preventive measures that have been introduced – the so-called ‘priority of prosecution’ approach.¹⁶ The merits of prosecution are clear – defendants have the benefit of due process rights and guarantees,¹⁷ guilt must be proved beyond a reasonable doubt, punishment must (at least in principle) be proportionate to the offence. Where prosecutions are based on legitimately enacted laws that do not extend the reach of the law unjustifiably, they should

¹⁴ There is a significant body of commentary on the competing values of liberty and security, as well as criticism of the ‘balance’ metaphor that is often employed when discussing new criminal offences, particularly in the terrorism context. This idea of ‘balancing’ the right to security with the right to freedom and other civil liberties is not one that will be explored in this thesis. Suffice to say that this balancing metaphor is problematic and not accepted as a useful or accurate approach. On this, see Stuart Macdonald, ‘Why We Should Abandon the Balance Metaphor: A New Approach to Counterterrorism Policy’ (2008) 15 *ILSA Journal of International and Comparative Law* 95; Benjamin J Gould and Liora Lazarus (eds), *Security and Human Rights* (Hart Publishing 2007).

¹⁵ There has been growing critical academic attention on the so-called pre-cursor or preparatory terrorism offences in recent years. See Victor Tadros, ‘Justice and Terrorism’ (2007) 10 *New Criminal Law Review* 658, and J Hodgson and V Tadros, ‘How to Make a Terrorist Out of Nothing’ (2009) 72 *Modern Law Review* 984 for criticism of resort to criminalisation and prosecution, focussing particularly on the possession offences in sections 57 and 58 of the Terrorism Act 2000; Peter Ramsay, ‘Preparation Offences, Security Interests, Political Freedom’ in R A Duff and others (eds), *The structures of the criminal law* (Oxford University Press 2011); Stuart Macdonald, ‘Prosecuting Suspected Terrorists: Precursor Crimes, Intercept Evidence and the Priority of Security’ in Lee Jarvis and Michael Lister (eds), *Critical Perspectives on Counter-terrorism* (Routledge 2014); Stuart Macdonald, ‘Understanding Anti-Terrorism Policy: Values, Rationales and Principles’ (2012) 34 *Sydney Law Review* 317.

¹⁶ Joint Committee on Human Rights, *Counter-Terrorism Policy and Human Rights: Prosecution and Pre-Charge Detention, Twenty-fourth Report of Session 2005-06* (HL Paper 240, HC 1576, 1 August 2006, 2005-06), 14, para 28; Clive Walker, *Blackstone's Guide to the Anti-Terrorism Legislation* (2nd Edition edn, Oxford University Press 2009), 182 para 6.01. Clive Walker, ‘Prosecuting Terrorism: The Old Bailey versus Belmarsh’ [2009] *Amicus Curiae* 21. However, see Lucia Zedner, ‘Terrorizing Criminal Law’ (2014) 8 *Criminal Law and Philosophy* 99, where doubts are raised with regard to the preference for prosecution.

¹⁷ Provided these are not eroded or diminished in order to prosecute terrorist suspects such as in the partially secret trial of *R v Incedal and Rarmoul-Bouhadjar* (2014).

be considered preferable to executive or administrative procedures due to the procedural protections and requirements of proportionality. However, where the substance of the offence is so broad, or drafted in terms that are vague and unclear, or where it is designed to capture conduct that should not legitimately form part of the criminal law, these due process protections do not serve to legitimate the essentially unjustified nature of the offences. Furthermore, where these very protections and guarantees are themselves diluted, for example by reverse burdens of proof such as those in the possession offences in sections 57 and 58 of the Terrorism Act, the case in favour of prosecution becomes even harder to sustain.

This thesis undertakes a detailed analysis of the counter-terrorism offences extending inchoate liability in order to demonstrate why they have been enacted, how they are being used and, ultimately, whether they can be justified. It highlights the very troubling features of these offences and their distorting effect on the contours and limits of criminal law. In particular, these offences give very wide discretion to prosecutors, police and the courts as a result of overly broad drafting and allow for the possibility that such laws are used as a means of policing and investigating those suspected of engagement with terrorism or terrorism-related activity rather than to punish culpable wrongdoing. Ultimately, these issues result in the potential for such laws to be counter-productive and incompatible with a counter-terrorism strategy based on community building and the counter-insurgency model, such as that pursued by the *Prevent* strategy. The thesis argues that these

offences do not adhere to standard criminal law doctrine and cannot be justified according to a framework of principles based on respect for autonomy, liberty and fundamental human rights.¹⁸ This thesis challenges the use of such extensions to inchoate liability as a means of preventing terrorism and raises concerns about the implications of these offences for the legitimate scope of the criminal law in general.

1.2 UK Counter-Terrorism Legislation - Background and Context

Before proceeding with an analysis of the extension of inchoate liability in counter-terrorism legislation, it is useful to give a brief overview of the background to the current counter-terrorism legislation and provide a summary of the main statutes currently in force. Such an overview sets the context for the later enactment of the preventive terrorism offences and allows one to locate the offences within the broader counter-terrorism legislative structure.

The events of 9/11 changed the global landscape of counter-terrorism. This attack was followed by a marked increase in counter-terrorism activity by the United Nations Security Council, while many countries rushed to enact expansive counter-terrorism laws and powers.¹⁹ In contrast to countries such as Australia, who had little experience of terrorism and were enacting

¹⁸ See A Ashworth and Jeremy Horder, *Principles of Criminal Law* (7th edition edn, OUP 2013), chapter 1, for a discussion of the principle of individual autonomy in criminal law and its relationship to respect for human rights and the rule of law.

¹⁹ Kent Roach, *The 9/11 Effect: Comparative Counter-Terrorism* (Cambridge University Press, 2011), 77

counter-terrorism powers for the first time, the UK had a long history of counter-terrorism that long preceded 9/11. Terrorism related to the political situation in Northern Ireland is said to have resulted in over 3,300 deaths and 40,000 injuries over the thirty years of the 'Troubles'.²⁰ Consequently, a significant body of counter-terrorism legislation was already in existence. Many of the controversial measures that are found in current legislation have their origins in legislation that was enacted from the 1970s on as a response to the political violence in Northern Ireland.²¹

During the 19th and early 20th centuries, the prevailing view was that terrorist crimes should be prosecuted under the ordinary criminal law.²² The Explosive Substances Act 1883 was enacted as a response to Fenian and anarchist bombings, but formed part of the ordinary criminal law rather than a separate counter-terrorist regime. Murder, manslaughter, making threats to kill and other crimes under the Offences Against the Person Act 1861 were also frequently used in the prosecution of terrorist crimes.²³ The use of the ordinary criminal law to prosecute terrorist offenders continues today, and the Explosive Substances Act, the Offences Against the Person Act and the

²⁰ Ibid, 244; Laura K. Donohue, *Counter-terrorist law and emergency powers in the United Kingdom, 1922-2000* (Irish Academic Press 2001), 263; Walker, *Blackstone's Guide to the Anti-Terrorism Legislation*, 276.

²¹ For example, proscription, speech and reporting offences, administrative detention or internment, and the use of immigration law for counter-terrorism purposes were all already in existence prior to 9/11 in the context of the UK's efforts to target Irish terrorism. Roach *ibid*, 241.

²² Ben Brandon, 'Terrorism, human rights and the rule of law: 120 years of the UK's legal response to terrorism' [2004] *Criminal Law Review* 981, 982; Alun Jones, Rupert Bowers and Hugo D Lodge, *Blackstone's Guide to the Terrorism Act 2006* (OUP 2006), 1;

²³ Brandon, 982; Jones, Bowers and Lodge, 2.

common law offences of incitement to murder²⁴ and conspiracy contrary to section 1 of the Criminal Justice Act 1977 have frequently been applied in cases of terrorist violence.

After the partition of Ireland in 1922, specific legislation was introduced to cover acts of terrorism in Northern Ireland. The Civil Authorities (Special Powers) Act (Northern Ireland) 1922 ('SPA') and its associated Regulations contained many powers that look familiar today. The Regulations provided for extraordinary powers of stop, search, arrest and detention, as well as the power to ban unlawful associations and the public display of the Irish tricolour.²⁵ These latter offences were precursors to the current membership, support and uniform offences under the proscription regime found in the Terrorism Act 2000,²⁶ and extraordinary powers of stop, search, arrest and detention have been a common feature of the contemporary counter-terrorism regime. While the SPA was initially introduced as a temporary piece of emergency legislation, it was renewed every year until 1933 when it was made permanent.²⁷

The SPA's most controversial power was the detention without trial, or 'internment', of those who were 'suspected of acting in a manner prejudicial to the preservation of peace or the maintenance of order'.²⁸ Between 1971 and

²⁴ Note that the common law offence of incitement has been replaced by the encouragement and assistance offences in the Serious Crime Act 2007, sections 44-46.

²⁵ Civil Authorities (Special Powers) Act (Northern Ireland) 1922. Brandon, 982-3.

²⁶ See chapter 7 for an analysis of the offences of association under the proscription regime.

²⁷ Brandon, 983.

²⁸ Roach, 245.

1972, almost 2,500 people were interned in Northern Ireland, often on the basis of secret evidence. In response to criticism of these administrative measures, there was an attempt to improve the procedure by requiring that the detainee be 'suspected of terrorism'²⁹ rather than simply being a threat to peace and order. However, detention still frequently occurred on the basis of secret and hearsay evidence.³⁰ Lord Diplock, the Chair of the Commission set up in 1972 to consider the legal measures against terrorism in Northern Ireland, recognised that even the improved administrative detention procedures could result in injustice and were not as safe as 'a public trial in a court of law'.³¹ The Commission thus recommended the creation of the so-called 'Diplock courts'. These courts dispensed with a jury and were adjudicated by a single judge, but they did not allow for the use of secret evidence or anonymous witnesses. The practice of internment was phased out in Northern Ireland by 1975. The creation of the Diplock courts signalled a preference for a criminal justice approach to counter-terrorism whereby prosecution was seen as more appropriate and just than administrative measures, foreshadowing the priority of prosecution argument in evidence in counter-terrorism policy today.

Internment was never introduced in mainland Britain, nor were any special or emergency powers or regulations enacted until the mid-1970s, when terrorist violence spread to the mainland. In 1974, there was a spate of

²⁹ Northern Ireland (Emergency Provisions) Act 1973, s11.

³⁰ Roach, 245

³¹ Lord Diplock, *Report of the Commission to Consider Legal Procedures to Deal with Terrorist Activities in Northern Ireland* (Cmnd 5185, 1972), para 33

bombings in pubs in Birmingham perpetrated by the Provisional Irish Republican Army. The Birmingham pub bombings, which killed 21 and injured 182, are regarded as the most serious terrorist acts during the conflict in Northern Ireland and constitute the deadliest terrorist attack to be committed in Britain after World War II until the London bombings in July 2005.³² As a response to this attack, the government enacted the Prevention of Terrorism (Temporary Provisions) Act 1974 (PTA). The PTA was envisaged as emergency legislation and contained a sunset clause whereby the legislation was subject to renewal every six months. However, this Act essentially became a permanent fixture as a result of constant renewal and re-enactment. The PTA was renewed until 1976, when it was re-enacted subject to certain amendments. The 1976 Act was renewed annually until it was re-enacted in 1984 and again in 1989. Many of the far-reaching and controversial powers and offences in current counter-terrorism legislation have their origins in the PTA. The possession offences introduced in sections 57 and 58 of the Terrorism Act 2000, the membership and association offences under the proscription regime in the Terrorism Act 2000 (sections 11, 12, 13), and even the speech offences in section 1 of the Terrorism Act 2006 were all in evidence in the PTA. This is not surprising given that the Terrorism Act 2000 was explicitly consolidating legislation, intended to make permanent by re-enacting or updating all the various legislation passed over the period of the Troubles.

³² Six Irish men, known as the Birmingham Six, were arrested and sentenced to life imprisonment for this attack. They consistently maintained their innocence and in 1991 their convictions were quashed for being unsafe. In 1991, the Royal Commission on Criminal Justice was established as a response to miscarriages of justice such as these.

In 1995, the government appointed Lord Lloyd of Berwick to conduct a review of the UK's counter-terrorism law in order to determine whether or not continued counter-terrorism legislation was necessary and, if so, whether the existing regime was adequate. The need for this inquiry stemmed from the possibility of a ceasefire in Northern Ireland. In the event of a ceasefire, were specific counter-terrorism laws still necessary, taking into account the threat of other forms of terrorism emanating from sources other than Northern Ireland, not least the rise of Al Qaeda in the 1990s, as well as the UK's international duties? Lord Lloyd, in his report to Parliament, recommended that there was a continuing need for specific counter terrorism legislation.³³ He concluded that while the threat from Irish terrorism could be expected to diminish, the threat of global terrorism was increasing. He argued for the consolidation of terrorism laws into one statute that would operate without the need for derogation from human rights or a declaration of emergency. He also proposed specific new offences, including offences related to terrorist financing and an offence of preparation for terrorism (which would be enacted a decade later, as discussed in chapter 4). The Government responded to Lord Lloyd's report in a Consultation Paper, stating that it agreed with his assessment of the continuing need for specific

³³ Lord Lloyd of Berwick, *Inquiry into Legislation Against Terrorism* ((Cm 3420), October 1996), October 1996.

counter-terrorism legislation. It thus proposed the enactment of a permanent, UK-wide Act governing counter-terrorism.³⁴

It was clear that the Government had reason to believe that the threat of terrorism was continuing and that the nature of the threat was changing.³⁵ It therefore intended the legislation to be sufficiently flexible so as to be applicable to this evolving threat. However, it was also specifically recognised that individual rights should not be compromised in pursuing this aim.³⁶

The Government's aim is to create legislation which is both effective and proportionate to the threat which the UK faces from all forms of terrorism – Irish, international and domestic – which is sufficiently flexible to respond to a changing threat, which ensures that individual rights are protected and which fulfils the UK's international commitments.

In the House of Commons debate on the second reading of the Bill, Lord Lloyd's review was approved:³⁷

The Government have accepted the central conclusion and recommendation of Lord Lloyd's inquiry that even when what we judged to be a lasting peace had been achieved, there would remain a requirement for specific counter-terrorism legislation.

³⁴ *Legislation Against Terrorism: A Consultation Paper* (Cm 4178, December 1998); House of Commons Library, *The Terrorism Bill Bill 10 of 1999-2000* (Research Paper 99/101, 13 December 1999), 8-9.

³⁵ *Legislation Against Terrorism: A Consultation Paper*, p vi para 8.

³⁶ *Ibid* p vi para 8.

³⁷ Hansard, *HC Debate vol 341* (14 December 1999), Col 154.

Again, it was stressed that the Government was determined to protect individual rights and freedoms and the rule of law:³⁸

... we will have handed the terrorists the victory that they seek if, in combating their threats and violence, we descend to their level and undermine the essential freedoms and rule of law that are the bedrock of our democracy.

Thus, although it was seen as necessary to enact permanent legislation aimed at preventing terrorism, there was also an express commitment to abide by the rule of law and human rights in combating terrorism. In this respect, it was specifically stated that the provisions of the Bill were compatible with Convention rights³⁹ and, further, that the Human Rights Act 1998 would provide a 'powerful control over the use of the powers that are set out in the Bill'.⁴⁰ However, as will become apparent in subsequent chapters of this thesis, it is questionable whether the government's commitment to rule of law principles and the protection of human rights has been borne out in respect of the preventive terrorism offences.

In 2000, following the report by Lord Lloyd, the UK government enacted the Terrorism Act. The Terrorism Act 2000 represented a significant change in the UK's counter-terrorism policy in that it was intended to be a

³⁸ Ibid, Col 152.

³⁹ Ibid, 162.

⁴⁰ Ibid, 160-1.

permanent and comprehensive statute applicable throughout the UK, which did not rely on derogation from human rights. Many, though not all, of the recommendations proposed by Lord Lloyd were incorporated in this Act.⁴¹ The Terrorism Act 2000 is in some ways a restatement of certain provisions contained in the PTAs, but also includes several new measures. One notable shift is the new definition of terrorism contained in section 1 of the Terrorism Act 2000. This definition departs significantly from the previous definition contained in the PTA 1989.⁴² The expansive definition in the Terrorism Act 2000, which is the subject of chapter 3, goes beyond not only the PTA definition but also earlier international attempts to formulate a definition.⁴³ This definition forms the foundation for all the offences and powers contained in the Terrorism Act 2000, and in subsequent terrorism legislation where provisions rely on the definition for their operation. Other notable features of the Terrorism Act 2000 are the provision for judicial review after the first 48 hours of detention, allowing for withdrawal from the derogation from the ECHR which had allowed for seven days of preventive detention without review,⁴⁴ powers to conduct stops and searches where a police officer reasonably suspects a person to be a terrorist⁴⁵ or, controversially, even in

⁴¹ The Terrorism Act 2000 dispensed with internment, exclusion orders and the offence of failing to provide authorities with information, but did not include the proposed offence of preparation for terrorism or the recommendations that Diplock courts be abolished and wiretap evidence be permitted as evidence in terrorism trials. Roach, 254.

⁴² Prevention of Terrorism Act 1989 s20(1).

⁴³ See for example the International Convention for the Suppression of the Financing of Terrorism, Dec 9 1999, 2178 UNTS 197, and the working definition of terrorism of the US Federal Bureau of Investigation quoted by Lord Lloyd of Berwick, *Inquiry into Legislation Against Terrorism*, p 25 para 5.22

⁴⁴ Terrorism Act 2000 Schedule 8.

⁴⁵ Terrorism Act 2000, section 43

cases where there is no reasonable suspicion in certain designated areas.⁴⁶ The Act also focuses on terrorism financing, an area that would become more prominent after the 9/11 attack,⁴⁷ and re-enacted the power of proscription and associated membership, support and uniform offences.⁴⁸ With regard to the extension of inchoate liability in the Terrorism Act 2000, this is seen in the broad offences of possession and dissemination of terrorist materials.⁴⁹

Although the Terrorism Act 2000 was envisaged as a permanent, comprehensive legislative counter-terrorist regime, this was not to be the case. The events of 9/11 created the impetus for the enactment of further legislation, and in 2001, less than three months after the attack, the legislature enacted the Anti-Terrorism, Crime and Security Act 2001 ('ATCSA'). The ATCSA introduced provisions aimed at ensuring the security of aviation and nuclear industries, stifling terrorist financing, targeting refugees who may be terrorists, and it reintroduced the offence of withholding information from the authorities that would be relevant to terrorist investigations. Controversially, the ATCSA derogated from the ECHR as permitted under Article 15 where there was a 'public emergency threatening the life of the nation', so as to allow for the indeterminate detention of non-citizens who were suspected of terrorist involvement but could not be deported due to the threat of torture. In the landmark case of *A v Secretary of State for the Home*

⁴⁶ Terrorism Act 2000, section 44, subsequently repealed by section 59 of the Protection of Freedoms Act 2012.

⁴⁷ Terrorism Act 2000, sections 16 and 17

⁴⁸ Terrorism Act 2000, sections 11, 12, 13

⁴⁹ Terrorism Act 2000, sections 57 and 58.

Department,⁵⁰ the derogation was found to be both disproportionate and discriminatory, due to its focus only on non-citizens. The provision under Part IV of ATCSA was thus repealed and replaced by the controversial control order regime, which was introduced in the Prevention of Terrorism Act 2005.⁵¹

The 7 July bombings in London represented a turning point for UK counter-terrorism policy and provided the drive for the introduction of expanded counter-terrorism powers, with Tony Blair declaring shortly after the event that ‘the rules of the game have changed’.⁵² As a result, the Terrorism Act 2006 was enacted, introducing many of the far-reaching preventive terrorism offences that are considered in this thesis. In the same year, the government introduced the Countering International Terrorism strategy (CONTEST).⁵³ The strategy sets out the measures for preventing extremism, pursuing terrorists, protecting areas vulnerable to terrorism and preparing to mitigate the effects of a terrorist attack. As will be discussed in chapter 8, the *Prevent* strand of CONTEST aimed at tackling the root causes of

⁵⁰ *A v Secretary of State for the Home Department* (2004) UKHL 56, known as the ‘Belmarsh’ case.

⁵¹ For a thorough explanation of the Control Order regime see D Anderson, *Control Orders in 2011: Final Report of the Independent Reviewer on the Prevention of Terrorism Act 2005* (March 2012). For a recent overview of the Control Order regime, see Andrew Ashworth and Lucia Zedner, *Preventive Justice* (OUP 2014), ch 8. For an analysis of the move to control orders, see Victor Tadros, ‘Controlling Risk’ in A Ashworth, L Zedner and P Tomlin (eds), *Prevention and the Limits of the Criminal Law* (OUP 2013). For further criticism of control orders see L Zedner, ‘Preventive Justice or Pre-Punishment? The Case of Control Orders’ (2007) 59 *Current Legal Problems* 174; David Feldman, ‘Deprivation of Liberty in Anti-Terrorism Law’ (2008) 67 *Cambridge Law Journal* 4; Stuart Macdonald, ‘ASBOs and Control Orders: Two Recurring Themes, Two Apparent Contradictions’ (2007) 60 *Parliamentary Affairs* 601; Clive Walker, ‘Keeping Control of Terrorists without Losing Control of Constitutionalism’ [2007] 59 *Stanford Law Review* 1395

⁵² Patrick Wintour, ‘Blair vows to root out extremism’ *The Guardian* (6 August 2005) <<http://www.theguardian.com/politics/2005/aug/06/terrorism.july7>> accessed 23 September 2015

⁵³ Home Office, *Countering International Terrorism* (Cmnd. 6888) (2006)

terrorism through so-called 'soft' measures based around community building and engaging in a 'battle of ideas' in order to prevent people being drawn into extremism.⁵⁴ However, as will be seen in chapter 8, there is significant overlap in the conduct targeted by the coercive measures under the Terrorism Acts 2000 and 2006 and the measures under the Prevent strategy.

The Terrorism Act 2006 was followed by the Counter Terrorism Act 2008, which expands the definition of terrorism to include acts of terrorism for a 'racial' purpose; authorises intelligence agencies to disclose information for the purposes of criminal proceedings; and requires those convicted of terrorism offences to notify the authorities of their whereabouts and travel. This was followed by the Terrorist Asset-Freezing Act 2010; the Terrorism Prevention and Investigation Measures Act 2011 (replacing control orders with Terrorism Prevention and Investigation Measures, known as TPIMs);⁵⁵ and the Protection of Freedoms Act 2012.

The most recent counter-terrorism statute to be enacted is the Counter-Terrorism and Security Act 2015 ('CTSA'), which received Royal Assent on 12 February 2015. During the course of 2014, there was an increase in global terrorist casualties, due predominantly to the actions of ISIL and Boko

⁵⁴ The term 'soft power' was coined in 1990 by Joseph Nye in Joseph Nye, *Bound to Lead: The Changing Nature of American Power* (Basic Books 1990). He developed his theory of 'soft power' in Joseph Nye, *Soft Power: The Means to Success in World Politics* (Public Affairs: New York 2004), later advocating for the use of both 'soft' and 'hard' power in what he termed 'smart' power as an effective means of leadership in Joseph Nye, *The Powers to Lead: Soft, Hard and Smart* (OUP 2008).

⁵⁵ For an overview of TPIMs see Anderson, *Control Orders in 2011*.

Haram.⁵⁶ In the UK, the threat level in respect of international terrorism was raised from 'substantial' to 'severe', indicating that 'an attack is highly likely'.⁵⁷ The CTSA was enacted in the wake of this increase in violence in order to target the threat of terrorism emanating from Syria and Iraq, by providing for the disruption of foreign fighters travelling to the region. The CTSA provides for the temporary seizure of travel documents of those who are suspected of travelling to engage in terrorist fighting, as well as temporary exclusion orders disrupting UK citizens suspected of engaging in terrorist action abroad from returning to the UK. In addition to these disruptive measures relating to foreign fighters, the CTSA has legislated part of the Prevent strategy by placing duties on various public bodies to prevent extremism. For example, section 26 of the CTSA places a duty on 'specified authorities' listed in Schedule 6 to the Act, in the exercise of their functions, to have 'due regard to the need to prevent people from being drawn into terrorism'.⁵⁸ Furthermore, the diversionary programme Channel, for people at risk of radicalisation, has now been placed on a statutory footing.⁵⁹ As will be discussed in chapter 8, the legislating of the *Prevent* strategy in this way has further blurred the distinction between so-called 'soft' measures aimed at tackling extremism and the coercive preventive terrorism offences.

⁵⁶ D Anderson, *The Terrorist Acts in 2014: Report of the Independent Reviewer on the Operation of the Terrorism Act 2000 and Part 1 of the Terrorism Act 2006* (September 2015), 8-12

⁵⁷ See the Security Service MI5 website for an explanation and history of the various threat levels, <https://www.mi5.gov.uk/home/the-threats/terrorism/threat-levels.html> (last accessed 24 September 2015)

⁵⁸ Counter-Terrorism and Security Act 2015, section 26.

⁵⁹ The Prevent strategy and Channel will be discussed in detail in chapter 8.

The trend of enacting counter-terrorism legislation appears to be continuing, with a Counter-Extremism Bill expected to be published later in 2015. The Bill is aimed at 'suppressing extremist activity', providing extremism banning orders outlawing extremist organisations, extremism disruption orders restricting the activities of individuals, and extremism closure orders closing down properties used by extremists. The Bill will provide for further restrictions on free speech by criminalising non-violent extremist speech, with extremism defined as 'vocal or active opposition to fundamental British values'.⁶⁰ The Bill has already attracted criticism, and David Anderson QC, the Independent Reviewer of Terrorism Legislation, has cautioned that the new law could 'risk provoking a backlash in affected communities' and increase the perception of 'an Islamophobic approach', which could alienate the Muslim community and ultimately be counterproductive.⁶¹

The brief overview above has highlighted the glut of counter-terrorism legislation that has been enacted over the past 15 years. The preventive terrorism offences operate within this legislative framework so as to target remote acts of preparation, encouragement, possession and association that may lead to the commission of a terrorist atrocity. The following section

⁶⁰ Alan Travis, 'It wasn't just Lib Dems who opposed Theresa May's counter-extremism plans' *The Guardian* (13 May 2015) <<http://www.theguardian.com/world/2015/may/13/theresa-mays-counter-extremism-proposals-are-fraught-with-difficulties>> accessed 23 September 2015; Alan Travis, 'Counter-extremism bill could play into terrorist' hands, says watchdog' *The Guardian* (17 September 2015) <<http://www.theguardian.com/uk-news/2015/sep/17/counter-extremism-bill-could-play-into-terrorist-hands-watchdog>> accessed 23 September 2015.

⁶¹ Anderson, *The Terrorist Acts in 2014: Report of the Independent Reviewer on the Operation of the Terrorism Act 2000 and Part 1 of the Terrorism Act 2006*, para 9.30.

looks more closely at the preventive rationale underlying the counter-terrorism legislation, which is given as the justification for the enactment of preventive terrorism offences.

1.3 Prevention as the Central Goal of the Preventive Terrorism Offences

1.3.1 The Rationale and Aim of Prevention

Shortly after the events of 9/11 in America, the United Nations passed a resolution imposing a series of obligations on all Member States with regard to international terrorism.⁶² According to the resolution, all states must ensure that the financing, planning, preparation or perpetration of terrorist acts be established as serious criminal offences in domestic laws and that the punishment should reflect the seriousness of such acts.⁶³ Thereafter, preparatory terrorism offences were enacted in domestic legislation in various jurisdictions.⁶⁴ The international response to the terrorist attack on 9/11 seemed to be focused on preventing and pre-empting threats and perceived threats, which was mirrored in the forward-looking preventive counter-terrorism legislation that was enacted domestically. While the details of the domestic laws differ in each country, the basic common rationale was one of

⁶² United Nations Security Council Resolution 1373 (2001)

⁶³ United Nations Security Council Resolution 1373 (2001), s 2(e).

⁶⁴ For example, Terrorism Act 2006, s 5(1); s 101(6)(1) Criminal Code (Cth); s 83.19(1) Criminal Code (Canada). Although as already mentioned, it is important to remember that the Terrorism Act 2000, enacted prior to 9/11, had already introduced several preventive offences.

prevention and a focus on ensuring public safety and security from the terrorist threat.⁶⁵

While it is certainly true that legislative and public attention with regard to terrorism increased after 9/11, as explained in the previous section, the UK had a long history of counter-terrorism legislation predating 9/11. The Terrorism Act 2000, enacted a year before 9/11, includes several offences that extend inchoate liability, including section 57 (possession of an article for terrorist purposes) and section 58 (collection of information useful for an act of terrorism), which together have resulted in the greatest number of charges under counter-terrorism legislation.⁶⁶ Section 58 alone has resulted in the second highest number of convictions under counter-terrorism legislation.⁶⁷ One cannot, therefore, simply point to the cataclysmic events of 9/11 to explain the preventive focus of counter-terrorism legislation. The rationale of prevention was already very much in existence and provided much of the impetus for the offences in the Terrorism Act 2000.⁶⁸

Evidence of this legislative focus on prevention can be seen in the House of Commons debate, where it was stated that the bill was 'about

⁶⁵ Jude McCulloch and Sharon Pickering, 'Pre-Crime and Counter-Terrorism' (2009) 49 *British Journal of Criminology* 628, 630.

⁶⁶ Home Office, *Operation of police powers under the Terrorism Act 2000 and subsequent legislation: arrests, outcomes and stops and searches, quarterly update to 30 June 2014* (4 December 2014), para 2.5. However, note that the Home Office records only principal charges, arrests and convictions. Thus, where there is more than one charge, only the most serious will be reflected in the statistical report.

⁶⁷ *Ibid*, para 2.8.

⁶⁸ See Ashworth and Zedner, *Preventive Justice*, section 1.5, for a brief overview of the historical context for preventive offences, demonstrating that the idea of a 'shift' to a focus on prevention is not quite accurate and that offences with prevention as their primary rationale have long been a part of the criminal law.

detering, preventing and, where necessary, investigating heinous crime ...'.⁶⁹ Furthermore, it was said that we need to 'think of the possible consequences of terrorist outrages in the absence of such legislation: innocent lives might be saved if such powers were on the statute book'.⁷⁰ It is clear that Parliament's intention in creating new criminal offences was to prevent terrorist atrocities, which it believed were still possible in spite of the ceasefire in Northern Ireland and also due to the perceived growing threat of international terrorism. The unquestioning certainty in the efficacy of counter-terrorism legislation to prevent terrorist atrocities is clearly evident in the following statement:⁷¹

Despite the hope in 1974 that the need for counter-terrorist legislation would be short-lived, those powers—with amendments and additions—remain in force a quarter of a century later. In the interim, more than 2,000 people have died in the United Kingdom as a result of Irish and international terrorism, and thousands more have been injured. *The toll would unquestionably have been greater without the anti-terrorist powers, and above all without the courage and commitment shown by members of the police and security forces over 25 years.*

In spite of the intention that the Terrorism Act 2000 would be permanent legislation flexible enough to respond to the changing nature of the terrorist threat, the events of 9/11 and the London bombings of July 2005 radically changed perceptions of the threat of terrorism and the need to combat it. This

⁶⁹ Hansard, col 156.

⁷⁰ Ibid, col 166.

⁷¹ Ibid, col 153, emphasis added.

is reflected in the enactment of the Terrorism Act 2006, which included expansive offences extending inchoate liability that were justified by the changing nature of the threat of terrorism. The justification for early intervention based on public safety is evidenced in the following statement, made during the House of Commons debate on the proposed Act:⁷²

The need to ensure public safety by preventing such attacks means that it is necessary to make arrests at an earlier stage than in the past, where there was a culture of warnings and where weapons of mass destruction did not exist as now.

The offences extending inchoate liability in the Terrorism Act 2000 and the Terrorism Act 2006 anticipate the perpetration of harm and seek to criminalise any act or state of affairs that may lead to the eventuation of such harm. This focus on the prevention of harm by criminalising conduct that precedes such harmful conduct is characteristic of the preventive nature of much recent criminal legislation.⁷³ These risk-based offences rely on forward-looking preventive rationales for their legitimacy. The government offers arguments based on security and on the state's duty to protect the public (or the state itself) from harm in justifying these measures.⁷⁴ This forward-looking

⁷² Hansard, *House of Commons Debate* (26 October 2005), col 344.

⁷³ Andrew Ashworth and Lucia Zedner, 'Just prevention: Preventive rationales and the limits of the Criminal Law' in R A Duff and S P Green (eds), *Philosophical foundations of the criminal law* (OUP 2011)

⁷⁴ See David Feldman, 'Human rights, terrorism and risk: the roles of politicians and judges' [2006] Public Law 364 at 369, quoting from the briefing paper *Three Month Pre-Charge Detention* prepared by the Anti-Terrorist Branch of the Metropolitan Police, SO13, and sent to the Home Secretary by Assistant Commissioner of the Metropolitan Police, Mr Andy Hayman QPM, MA, on 6 October 2005: 'Public safety always comes first, and the result of this is that there are occasions when suspected terrorists are arrested at an earlier stage in

preventive rationale for criminal offences may at first appear to sit uncomfortably with the retributive justifications for punishment, which have dominated criminal law theory in recent years.⁷⁵ However, preventive justice is not a new concept.⁷⁶ Both Rawls and Hart argued for a multi-level theory of punishment where decisions on criminalisation would be based on utilitarian considerations (such as deterrence and the prevention of crime) but the punishment for infringement of such laws would be justified on retributive grounds.⁷⁷ It would be counter-intuitive to argue that the criminal law is only concerned with the condemnation and punishment of culpable wrongdoing on the basis of desert with no concern for the prevention of future acts of culpable wrongdoing.⁷⁸ As Ashworth says:⁷⁹

The need to recognise the preventative function [of the criminal law] as one of the central functions of the criminal law is not in doubt; it would not make sense if the criminal law were purely a retrospective, blaming institution, since the seriousness with which it treats wrongs against physical safety, for example, points to the importance of preventing those wrongs from occurring.

their planning and preparations than would have been the case in the past ...'. The briefing paper is no longer available on the Home Office website but David Feldman has possession of a copy of the document.

⁷⁵ See also Michael Tonry (ed) *Retributivism Has a Past: Has it a Future?* (OUP 2011); Mark D. White (ed) *Retributivism: Essays on Theory and Policy* (OUP 2011).

⁷⁶ See Ashworth and Zedner, *Preventive Justice*, chapter 2, for a historical examination of prevention as an animating principle in the criminal law.

⁷⁷ J Rawls, 'Two Concepts of Rules' in S Freeman (ed), *Collected Papers* (Harvard University Press 1999) drawing on J D Mabbott, 'Punishment' (1939) 48 *Mind* 152; H L A Hart, 'Prolegomenon to the Principles of Punishment' in *Essays in the Philosophy of Law* (2nd edn, OUP 2008).

⁷⁸ Andrew Ashworth, 'Conceptions of Overcriminalization' (2008) 5 *Ohio State Journal of Criminal Law* 407, 417; Andrew Ashworth and Lucia Zedner, 'Punishment Paradigms and the Role of the Preventive State' in A P Simester, Ulfrid Neumann and Antje du Bois-Pedain (eds), *Liberal Criminal Theory: Essays for Andreas von Hirsch* (Hart Publishing 2014).

⁷⁹ Ashworth, 'Conceptions of Overcriminalization', 417.

This supplies the rationale for the inchoate offences and, less strongly, for many of the possession offences.

Even on a purely retributivist construction of the criminal law, one needs to acknowledge the importance of prevention to the criminal law. The two rationales are closely linked.⁸⁰ By declaring certain wrongs to be reprehensible and deserving of condemnation and punishment by the criminal law, the law is surely also concerned with preventing or reducing the occurrence of these wrongs. As Ashworth and Zedner state:⁸¹

Surely it is because these wrongs are so serious that it is important to reduce the frequency of their occurrence: the 'backward-looking' justification for making these wrongs punishable must imply a 'forward-looking' concern that fewer such wrongs should occur in the future.

Thus, it is accepted that prevention is a legitimate goal of the criminal law, based on the state's duty to prevent harm.⁸² It is acknowledged that one of the state's fundamental duties is to ensure public safety and security and protect the public from harm. In exchange, the public relinquishes its right to

⁸⁰ Ashworth and Zedner, 'Just prevention: Preventive rationales and the limits of the Criminal Law', 281. See chapter 2 for further explanation on the importance of prevention in decisions on criminalisation.

⁸¹ Ashworth and Zedner, 'Just prevention: Preventive rationales and the limits of the Criminal Law', 281.

⁸² For a discussion of the state's duty to prevent harm and the right to security, see Ashworth and Zedner, *Preventive Justice*, chapter 1; Liora Lazarus, 'Positive Obligations and Criminal Justice: Duties to Protect or Coerce?' in Julian V. Roberts and L Zedner (eds), *Principled Approaches to Criminal Law and Criminal Justice: Essays in Honour of Professor Andrew Ashworth* (OUP 2012); Liora Lazarus, 'The Right to Security' in Rowan Cruft, Matthew Liao and Massimo Renzo (eds), *The Philosophical Foundations of Human Rights* (OUP 2014).

self-governance and recognises the authority of the state.⁸³ As observed by Hobbes:⁸⁴

... the motive and end for which this renouncing and transferring of rights is introduced is nothing else but the security of a man's person in his life and in the means of preserving his life.

However, recognising the legitimacy of the state's duty to prevent harm in order to enhance public safety does not licence an unfettered power to pursue this goal. Prevention as a justifying goal alone presents several problems.

1.3.2 Problems with Prevention as a Justifying Principle

Allowing the state free reign in fulfilling its obligations to prevent harm could have serious implications for individual liberty. The risk that comes with the fulfilment of state's preventive role was recognised by Mill, who stated as follows:⁸⁵

It is one of the undisputed functions of government to take precautions against crime before it has been committed, as well as to detect and publish it afterwards. The preventive function of government, however, is far more liable to be abused, to the prejudice of liberty, than the punitive function; for there is hardly any part of the legitimate freedom of action of a human being

⁸³ Ashworth and Zedner, *Preventive Justice*, 9

⁸⁴ T Hobbes, *Leviathon* (OUP 2008), chapter XIV

⁸⁵ John Stuart Mill, *On Liberty* (1859), 165.

that would not admit of being represented, and fairly too, as increasing the facilities for some form or other of delinquency.

For this reason, Mill was concerned with determining what limits and restrictions should be placed on the state in the exercise of its preventive power. A crucial question for Mill was 'how far liberty may legitimately be invaded for the prevention of crime', though it could hardly be said that Mill makes any sustained answer to this question.⁸⁶ But before discussing the relevant limiting principles and constraints that should guide the state in this regard,⁸⁷ what are some of the problematic implications of prevention as a justifying principle for criminalisation of the preventive terrorism offences?

As discussed, the preventive terrorism offences were enacted so as to allow for early intervention by police in order to disrupt and prevent terrorist atrocities. However, in order to allow for this early intervention, the offences criminalise a broad range of conduct, much of which could be innocent and harmless. Thus, the offence could extend to cover the acts of ordinary people with no terrorist intent. The result of this is that people are required to 'forego options that are themselves valuable', thus impacting on their liberty.⁸⁸ Furthermore, licencing early intervention allows for intrusive investigatory measures and policing, by virtue of the fact that the offences

⁸⁶ Ibid, 165. Mill's formulation of the harm principle as providing such a restriction will be discussed in chapter 2.

⁸⁷ See chapter 2 for the framework of principles and constraints that are proposed for limiting the reach of the preventive terrorism offences.

⁸⁸ A P Simester, 'Prophylactic Crimes' in G R Sullivan and Ian Dennis (eds), *Seeking Security: Pre-Emptying the Commission of Criminal Harms* (Hart Publishing 2012), 61; Ashworth and Zedner, *Preventive Justice*, 109.

criminalise ordinary conduct. In order to determine whether a terrorist intent underlies this conduct, there is likely to be resort to greater use of surveillance of normal, everyday actions, having implications on the liberty and privacy of all individuals.⁸⁹ A further problem is that these offences are likely to be applied disproportionately against certain individuals or groups in society who are seen to present a greater risk of terrorist activity. Surveillance and investigation is thus liable to be based on stereotypes, resulting in discriminatory policing practices and enforcement mechanisms.⁹⁰ While the rationale for the preventive terrorism offences may be one of increasing public safety and security, the reality is that these measures have the potential to negatively affect the security of certain groups or individuals from unwarranted coercion by the state.⁹¹

Aside from concerns arising from the impact on the liberty and rights of the individual, what about the consequentialist argument that these offences will reduce the incidence of terrorist harms? When exploring the rationale of prevention as justification for enacting offences, it is impossible to ignore the question of efficacy.⁹² If these forward-looking preventive justifications are to suffice, one needs to show that they achieve their stated

⁸⁹ Ashworth and Zedner, *Preventive Justice*, 109.

⁹⁰ Ibid. See chapter 8 for a discussion of the disproportionate application of terrorism measures on 'suspect communities'.

⁹¹ See Lucia Zedner, *Security* (Routledge 2009), for a discussion of the different applications and implications of the term 'security'. See also BJ Goold and Lucia Zedner, *Crime and Security* (Ashgate 2006) Goold and Lazarus, *Security and Human Rights* Lazarus, 'The Right to Security' Peter Ramsay, *The Insecurity State: Vulnerable Autonomy and the Right to Security in the Criminal Law* (OUP 2012) Victor Tadros, 'Crimes and Security' (2008) 71 *The Modern Law Review* 940 Jeremy Waldron, 'Safety and Security' (2006) 85 *Nebraska Law Review* 454.

⁹² Though, see Ashworth and Zedner, *Preventive Justice*, 195, who caution that 'efficacy alone cannot suffice to justify substantially liberty-eroding measures'.

goal. If they are not successful in preventing the harm at which they are aimed, then it is impossible to see how they could be justified on consequentialist grounds.

Unfortunately, empirical evidence on the efficacy of counter-terrorism legislation is scarce, especially in the context of offences extending inchoate liability. It is therefore very difficult to assess whether or not these laws can be justified on the basis of achieving the preventive goals for which they were intended. Such limited research as there is provides equivocal results. The consensus is that there is no consistent evidence that counter-terrorism measures are effective in preventing terrorism or terrorist acts and the introduction of harsher laws and penalties may in some cases be counter-productive.⁹³ Even Lord Carlile, the former Independent Reviewer of Terrorism Legislation, who was generally in support of the specific criminal offences enacted by terrorism legislation, said that criminal prosecutions of these terrorist offences can be counter-productive in that they 'risk fuelling the radicalisation of others rather than removing it'.⁹⁴ However, it appears that the overarching concern is that there is simply not enough evidence upon which to make pronouncements on the effectiveness of counter-terrorism measures.⁹⁵

⁹³ Cynthia Lum, Leslie Kennedy and Alison Sherley, 'The effectiveness of counter-terrorism strategies: A Campbell Systematic Review' The Campbell Collaboration Available online at: http://www.campbellcollaboration.org/doc-pdf/Lum_Terrorism_Reviewpdf accessed 15 November 2011, 3.

⁹⁴ Lord Carlile, *Report on the Operation in 2008 of the Terrorism Act 2000 and of Part 1 of the Terrorism Act 2006* (June 2009), p49 para 246.

⁹⁵ Lum, Kennedy and Sherley; Gary LaFree and Gary Ackerman, 'The Empirical Study of Terrorism: Social and Legal Research' (2009) 5 *Annu Rev Law Soc Sci* 347 ; Walter Enders,

Lum et al undertook a systematic, comprehensive review of counter-terrorism research in order to determine what studies had been done on the effectiveness of counter-terrorism measures. Of the 2,000 research sources that were studied, only 7 were found to provide an empirically-based evaluation of the effectiveness of counter-terrorism measures.⁹⁶ Unfortunately none of the 7 evaluates the effectiveness of new criminal offences in reducing or preventing terrorist acts. However, one of the studies analysed dealt with the effect of increasing the severity of punishment for hijackers. According to Lum et al, this study did not provide evidence that increasing the severity of punishment 'had a statistically discernible effect on reducing skyjacking incidents'.⁹⁷ The review concluded that the studies provided no clear empirical evidence that the most commonly used counter-terrorism interventions are effective. In fact, in some cases it was shown that these measures could increase the likelihood of a terrorist act. However, the overwhelming conclusion and concern raised was that there was simply not enough empirical work on the effectiveness of such measures on which to draw any conclusions.⁹⁸

LaFree and Ackerman reach a similar conclusion as to the dearth of empirical research in evaluating counter-terrorism strategies. They examine studies as to the efficacy of certain legal and criminal justice measures and

'Terrorism: An Empirical Analysis' in Todd Sandler and Keith Hartley (eds), *Handbook of Defense Economics*, vol 2 (Elsevier B.V. 2007).

⁹⁶ Lum, Kennedy and Sherley

⁹⁷ Ibid, 32.

⁹⁸ Ibid, 32-33.

conclude that the results are in no way clear. One such study related to the enactment of tougher anti-terrorism laws in the United States in 1984. It was shown the enactment of such legislation had no noticeable effect on reducing incidents of terrorism in the United States.⁹⁹ A further study referred to in relation to the changes in criminal law and internment policy in Northern Ireland also showed these to have no significant effect on the occurrence of terrorist attacks.¹⁰⁰

None of the above studies has focussed specifically on extensions to inchoate liability as a response to the threat of terrorism. There has been no research assessing the efficacy of the offences under consideration in this thesis. This is clearly something that needs to be pursued. In the absence of any empirical research on these offences, the only evidence of their efficacy is to be found in the Home Office Statistical Bulletins, which provide details on arrest, charge and conviction rates for terrorism offences as well as the principal offences charged. While such figures are only a proxy for determining efficacy of the legislation, they do provide an indication of how the legislation is being used. However, it is clear that more empirical work is needed in this area in order to provide a clearer picture of the use of criminal offences in preventing terrorism.¹⁰¹

⁹⁹ LaFree and Ackerman, 365.

¹⁰⁰ Ibid, 365.

¹⁰¹ However, see the recently published Gary LaFree, Laura Dugan and Erin Miller, *Putting Terrorism in Context: Lessons from the Global Terrorism Database* (Routledge 2015) for an analysis of the global terrorism database, providing details of all terrorist attacks committed since 1970. This valuable empirical research argues that high profile terrorist events, known as 'black swan' events, such as 9/11, have skewed the perception of terrorism and have had a disproportionate impact on policies and attitudes towards terrorism.

It is important to bear in mind that while these marked extensions to criminal law present a danger of overreach and unjust enforcement and licence to intrusive investigations and policing, the actual number of people who have been convicted under these offences since 2001 is tiny. In the period from September 2001 to 31 March 2015, 2,944 people have been arrested for terrorism-related offences.¹⁰² Of these, a total of 744 people have been charged with terrorism-related offences, with 449 of them being charged with offences under the counter-terrorism acts.¹⁰³ However, only 223 people have been convicted of terrorism related offences under the counter-terrorism acts.¹⁰⁴ It is questionable whether one could legitimately argue that these offences are necessary in order to prevent the occurrence of a terrorist attack. If they are not being used to prosecute and convict offenders, either their existence has the desired deterrent effect (although this seems unlikely considering that the offences criminalise so much ordinary conduct that it would be almost impossible for everyone to comply with the prohibitions); or they are not being used very much and are therefore not necessary (due, possibly, to the availability of other legislation), or they are being used for a purpose other than to prosecute and punish culpable wrongdoing (such as investigation, disruption and policing), which raises questions as to the integrity and proper scope of criminal law offences.

¹⁰² Home Office, *Operation of police powers under the Terrorism Act 2000 and subsequent legislation: Arrests, outcomes, and stop and search, Great Britain, financial year ending 31 March 2015* (Statistical Bulletin 04/15, September 2015), data table A 03.

¹⁰³ The terrorism acts in questions are the Terrorism Act 2000, the Terrorism Act 2006, the Anti-Terrorism Crime and Security Act 2001, the Prevention of Terrorism Act 2005, and the Terrorism Prevention and Investigation Measures Act 2011. Home *ibid*, data table A 03.

¹⁰⁴ Home *ibid*.

The government, in enacting counter-terrorism legislation, has stated that while its goal is to prevent acts of terrorism, legislation in furtherance of this goal must be shown to be effective and must also protect individual rights and freedoms and uphold the rule of law. As has been demonstrated above, allowing for the extension of inchoate liability in order to further preventive goals can have serious negative consequences for individual liberties and freedoms and for the integrity of the criminal law itself.¹⁰⁵ Furthermore, in the absence of clear empirical evidence as to the efficacy of the preventive terrorism offences, consequentialist arguments in their favour become very hard to sustain. Chapter 2 develops this argument by proposing a framework of limiting principles and constraints, based on a conception of the criminal law that respects autonomy, liberty and other fundamental human rights, against which the preventive terrorism offences should be judged. It is argued that such a framework acts as a necessary constraint on the criminalisation of terrorism-related offences to ensure that the reach of the criminal law is not extended unjustifiably in the name of prevention.

¹⁰⁵ For further explanations of ‘perversions’ of the criminal law as a result of their extension based on preventive goals, see R A Duff, ‘Perversions and Subversions of Criminal Law’ in R A Duff and others (eds), *The Boundaries of the Criminal Law* (Oxford University Press 2011); Zedner, ‘Terrorizing Criminal Law’.

1.4 Thesis Outline

The argument will proceed in four parts. The first part proposes various limiting principles and constraints that should be applied in assessing the criminalisation of the preventive terrorism offences. Secondly, the definition of terrorism is interrogated, based on comparisons with other authoritative definitions in international law, in order to provide the basis for analysing the specific preventive terrorism offences, all of which rely on the definition of terrorism for their operation. The third and largest part of the thesis consists of four chapters, analysing the four categories of offences set out above, namely, preparatory, encouragement, possession and associative offences. Finally, the thesis concludes by placing these preventive terrorism offences in the context of the government's broader counter-terrorism strategy. In particular, the offences are assessed in light of the government's *Prevent* strategy, which entails the use of so-called 'soft' power and various strategies that are intended to be reintegrative. The tensions that arise as a result of the use of these 'soft' powers in combination with coercive measures such as the preventive terrorism offences, and the overlap between these approaches, are highlighted in order to demonstrate that the preventive terrorism offences have the potential to be counter-productive to the government's counter-terrorism efforts.

Chapter 2 undertakes a review of the literature on criminalisation and the limits and boundaries of the criminal law, in order to provide the

theoretical foundation for the project. Recently, there has been significant work on the principles of criminalisation in respect of the general criminal law,¹⁰⁶ and, a smaller body of work on the inchoate offences.¹⁰⁷ Chapter 2 engages with this literature in order to develop a framework of limiting principles and constraints against which to assess the specific terrorist offences extending inchoate liability in subsequent chapters.

It is impossible to embark on an analysis of the specific terrorism offences without first examining the scope of the definition of terrorism. Section 1 of the Terrorism Act 2000 includes a very widely drafted definition of terrorism. All of the offences extending inchoate liability depend on this definition of terrorism and make reference to 'terrorism' within the statement of the offence. Therefore, the very broad definition of this term extends the reach of the specific offences even further. This is the subject of chapter 3. This chapter first engages with the necessity of a separate legal regime governing terrorism, arguing that the most persuasive reason is that of fair labelling and the expressive function of the criminal law. It also discusses the argument that such legislation is necessary due to the specific complexities of policing terrorism, thus reflecting the focus on enhancing police power

¹⁰⁶ For example Ashworth, *Principles of Criminal Law*; Douglas Husak, *Overcriminalization: The Limits of the Criminal Law* (Oxford University Press 2008); A P Simester and A von Hirsch, *Crimes, Harms, and Wrongs: On the Principles of Criminalisation* (Hart Publishing 2011)

¹⁰⁷ For example Bernadette McSherry, 'Expanding the Boundaries of Inchoate Crimes: The Growing Reliance on Preparatory Offences' in B McSherry, A Norrie and S Bronnitt (eds), *Regulating Deviance: The Redirection of Criminalisation and the Futures of Criminal Law* (Hart Publishing 2009); R A Duff, *Criminal Attempts* (Oxford University Press 1997); Kimberly Kessler Ferzan, 'Inchoate Crimes at the Prevention/Punishment Divide' (2011) 48 *San Diego Law Review* 1273; Larry Alexander and Kimberly Kessler Ferzan, 'Risk and Inchoate Crimes: Retribution or Prevention?' in G R Sullivan and Ian Dennis (eds), *Seeking Security: Pre-Emptying the Commission of Criminal Harms* (Bloomsbury Publishing 2012).

inherent in counter-terrorism legislation. It concludes that although an argument could be made for responding to terrorism under the ordinary criminal law, after the events of 9/11 and the bombings in London in July 2005 and, more recently, in light of the threats posed by Islamic State (also known as ISIS, ISIL or IS), such an argument is unlikely to be very persuasive, as ordinary offences do not adequately capture the specific attributes of terrorism offences. It is therefore important to ensure that 'terrorism' is defined in a manner that clearly distinguishes it from other forms of crime. It must be narrowly tailored so as to only catch conduct that can rightfully be described as terrorism. The chapter then moves on to an analysis of the scope of the definition of terrorism in UK law, contrasting it with those used elsewhere, particularly the two most authoritative international definitions of terrorism, namely the International Convention for the Suppression of the Financing of Terrorism¹⁰⁸ and Security Council Resolution 1566,¹⁰⁹ both of which are much narrower than the UK definition. It concludes that the UK definition is overbroad, having serious implications for the scope of the specific terrorist offences under consideration.

Chapter 4 considers the development of preparatory liability under section 5(1) of the Terrorism Act 2006. This provision sets out that 'a person commits an offence if, with the intention of committing acts of terrorism, or assisting another to commit such acts, he engages in any conduct in

¹⁰⁸ International Convention for the Suppression of the Financing of Terrorism, Dec 9 1999, 2178 UNTS 197.

¹⁰⁹ S.C. Res 1566, U.N. Doc. S/RES/1566 (Oct 8, 2004).

preparation for giving effect to his intention', the penalty for which is life imprisonment.¹¹⁰ The effect of this provision is to extend the scope of attempts liability to the early stages of preparation, contrary to long established principles of attempts liability, which requires that the act be more than merely preparatory. Liability is extended to steps that are merely preparatory and thus remote, both temporally and causally, from the commission of a substantive act of terrorism. However, in spite of this remoteness, the maximum penalty specified for this offence is life imprisonment. The offence presents major difficulties in its justification as a result of its criminalisation of remote harm. This is reflected in the drafting of the offence, which provides for a conduct requirement that overly broad. This chapter analyses the scope of the offence, with reference to case law, and measures it against the framework of principles outlined in chapter 2 in order to determine whether it is a justified instance of criminalisation.

Of all of the terrorism offences to extend the boundaries of inchoate liability, the ones generating the greatest controversy are the so-called speech offences found in sections 1 and 2 of the Terrorism Act 2006.¹¹¹ These offences form the subject of chapter 5. These sections create two new offences prohibiting direct or indirect encouragement of terrorism, extending the

¹¹⁰ Terrorism Act 2006, s 5(1).

¹¹¹ See, for example, Amnesty International, *UK Human Rights: A Broken Promise* (23 February 2006) <http://www.amnesty.org/en/library/asset/EUR45/004/2006/en/cc167867-d45b-11dd-8743-d305bea2b2c7/eur450042006en.pdf>, last accessed 6 October 2015; Liberty, *Terrorism Bill: Liberty's Briefing for Second Reading in the House of Lords* (November 2005).

common law inchoate offence of incitement.¹¹² Section 1 of the Terrorism Act 2006 prohibits the publication of 'a statement that is likely to be understood by some or all of the members of the public to whom it is published as a direct or indirect encouragement or other inducement to them to the commission, preparation or instigation of acts of terrorism or Convention offences'. Section 2 of the Terrorism Act 2006 prohibits the dissemination of such material or its possession with a view to its dissemination. These sections are both very long and complex, running to over 1,500 words together. Thus, determining the precise scope and limits of these offences is a complicated task. This chapter analyses the scope of these offences, highlighting particular problems in terms of the lack of a culpability requirement and the potential to infringe rights to freedom of expression as well as rule of law based principles, such as the principles of fair warning and maximum certainty.

Chapter 6 focuses on the possession offences contained in the Terrorism Act 2000. Possession offences are particularly difficult to accommodate within the general principles of the criminal law.¹¹³ Sections 57 and 58 of the Terrorism Act 2000 contain very broadly drafted possession offences. This chapter sets out the various sub-sets of possession offences and locates these terrorism possession offences within what Ashworth refers to as risk-based possession offences. That is they are concerned with prohibiting the possession of certain material on the basis that it increases the risk of

¹¹² The common law inchoate offence of incitement was replaced by the new statutory offences of assisting and encouraging crime by the Serious Crime Act 2007.

¹¹³ Andrew Ashworth, 'The Unfairness of Risk-Based Possession Offences' (2011) 5 Criminal Law and Philosophy 237.

terrorism in some way. These offences stretch the paradigm of criminal law as being concerned with culpable wrongdoing in several respects. They lack a clear act requirement as they criminalise a state of affairs rather than a voluntary act. They are defined as strict liability offences and incorporate reverse burdens of proof, thus offending the presumption of innocence. They criminalise acts that are remote from the causing of harm and as such, they hold the individual responsible for the possible future decisions of themselves or others. In attempting to determine whether these offences are justifiable instances of criminalisation, wider questions as to the nature and justifiability of possession offences in general will be explored.

Chapter 7 analyses the various group-based offences, such as membership, association or support offences. Unlike some of the offences discussed in earlier chapters that extend inchoate liability temporally and causally, these participatory or associative offences extend liability laterally by criminalising various facilitative, associative or participatory acts. While participatory offences are not considered as inchoate offences, these offences display similar characteristics and suffer from many of the same problems as the offences discussed in earlier chapters. These offences are broadly drafted and present particular difficulties in respect of the imputation of responsibility, as they often fail to specify any wrong or harm within the scope of the offence. As with the other offences analysed, liability is imposed for conduct that is very remote from the causing of harm. Liability is imposed for, *inter alia*, providing financial support to a terrorism organisation,

supporting or belonging to a proscribed organisation, wearing the uniform of a proscribed organisation, giving or receiving training in terrorist activities and so forth. In engaging with the scope and justifiability of these offences, this chapter raises questions with regard to the attribution of participatory liability in general.

Chapter 8 examines the relationship between the preventive terrorism offences and the implementation of various supposedly 'soft' counter-terrorism strategies, based on a counter-insurgency model, which are intended to be reintegrative.¹¹⁴ It highlights the problematic relationship between the government's *Prevent* strategy, which is based on 'winning hearts and minds' and preventing radicalisation, and the existence of these criminal offences, which could be counter-productive to this pursuit. Furthermore, the overlap between criminal offences that seek to prevent radicalisation and the so-called 'soft' measures implemented to achieve the same aim is scrutinised in order to determine whether these different approaches can be reconciled. The very broad scope of the preventive terrorism offences is problematic for the *Prevent* strategy because those who are identified as being 'at risk of radicalisation' can nearly always find themselves liable to prosecution of terrorism offences. This chapter raises questions as to the purpose behind enacting terrorism offences extending inchoate liability and their place within the context of a larger counter-terrorism strategy. Doubt is cast on whether the offences are intended to be used to punish wrongdoing or if they are

¹¹⁴ As will be seen, many of these measures are not soft at all.

rather tools in the counter-terrorism armoury to bolster the powers of the police powers and intelligence gathering, regulate public order and perceived dangerous persons, and provide a back up to the 'softer' approaches pursued under the Prevent strategy.

The thesis concludes by bringing together the findings from the previous chapters, raising serious concern about the extension of inchoate liability as a means of preventing terrorism and highlighting the hazards to the criminal law of prioritising prosecution as a means of preventing terrorism. Based on a critical analysis of the offences extending inchoate liability, it is argued that these are not justifiable instances of criminalisation. Arguably, when one is dealing with the gravest potential dangers or harms, such as those posed by the threat of terrorism, the lines or boundaries of criminal law may need to be redrawn. However, these lines need to be redrawn so as to respect principles of autonomy and liberty and to ensure that such actions are a legitimate exercise of state authority.

This thesis aims to demonstrate that without substantial revision, these offences cannot be conceived of as punishing culpable wrongdoing based on an offender's desert. Rather, they appear to be an adjunct to a wider counter-terrorism strategy based on an unwarranted extension of the powers of policing and prosecutorial and judicial discretion, leaving the limits and contours of the offences, and thus this area of the criminal law, to be defined by the courts.

2. Framework for Assessing Preventive Terrorism

Offences

The criminal law is an institution that is concerned with the condemnation and punishment of wrongful conduct that is of public concern.¹ However, as acknowledged in the previous chapter, the criminal law is also concerned with the prevention of those wrongs that are deemed worthy of condemnation and punishment. As Duff has argued:²

a law that condemned and punished actually harm-causing conduct as wrong, but was utterly silent on attempts to cause such harms, and on reckless risk-taking with respect to such harms, would speak with a strange moral voice

Having acknowledged the preventive aims and purposes of counter-terrorism legislation in chapter 1, this chapter turns to the question of what principles and constraints should guide and limit the enactment of the preventive terrorism offences. While the rationale for the offences is based on the prevention of harm and the state's duty to protect the public and increase security, this alone does not justify their enactment. Prevention is a legitimate goal of the criminal law, but relying on prevention as a justifying principle

¹ Ashworth and Zedner, *Preventive Justice*, 95; Duff, 'Perversions and Subversions of Criminal Law', 91.

² Duff, *Criminal Attempts*, 134.

can have serious negative consequences for individual liberty. Preventive criminalisation presents a danger of overreach, allowing for intrusive investigative and policing practices, and requiring individuals to sacrifice options that may themselves be valuable in order to avoid falling foul of the law.³ Conviction for any of the preventive terrorism offences carries a significant sentence of imprisonment. Liberty eroding measures such as these require strong justification in order to be regarded as legitimate instances of criminalisation.⁴ Furthermore, the lack of empirical evidence on the use of preventive terrorism offences to prevent harm means that, even on its own terms, the preventive rationale is not entirely convincing. If the offences cannot be shown to achieve the stated aim of preventing terrorism, it becomes difficult to justify them on consequentialist grounds, making the case for further constraints on criminalisation even more crucial.

The government has recognised that in enacting counter-terrorism legislation to prevent acts of terrorism, it has a duty to ensure that such legislation safeguard individual rights and freedoms and abide by rule of law standards.⁵ The aim of this chapter is to develop a framework to be used in the chapters that follow to assess the justifiability of the various preventive terrorism offences under consideration, and to determine whether the

³ Simester, 'Prophylactic Crimes', 61.

⁴ Ashworth and Zedner, *Preventive Justice*, 6-7, 21. See also Andrew Ashworth, 'Should Strict Criminal Liability be Removed from all Imprisonable Offences?' (2010) 45 *Irish Jurist*, 1

⁵ See, for example, the House of Commons debate on the second reading of the Terrorism Bill, where it was stated that 'we will have handed the terrorists the victory that they seek if, in combating their threats and violence, we descend to their level and undermine the essential freedoms and rule of law that are the bedrock of our democracy'. Hansard, *HC Debate vol 341*, col 152.

government's expressed intention to protect individual rights and freedoms and uphold the rule of law has been realised. Recently, there has been increasing academic focus on the expansion of the criminal law to cover ever more remote conduct as a means of preventing harm.⁶ This chapter draws on this literature in order to propose a framework of guiding principles and limiting constraints, based on the state's duty to respect individual autonomy, liberty and other fundamental human rights, which should be considered when appraising the criminalisation of offences that extend inchoate liability.

2.1 Criminalisation of Remote Harms

Before setting out the specific principles and constraints that are pertinent in considering the preventive terrorism offences, it is necessary to address the issue of 'remoteness' and its relevance to these offences. Offences that extend inchoate liability are typically instances of the criminalisation of remote harms. They are remote harms in that the conduct itself does not cause harm, but rather creates the risk of harm. Such remoteness does not relate only to a temporal gap between the risk of harm and the ultimate harm, although this may be a factor. It is also remote in the sense that it is contingent upon

⁶ See, for eg, Ashworth and Zedner, *Preventive Justice*; Antony Duff and others (eds), *The Boundaries of the Criminal Law* (OUP 2010); G. R. Sullivan and I. H. Dennis, *Seeking Security : Pre-empting the Commission of Criminal Harms* (Hart 2012); Simester and von Hirsch, *Crimes, Harms, and Wrongs: On the Principles of Criminalisation*; A Ashworth, L Zedner and P Tomlin (eds), *Prevention and the Limits of the Criminal Law* (OUP 2013).

further events or actions, either by another person or by the original actor.⁷ So, for example, whether or not the direct or indirect encouragement of terrorism results in an act of terrorism depends on whether another is encouraged to commit such an act of terrorism. The possession of material which may be useful in the commission of a terrorist attack will only result in harm if the possessor or another person decides to use such material in the commission of a terrorist attack. Acts performed in preparation for committing an act of terrorism will only result in harm if the actor decides to fulfil his or her terrorist intention and does not undergo a change of mind or fail in his or her endeavour.

According to Simester and von Hirsch, the relevant question in assessing offences that criminalise remote harm is how responsibility can be imputed to one who commits such an offence?⁸ How can responsibility legitimately be imputed where the risk of harm is remote from the causation of harm and is dependant upon intervening actions of either the original actor or another?⁹ They argue that such offences 'criminalise conduct that should not, in and of itself, be criminal'.¹⁰ By making such conduct criminal, the law imputes responsibility for the ultimate harm to the offender. However,

⁷ For discussions on the principle of remoteness and remote harms, see A von Hirsch, 'Extending the Harm Principle: Remote Harms and Fair Imputation' in A P Simester and A T H Smith (eds), *Harm and Culpability* (Clarendon Press 1996); A P Simester and A von Hirsch, 'Remote Harms and Non-constitutive Crimes' (2009) 28 *Criminal Justice Ethics* 89 ; Simester and von Hirsch, *Crimes, Harms, and Wrongs: On the Principles of Criminalisation*, Simester, 'Prophylactic Crimes'.

⁸ Simester and von Hirsch, *Crimes, Harms, and Wrongs: On the Principles of Criminalisation*, ch 5

⁹ Simester and von Hirsch, 'Remote Harms and Non-constitutive Crimes'; Simester and von Hirsch, *Crimes, Harms, and Wrongs: On the Principles of Criminalisation*, ch 4-5.

¹⁰ Simester and von Hirsch, *Crimes, Harms, and Wrongs: On the Principles of Criminalisation*, 80.

whether or not the ultimate harm occurs is contingent upon future acts, either of the offender or of another. Simply arguing that the initial risk-causing behaviour makes the ultimate harm more likely is not sufficient to impute responsibility. If we are to treat people as autonomous moral agents, responsible for their own individual acts and choices, one cannot impute responsibility for future harm that is dependent on contingent events.¹¹ Simester and von Hirsch argue that in order to legitimately impute responsibility, the offender must have 'some form of normative involvement' in the subsequent choice of the intervening actor to commit the ultimate harm. In other words, the original actor must underwrite or affirm the intervening actor's subsequent choices. Only in this way can the ultimate harm be said to be the concern of the original actor.¹² Examples of instances of such normative involvement are advocacy, encouragement and assistance. However, this idea of normative involvement does not provide a clearly specified set of criteria for judging the legitimacy of imputation. Simester and von Hirsch do not adequately specify what degree of normative involvement they require. In the context of terrorism offences that extend inchoate liability, one needs recourse to additional, more specific constraints. Such constraints are necessary in order to evidence a sufficiently strong connection between the risk-causing, or remote-harm, conduct and the ultimate harm at which the legislation is aimed so that the offender can legitimately be held responsible for such conduct.

¹¹ Ibid, 81.

¹² Ibid, 81.

2.2 Limiting Principles for Criminalisation

2.2.1 *The Harm Principle*

The traditional starting point in any consideration of the limits of criminal liability is the 'harm principle'. The harm principle was first set out by Mill as follows:¹³

The principle is, that the sole end for which mankind are warranted, individually or collectively, in interfering with the liberty of action of any of their number is self-protection. That the only purpose for which power can rightfully be exercised over any member of a civilised community against his will is to prevent harm against others. His own good, either physical or moral, is not a sufficient warrant.

This is essentially a negative, limiting principle. The state may not intervene in penalising or prohibiting any conduct unless such conduct causes harm to others. However, Mill provides no formulation of how the concept of harm is to be defined. Furthermore, such a construction does not create a positive duty to criminalise all conduct that causes harm. It simply places a limit on the state in stating that it is not permissible to interfere with conduct where such conduct does not cause harm to others.

Mill's construction of the harm principle was refined by Feinberg, who formulates it as providing positive grounds to criminalise, as follows:¹⁴

¹³ Mill ch 1 para 9.

It is always a good reason in support of penal legislation that it would be effective in preventing (eliminating, reducing) harm to persons other than the actor (the one prohibited from acting) and there is no other means that is equally effective at no greater cost to other values.

Feinberg goes on to set out a number of factors that should be taken into account once such harmful behaviour has been identified, so that not all harm conforming to the formulation proposed should necessarily be criminalised.

The factors he proposes are as follows:¹⁵

- (a) the greater the gravity of a possible harm, the less probable its occurrence need be to justify prohibition of the conduct that threatens to produce it;
- (b) the greater the probability of harm, the less grave the harm need be to justify coercion;
- (c) the greater the magnitude of the risk of harm, itself compounded out of gravity and probability, the less reasonable it is to accept the risk;
- (d) the more valuable (useful) the dangerous conduct, both to the actors and to others, the more reasonable it is to take the risk of harmful consequences, and for extremely valuable conduct it is reasonable to run risks up to the point of clear and present danger;
- (e) the more reasonable a risk of harm (the danger), the weaker is the case for prohibiting the conduct the conduct that creates it.

¹⁴ Joel Feinberg, *Harm to Others* (1984), 26.

¹⁵ *Ibid*, 216.

Feinberg explains the concept of harm as a 'thwarting, setting back, or defeating of an interest'.¹⁶ Accordingly, in order to constitute a harm there must be a setting back of interests and, thus, a violation of the rights of others. The preventive terrorism offences do not in themselves concern conduct that directly causes harm, but rather seek to prohibit conduct that is causally linked to the occurrence of harm. Essentially, these are offences designed to prohibit the risk of harm rather than harm itself. Such offences are, by definition, inchoate as no harm has yet occurred. There is at this stage only the risk of harm. Therefore, one cannot say that there has been a setting back of interests, or a violation of rights. There is only the risk of such a violation. If one were to argue that the risk of harm was itself a harm, with others holding a right against being subjected to such risk, then the moment that the risk arises their rights would be infringed, the harm would be done and the offence would therefore be complete, thus transforming an inchoate into a choate offence.¹⁷

This does not, however, mean that offences targeting the risk of harm necessarily fall foul of the harm principle. Both Mill and Feinberg use the word 'prevent' in their formulation of the harm principle, reflecting a focus on the prevention of harm and not just the punishment of actual harm causing behaviour. Furthermore, the above factors proposed by Feinberg

¹⁶ Ibid, 33.

¹⁷ Douglas Husak, *The Philosophy of Criminal Law* (Oxford University Press 2010), 127. However, see John Oberdiek, 'Towards a Right Against Risking' (2009) 28 *Law and Philosophy* 367, for an argument in favour of a 'right against risking' that is grounded in the interest in autonomy, and Claire Finkelstein, 'Is Risk a Harm?' (2003) 151 *University of Pennsylvania Law Review* 963, where it is argued that a risk constitutes a harm, based on the argument that minimising risk exposure is an 'element of an agent's basic welfare'.

suggest that the criminal law can be used to prevent the risk of harm in certain defined situations. Factors such as gravity, probability and magnitude are essential elements in providing the necessary justification for prohibiting conduct that creates the risk of harm. The harm principle is therefore broad enough to accommodate the criminalisation of conduct that risks harm, not because such conduct is harmful in itself, but rather by virtue of the harm principle's focus on the prevention of harm.¹⁸

The factors set out by Feinberg presuppose an empirical enquiry, whereby one needs to determine the gravity and magnitude of a potential harm and the probability of such a harm eventuating, and weigh this against the utility of the potentially harm causing behaviour in making decisions as to whether or not to criminalise. Furthermore, one needs to establish that there is no other way of preventing harm outside of criminalisation that is equally effective. As discussed above, it is this empirical analysis that is lacking in the context of the preventive terrorism offences in counter-terrorism legislation. It seems obvious that the potential gravity and magnitude of harm resulting from a terrorist attack is incredibly high - no-one would trivialise the devastating consequences of loss of life, maiming, damage to property and destabilising of society that results from terrorist attacks. However, evidence as to the probability of such an attack occurring, and the ability of the offences to prevent this harm from arising is less clear. Feinberg's formulation does

¹⁸ Tadros argues that the harm principle 'must be understood to include conduct that creates a risk of harm or a tendency to harm' and is thus fairly broad. Tadros, 'Crimes and Security', 942; Simester and Von Hirsch state that "in the absence of harm, or risk of harm, the state is not morally entitled to intervene". Simester and von Hirsch, *Crimes, Harms, and Wrongs: On the Principles of Criminalisation*, 35.

not tell us how we should calculate or weigh up these various factors and does not attempt to develop a precise system for making these empirical determinations. In practice, the legislature seems to rely on the gravity and magnitude of the ultimate harm as license to enact new offences, irrespective of the plausibility of them occurring and the fact that it is not clear that such offences are necessary to prevent harm.

The harm principle requires an objective enquiry into the harmful consequences of certain conduct and empirical evidence as to the suitability and efficacy of an offence to prevent this harm.¹⁹ In the absence of this empirical evidence, the harm principle does not provide any meaningful restraint on criminalisation of offences that extend inchoate liability as a means of preventing terrorism. If the harm principle is to do sufficient work as a limiting principle, it is necessary to engage with the empirical questions regarding the consequences of enacting new offences.

In summary, according to Feinberg's formulation of the harm principle, there are positive grounds for criminalising conduct in order to prevent harm to others, taking into account factors such as the probability of harm occurring, the gravity and magnitude of such harm were it to occur, and the ability of the offences to prevent such harm. Thus, it may be permissible to criminalise conduct that creates a risk of harm, not because the risk constitutes harm in itself, but rather in order to prevent the ultimate harm

¹⁹ Simister and von Hirsch, *Crimes, Harms, and Wrongs: On the Principles of Criminalisation*, 35-36.

from occurring. The satisfaction of the harm principle, which may provide positive grounds for criminalisation, is therefore founded on the preventive aspect of the harm principle and the criminal law. This principle is clearly very broad – almost all conduct could be said to risk causing harm to some degree – and in the context of the preventive terrorism offences does not provide a sufficiently powerful constraint on criminalisation. One therefore needs recourse to further limiting principles and constraints in determining the justifiability of the preventive terrorism offences.

2.2.2 *The Wrongfulness Principle*

Another fundamental principle of criminalisation is that of wrongfulness.²⁰ The criminal law is concerned with prohibiting and punishing wrongful conduct. While harm consists in a setting back of interests, not all such setbacks are the concern of the criminal law. The additional essential element is that of wrongfulness – the criminal law is concerned with prohibiting wrongful setbacks to interests, or wrongful harms. Whereas the harm principle involves an objective enquiry as to the harmful consequences of

²⁰ It is generally accepted that wrongfulness is an essential requirement for criminalisation. See, for example Ashworth, *Principles of Criminal Law*, R A Duff, *Answering for Crime: Responsibility and Liability in the Criminal Law* (Hart Publishing 2007), Husak, *Overcriminalization: The Limits of the Criminal Law*, M Moore, *Placing Blame: A Theory of Criminal Law* (Oxford: Clarendon Press 1997), Simester and von Hirsch, *Crimes, Harms, and Wrongs: On the Principles of Criminalisation*. See, also, recent theoretical debates on the content of the wrongfulness principle in A P Simester, 'Enforcing Morality' in A. Marmor (ed), *The Routledge Companion to Philosophy of Law* (New York: Routledge 2012); A du Bois-Pedain, 'The Wrongfulness Constraint in Criminalisation' (2014) 8 *Criminal Law and Philosophy* 149; J R Edwards and A P Simester, 'Wrongfulness and Prohibitions' (2014) 8 *Criminal Law and Philosophy* 171; Antony Duff, 'Towards a Modest Legal Moralism' (2014) 8 *Criminal Law and Philosophy* 217.

particular conduct, the wrongfulness principle focuses on the moral nature of the conduct to be criminalised by asking whether the conduct itself is wrongful. This principle reflects the essentially moral character of the criminal law and its retributivist rationale based on notions of desert and moral blameworthiness.²¹ The two principles are therefore complementary in any assessment of the justifiability of offences, as they reflect both preventive and retributive rationales.²²

The wrongfulness principle is grounded in the expressive role of the criminal law as an institution that condemns and punishes offenders for culpable wrongdoing.²³ Once a person is convicted of an offence, they are labelled as wrongdoers, deserving of condemnation and punishment by the state. It is therefore important that the criminal laws prohibit conduct that is in fact wrongful, and that those who commit such prohibited acts deserve the condemnation and punishment meted out by the criminal law. People are entitled not to be labelled and punished as criminals where they have not committed any wrong.²⁴

²¹ See Duff, 'Towards a Modest Legal Moralism' for an examination of various forms of legal moralism in terms of wrongfulness.

²² See A von Hirsch, 'Harm and Wrongdoing in Criminalisation Theory' (2014) 8 *Criminal Law and Philosophy* 245, who argues for a 'dual element approach' to criminalisation where both harm and wrongfulness are necessary conditions. For a differing approach, see John Gardner, *Offences and Defences* (Oxford University Press 2007), chapter 1, where it is argued that the fundamental issue in determining whether or not conduct should attract criminal liability is not harm, but wrongfulness. See also Moore, who argues in favour of wrongfulness as the fundamental basis for criminalisation.

²³ Duff, 'Perversions and Subversions of Criminal Law', 89.

²⁴ Simester and von Hirsch, *Crimes, Harms, and Wrongs: On the Principles of Criminalisation*, 19-20.

It is generally accepted that there may be instances of wrongful conduct that cause or risk harm but which should not be liable for sanction under the criminal law.²⁵ This is due to the principle that only wrongful conduct of a public nature should be criminalised. This public element can manifest in one of either two ways. Either there can be a specific wrong against the public in that the victim is not an individual but rather a community, for example offences against state security.²⁶ However, the more common conception of a wrong against the public relies not on the fact that it is directed against the state or a community, but rather that the nature of the wrong is of concern to the public such that the public is wronged by a wrong done to an individual. According to Duff:²⁷

We should interpret a 'public' wrong, not as a wrong that injures the public, but as one that properly concerns the public, ie the polity as a whole ... A public wrong is thus a wrong against the polity as a whole, not just against the individual victim: given our identification with the victim as a fellow citizen, and our shared commitment to the values that the rapist violates, we must see the victim's wrong as also being our own wrong.

Put slightly differently, certain wrongs are sufficiently serious as to concern not only the individual person who has been affected by the wrong but also the public as a whole. Thus, there is a public interest in prohibiting and

²⁵ For example, cheating on one's partner, lying, self harm and so forth.

²⁶ Ashworth, *Principles of Criminal Law*, 29.

²⁷ Duff, *Answering for Crime: Responsibility and Liability in the Criminal Law*, 141-2. See also Grant Lamond, 'What is a Crime?' (2007) 27 *Oxford Journal of Legal Studies* 609.

punishing such conduct because it is of public concern.²⁸ Lamond argues that rather than saying that a wrong has been done *to* the public, it is better to understand public wrongs as wrongs that the public should be responsible for punishing.²⁹ The public is not the victim of the wrong. Rather, the public is the proper body to bring proceedings against the wrongdoer and to impose any required punishment.³⁰ Thus, a public wrong is a wrong that it is in the public interest to prosecute and punish, irrespective of the individual affected.

In the context of terrorism offences, both conceptions of this 'public' element are relevant. Acts of terrorism are without a doubt regarded by the polity as acts worthy of condemnation and punishment by the state. Public abhorrence of terrorism is undisputed. In this sense, it could be argued that the wrong of terrorism is of public concern in that it is a wrong done to the public as a whole, based on the public's shared commitment to the values violated by acts of terrorism. Furthermore, it is in the public interest for the State to be responsible for punishing acts of terrorism. However, terrorism can also be seen to be an attack on the state itself, aimed at destabilising government and terrorising a community. On such a construction, a wrong is done to the public directly in that it is the public (ie the state or the community) that is the targeted victim of this wrong.

²⁸ Ashworth, *Principles of Criminal Law*, 2.

²⁹ Lamond, 'What is a Crime?', 614.

³⁰ *Ibid*, 621.

Terrorism readily meets this principle of wrongfulness of concern to the public, no matter which interpretation of the principle is preferred. However, this is not necessarily the case when one examines specific offences enacted in order to prevent acts of terrorism. Judging wrongfulness in the context of direct harm causing conduct, such as murder or destruction of property, is a relatively straightforward process. However, it becomes far more difficult in respect of offences that extend inchoate liability, for example, it is difficult to identify the wrongful conduct involved in the possession of material that may be useful to a person committing or preparing to commit an act of terrorism, as under section 58 of the Terrorism Act 2000.³¹ It may be clear that the ultimate harm that the offence seeks to prevent is wrongful, but that does not necessarily render the conduct that risks such harm wrongful. The external elements of the harm-risking conduct may not, by themselves, provide any indication that the conduct is wrongful.³² In cases such as these, recourse must be had to the underlying intention with which the conduct is performed in order to judge whether it is wrongful. Glanville Williams explained that:³³

the act constituting a crime may in some circumstances be objectively innocent, and take its criminal colouring entirely from the intent with which it is done.

³¹ For a discussion of the difficulties of reconciling possession offences with the general paradigm of criminal law, see Ashworth, 'The Unfairness of Risk-Based Possession Offences'.

³² W Chan and A P Simester, 'Four Functions of Mens Rea' (2011) 70 Cambridge Law Journal 381, 385.

³³ G Williams, *Criminal Law: The General Part* (2nd edn, 1961), 22.

In intention-dependent wrongs such as these, the *mens rea* requirement becomes a means of constituting the wrongfulness of the *actus reus*, rather than simply operating to establish fault.³⁴ This leads into the first of the constraints that is proposed for assessing the justifiability of the preventive terrorism offences – the culpability constraint.

2.3 Constraints on Criminalisation

2.3.1 *The Culpability Constraint*

It is difficult to identify objectively wrongful conduct in the case of many of the terrorism offences that extend inchoate liability. However, it is arguable that what seems to be objectively non-wrongful behaviour can become morally wrongful when coupled with an intention to carry out or assist another to carry out an act of terrorism. It is this intention with regard to the ultimate harm at which the legislation is aimed and that may form the basis for determining whether a person has acted wrongfully.

Ideally one should be able to distinguish the wrongfulness of the act from the actor's culpability in performing the act. However, in cases of remote harms, to insist on retaining a rigorous division between these principles is not always possible. The underlying terrorist intent with which a preparatory, ostensibly non-harmful action is undertaken clearly impacts

³⁴ Chan and Simester, 386.

upon determinations of wrongfulness of the act. Buying bleach is not wrongful. Buying bleach with the intention of using it to create a bomb with which to commit an act of terrorism surely is. Intention becomes a constitutive part of the wrongful act, transforming what may appear to be objectively innocent into something that is wrongful. For this reason, it is necessary to insist on a high degree of culpability in relation to the ultimate harm when creating offences that extend inchoate liability. Only where there is an ulterior intention with regard to the ultimate harm can a person legitimately be said to have acted wrongfully in committing conduct that, in isolation, appears non-wrongful. As will be seen in the chapters that follow, many of the preventive terrorism offences are strict liability offences, which have the potential to criminalise non-wrongful conduct.

Apart from the importance of a culpability constraint as a means of constituting wrongfulness, this constraint is also necessary to establish fault. Duff argues that inchoate offences are criminal only by virtue of their derivative relationship with some primary harm or substantive offence. They need not involve the commission of the substantive offence or the causing of harm.³⁵ This is reflected in the fact that it is generally accepted that the required fault element for inchoate offences is intention, and not the lower standard of recklessness or negligence – for example, the higher *mens rea* requirement for attempts liability. If this higher *mens rea* standard is required for inchoate liability, surely it is even more important to retain this fault

³⁵ Duff, *Criminal Attempts*, 129.

requirement in offences that extend inchoate liability, where the connection between the offence and the ultimate harm to which it relates is even more remote. In order to hold a person liable for conduct that risks harm by virtue only of the future actions of that person or another in committing the ultimate harm, it is necessary for that person to have intended the ultimate harm to occur. Without this high culpability constraint, there is an insufficient connection between the offender's conduct and the ultimate harm that the offence seeks to prevent.

In summary, a person should not be held liable for conduct that creates a risk of harm unless they engaged in such conduct with a high degree of culpability, in the form of an ulterior intent in respect of the ultimate harm that the offence aims to prevent.³⁶ It is not enough to say that the conduct made the ultimate harm more likely. There must be a high level of culpability for the commission of the ultimate harm.³⁷ Where the offender commits an act that is the subject of a preventive terrorism offence with the intention to commit the ultimate terrorist harm, one could say that the offender displays a high degree of culpability in respect of that ultimate harm. However, this becomes more difficult where the act is committed with only recklessness or negligence as regards the ultimate harm.³⁸ As will be seen in the following chapters, the encouragement and dissemination offences in sections 1 and 2 of

³⁶ Though see P Asp, 'Preventionism and Criminalization of Nonconsummate Offences' in A Ashworth, L Zedner and P Tomlin (eds), *Prevention and the Limits of the Criminal Law* (OUP 2013), who argues that an ulterior intent requirement does not always render nonconsummate offences justifiable.

³⁷ Husak, *The Philosophy of Criminal Law*, 138.

³⁸ *Ibid*, 139.

the Terrorism Act 2006 and the possession offences in section 57 and 58 of the Terrorism Act 2000 arguably fall foul of this constraint, due to the fact that they allow for liability in cases of recklessness. However, the offence of preparation for terrorism in section 5 of the Terrorism Act 2006 satisfies this constraint by requiring an 'intention of committing acts of terrorism or assisting another to commit such acts'.³⁹

Requiring a high degree of culpability ensures that offences are not so broad as to criminalise those who are not deserving of censure and punishment by insisting on a connection between the prohibited act and the ultimate harm. However, even if such a connection is founded, the distance between the harm-risking conduct and the ultimate harm may be too great to justify criminalisation.⁴⁰ If we are to impute responsibility for the ultimate harm to a person who performs some preliminary conduct, with the intention of furthering the ultimate harm, what types of conduct would suffice for liability? Would any act performed with the relevant intent be liable for criminalisation, for example, the act of waking up in the morning and getting dressed, intending to later commit a terrorist act? At what point does one judge the intention to further the ultimate harm? If liability for remote harm offences is based largely on the intention of the offender, how can it be shown that the offender's intention is sufficiently settled as to be deserving of criminal liability? This leads to the next constraint that is proposed for

³⁹ s5 Terrorism Act 2006

⁴⁰ Simester, 'Prophylactic Crimes', 68; Ashworth and Zedner, *Preventive Justice*, 112.

determining the justifiability of the preventive terrorism offences – the proximity constraint.

2.3.2 *The Proximity Constraint*

One of the chief concerns that arise when examining the justifiability of inchoate offences is the question of proximity.⁴¹ At what point can one say that conduct is too remote from the causation of harm to be legitimately targeted by the criminal law? According to Husak, if the risk-causing conduct is not sufficiently proximate (ie. too remote or distant) to the ultimate harm that such conduct risks, criminal liability would not be justified. The conduct must be sufficiently proximate in order to evidence a direct relationship with the ultimate harm that such conduct risks.⁴² Determining just where this proximity line falls is a very difficult task. However, efforts to enforce a proximity principle can be seen in the formulation of the inchoate offence of attempt, whereby conduct must be more than merely preparatory. While there is no general consensus on where exactly the tipping point should be for determining questions of proximity, it seems fairly clear that this requirement would represent a significant stumbling block for the preventive terrorism offences. For example, section 5 of the Terrorism Act 2006 sets out that ‘a person commits an offence if, with the intention of committing acts of terrorism or assisting another to commit such acts, he engages in any conduct

⁴¹ Simester and von Hirsch, ‘Remote Harms and Non-constitutive Crimes’

⁴² Husak, *The Philosophy of Criminal Law*, 140.

in preparation for giving effect to his intention', the penalty for which is life imprisonment. This provision contravenes the test set in relation to attempts that only conduct that has progressed beyond the merely preparatory falls within the ambit of criminal liability, extending it to a point even more remote from the commission of the substantive harm.⁴³

The question of proximity has formed the basis of discussions about attempts liability, where it is necessary to determine at what point in time conduct can be said to be 'more than merely preparatory', or far enough advanced to count as an attempt. How this question is answered depends, in part, upon whether an objective or a subjective approach to criminal liability is preferred. In terms of the subjective analysis, culpability is related to a person's choices. If someone makes a morally defective choice by choosing to do a wrong action, they will be culpable for that action. Therefore, if such person does not deliberately choose to perform the wrongful action,⁴⁴ they will lack the requisite fault element.⁴⁵ One might say that under a subjective approach a person should be held liable for his or her bad intentions and choices in furtherance of those intentions, whether or not any harmful outcome resulted. It would therefore be logical to assume that subjectivists

⁴³ See chapter 4 for an analysis of the offence in section 5 of the Terrorism Act 2006.

⁴⁴ Note that in respect of specific intent crimes, the defendant must not only have the requisite intent as to conduct but also intend the specific consequence required.

⁴⁵ In cases of criminal liability for recklessness, subjectivists argue that liability should only attach where a person engaged in conduct that was sufficiently risky to warrant criminal sanction, and he or she was aware that the action was risky. Thus, the person is choosing to engage in risky behavior and liability is warranted on the basis of this choice. V Tadros, 'Recklessness and the Duty to Take Care' in S Shute and A P Simester (eds), *Criminal Law Theory: Doctrines of the General Part* (OUP 2002), 227-228. See also A Norrie, *Crime, Reason and History: A Critical Introduction to Criminal Law* (3rd edn, Cambridge University Press 2014), ch 4, for a discussion of the subjectivist/objectivist dichotomy in the context of criminal liability for recklessness.

would be in favour of a broad law of attempts liability, provided there is evidence of a clear criminal intent. The conduct element would be required simply as evidence of such criminal intent.

In contrast, an objective analysis focuses on conduct rather than choices. According to this account, where a wrongful act is committed by someone when a reasonable person would not have acted in such a way, that person is culpable, even if he or she did not deliberately intend to do wrong or was not aware of the wrongdoing.⁴⁶ One might therefore assume that an objective approach would be more likely to favour a narrow law of attempts, as there would need to be objectively wrongful conduct before criminal liability would be imposed. However, legal commentators do not generally adopt a wholly objective or wholly subjective approach but rather some mixture of the two.⁴⁷

Duff, in his monograph on attempts liability, argues that while subjective intention is crucial for criminal liability, it should be accompanied

⁴⁶ A P Simester and G R Sullivan, *Criminal Law Theory and Doctrine* (3rd edn, Hart Publishing 2007), 9.

⁴⁷ For various approaches see: Lawrence Crocker, 'Justice in Criminal Liability: Decriminalizing Harmless Attempts' (1992) 53 Ohio St LJ 1057, in support of an objective approach, arguing in favour of an imposition theory of criminal liability. P R Glazebrook, 'Should We Have a Law of Attempted Crime?' (1969) 85 Law Quarterly Review 28, B B Levenbook, 'Prohibiting Attempts and Preparations' (1980) 49 University of Missouri-Kansas City Law Review 41, Jonathan Rogers, 'The Codification of Attempts and the Case for "Preparation"' [2008] Criminal Law Review 937, all proponents of the criminalisation of preparatory offences. Daniel Ohana, 'Responding to Acts Preparatory to the Commission of a Crime: Criminalization of Prevention?' (2006) 25 Criminal Justice Ethics 1, in favour of limited instances of the criminalisation of preparatory offences. Larry Alexander and Kimberly Kessler Ferzan, *Crime and Culpability: A Theory of Criminal Law* (Cambridge University Press 2009), for a more radical position based on a subjectivist conception of criminal liability where results are not relevant for liability.

by an objective element taking in the consequences of the action.⁴⁸ The conduct element must be connected objectively to the commission of the substantive crime and cannot simply be seen as evidence of the offender's criminal intent.⁴⁹ Duff argues that criminal liability should only attach when 'an intending criminal passes beyond the stage of "mere preparation" and embarks on the commission of the crime itself'.⁵⁰ In explaining this, he states:⁵¹

At preparatory stages, preparatory conduct can be understood as being connected to an intended crime in light of the actor's intention to commit a crime. However, that connection is so far constituted primarily by her intention, and her commission of the crime has so far only a shadowy existence in the public world: it exists in thought (in her intention), but has yet to acquire any very concrete existence in her actions. As her criminal enterprise advances, and her criminal intention is further actualised in action, her prospective commission of the crime becomes less shadowy, more concrete as an active engagement in the world. Her actions connect her more closely to the commission of the crime, and in the end that crime becomes something that she is doing, rather than merely something she is intending or preparing to do.

Duff argues that one of the reasons for insisting on a high threshold in relation to the conduct element is that there needs to be a *locus poenitentiae*, that is an opportunity for potential criminals to decide for themselves to

⁴⁸ Duff, *Criminal Attempts*, 348.

⁴⁹ *Ibid*, 348-9.

⁵⁰ *Ibid*, 390.

⁵¹ *Ibid*, 387.

abandon their criminal plans. Not to allow for such a space would mean that the law would not be treating subjects as responsible agents, thus offending their autonomy.⁵² This argument in favour of a *locus poenitentiae* is particularly persuasive in cases of remote harm offences, where wrongfulness is often constituted by the underlying intention with regard to the ultimate harm, such as with many of the preventive terrorism offences. Where so much rests on the intention with which the offence was committed, there needs to be some evidence that the intention is in fact settled and the offender should be given a sufficient space in which to either abandon or commit to the criminal intention.

Duff's approach to attempts liability would not support the enactment of preventive terrorism offences targeting preparatory conduct, such as that in section 5 of the Terrorism Act 2006. Preparatory acts that are remote from the consummate harm that they are intended to prevent lack the required objective element in that much of the conduct could be regarded as objectively innocent.⁵³ It may be possible to accommodate preparatory offences more easily within a subjectivist account of the criminal law that focuses on the intention of the offender, provided there is a clear intention to commit the ultimate harm to which the preparatory offence relates. Such a rationale effectively allows for the punishment of people who have demonstrated their culpability by engaging in preparatory conduct that

⁵² Ibid, 387.

⁵³ McSherry, 154.

evidences their criminal intentions.⁵⁴ Any act that provides evidence of a person's criminal intention with regard to the commission of the ultimate harm would be sufficient, provided such act constituted clear proof of intention. However, intention is very difficult to prove in the absence of a conduct requirement that is sufficiently proximate to the ultimate harm. Furthermore, even on a subjectivist account, preventive terrorism offences face a problem in relation to the *locus poenitentiae*. While a person may have the intention to commit an act of terrorism, which is evidenced by a preparatory act, there is still the opportunity for them to have a change of heart (or mind) and decide not to proceed any further with their criminal plans. In such a situation, their original intention, for which they should be culpable according to subjectivists, no longer exists. They no longer present any danger as they have decided not to act on their original intention. While the objective fact that they no longer present a danger would not be a consideration under a subjectivist conception of liability, the fact that the initial intention has been replaced with the intention not to carry out the criminal endeavour is relevant. If criminal liability is based on a subjective analysis of intentions, at what point are those intentions judged? Where a person has a change of intention after taking some preparatory steps in furtherance of an initial intent to commit a crime, this would affect their culpability and thus, their criminal liability. This brings us back to the problem of when to attribute liability and what sort of conduct is necessary

⁵⁴ See Christopher Slobogin, 'The Civilization of the Criminal Law' (2005) 58 Vanderbilt Law Review 121 and Paul H Robinson, 'Punishing Dangerousness: Cloaking Preventive Detention as Criminal Justice' (2001) 114 Harvard Law Review 1429 for perspectives on dangerousness.

before liability can be imposed. Under a subjective analysis the conduct element may be purely evidential. However, in practical terms, it is still necessary for the actor to have committed some form of conduct that is sufficiently far along the spectrum of activity from first to last acts,⁵⁵ or sufficiently proximate to the ultimate harm, in order to eliminate or at least minimise the potential for a change of intention.

Alexander and Ferzan argue for a radical subjectivist conception of criminal liability where results are not relevant to whether or not a person should be held criminally liable.⁵⁶ However, although they adopt a subjectivist approach to criminal liability, they propose a 'last act' test in respect of inchoate offences, thus favouring a high threshold in relation to the conduct element. On their construction of subjectivism, preparatory acts would therefore not be justified. They acknowledge that in order to determine whether an actor is culpable, one needs to specify what sort of action is necessary to provide evidence of culpability. They contend that a person can only be considered to have acted culpably at the point when such a person 'engages in conduct that unleashes a risk of harm that he believes he can no longer control' and describe this as a 'last act' test.⁵⁷ They set out three assumptions that underlie this 'last act' test. First, they contend that one of the purposes of the criminal law is to 'influence the actor's reasons for action'.

⁵⁵ Ashworth and Zedner state: 'There is a whole spectrum of tests, from 'any overt act' as the least demanding, through the 'substantial step' test of the MPC and the 'more than merely preparatory' test of English law, to the most demanding test of 'last act'. Ashworth and Zedner, *Preventive Justice*, 110.

⁵⁶ Alexander and Ferzan, *Crime and Culpability: A Theory of Criminal Law*, 197.

⁵⁷ *Ibid*, 197-8.

Secondly, they recognise that an actor can change his or her mind and that this should be accommodated by the law. However, once the actor believes he or she has done everything necessary to unleash the risk of harm, the opportunity to change his or her mind has passed. Finally, they argue that an actor cannot be punished for future acts that have not been committed but rather only for actions that he or she has actually committed.⁵⁸ Alexander and Ferzan suggest that the formation of an intention is an act, but that it is not an act for which an actor can be culpable. This is due to the nature of intentions – it is hard to distinguish an intention from a fantasy or to say with certainty whether or not an intention will be pursued or even whether it is in fact possible to pursue such an intention. Intentions can be withdrawn or retracted; one can change one’s mind.⁵⁹ For the same reason, they reject the Model Penal Code’s substantial step formulation as being too close to intention in the spectrum from first to last act.⁶⁰ According to this argument, incomplete attempts would not be justified and only complete attempts would be liable to conviction and punishment.

While Alexander and Ferzan’s extreme subjectivist approach and Duff’s nuanced approach requiring some objective conduct may seem to be at differing ends of the philosophical spectrum, there are certain points of intersection with regard to their position on liability for inchoate offences. Both argue that a person cannot be held liable for their intentions without

⁵⁸ Ibid, 198.

⁵⁹ Ibid, 200.

⁶⁰ Ibid, 210.

requiring some form of conduct, due to the fact that intentions are not fixed and can be changed or abandoned. For Duff, this means that a person must be given a sufficient *locus poenitentiae* in order to respect individual autonomy, and conduct must have moved beyond 'mere preparation' in order to ensure this condition. For Alexander and Ferzan, this means that liability will not attach until a person believes they have done everything in their control to bring about the intended harm – the so-called 'last act' test for liability. The points at which liability attaches according to the two theories may differ, but both require some form of conduct that is sufficiently proximate to the intended harm in order to allow the actor to have a change of intention.

It was argued above that it may be possible to regard remote harm-causing conduct that appears to be non-wrongful as wrongful, provided there is a sufficiently high degree of culpability with regard to the ultimate harm. Where conduct is wrong by virtue only of the harm that it risks, intention becomes a constitutive element of wrongfulness. However, if one is to respect autonomy, one cannot simply rely on this culpability constraint without determining at what point the conduct is sufficiently proximate to justify regarding such conduct as wrongful and thus eligible for criminal liability. While the formulation provided by Alexander and Ferzan provides a neat and clear point for attributing liability by relying on a 'last act' test, this radical view does not accord with the long established position in the law of attempts liability that incomplete attempts are liable to punishment. Alexander and Ferzan's theory on the attribution of liability would result in a

substantial narrowing of inchoate liability and would certainly have no room for offences that extend inchoate liability. It does not seem correct to say that someone who has passed the point of preparation and is attempting to commit a crime but is interrupted in his or her criminal enterprise is not morally blameworthy. It is true that until the actor has done everything possible to bring about the ultimate harm there is a chance that he or she may decide not to proceed with the criminal plan. However, as the actor moves further along the road to completion the chances of a change of mind diminish and moral blameworthiness increases sufficiently so as to attract criminal liability. If we are to retain liability for attempts, based not only on its preventive rationale but also on the fact that there is something criminally blameworthy about attempting to bring about harm, then Alexander and Ferzan's theory must be rejected. Duff's argument, that conduct must have passed the stage of 'mere preparation' in order to be considered worthy of criminalisation, is more persuasive. Only where conduct has moved beyond the stage of mere preparation can one say that an actor is sufficiently engaged in carrying out his or her ultimate criminal intention in order to be held responsible for attempting the crime.

Criminalising preparations or possession or other forms of remote conduct fails to allow a sufficient *locus poenitentiae* for the offender to decide not to proceed with the ultimate criminal plan, and thus offends autonomy. With these preventive terrorism offences, where the relevant conduct is even more remote from the ultimate harm than the conduct required for inchoate

liability, arguments in favour of criminalisation become hard to sustain, especially when sentences of imprisonment are attached. This is not to say that conduct that has not passed the stage of 'mere preparation' can never attract criminal liability.⁶¹ Rather, it is argued that the further an act moves from the ultimate harm, the weaker the case for criminalisation.⁶² Duff's argument, that only actions that have passed beyond the preparatory should be criminalised as an attempt, is correct if one is to respect an actor's moral autonomy and allow a *locus poenitentiae* for a change of mind. However, there may be certain exceptional instances of preparatory conduct that are deemed sufficiently serious as to warrant criminal prohibition and sanction. Where this is so, there needs to be a recognition of the fact that an actor's blameworthiness increases the closer he or she comes to the commission of the ultimate harm. If preparatory offences are to address this issue and ensure that sufficient respect is given to an actor's autonomy, it should allow for a defence of withdrawal or voluntary abandonment, whereby the actor can renounce his or her criminal purpose. If such a defence were included in a preparatory offence, the offence would allow a *locus poenitentiae* within which

⁶¹ Note that efforts to enforce a proximity constraint in the law of attempts has led to the concern that certain conduct that should be criminalised is not captured due to the fact that the threshold for liability is set too high. This is illustrated by the controversial finding in *R. v. Geddes* [1996] Crim LR 894. In this case, the defendant had entered a school carrying equipment for detaining and assaulting a boy. However, the Court of Appeal held that the defendant could not be said to have done an act that was more than merely preparatory to imprisoning the boy. Rather, he had only got himself ready to commit the offence. The Court of Appeal therefore quashed the defendant's conviction for attempted false imprisonment of a child. The Law Commission expressed concern over the implications of the enforcement of a proximity requirement in attempts whereby law enforcers have to passively wait while an offender gets himself ready, but then may not have enough time to prevent the attack once it passes the stage of mere preparation (see Law Commission "Conspiracy & Attempts" No 318 (2009) Part 8, para 8.11-8.15). Such concerns have led to the introduction of specific preparatory offences, such as section 63 of the Sexual Offences Act 2003, which creates the offence of trespassing on premises with intent to commit a specified sexual offence.

⁶² Ashworth and Zedner, *Preventive Justice*, 112.

the actor could have a change of mind or heart and abandon the criminal plan, thus negating criminal liability.⁶³ In addition, where such preparatory offences are deemed necessary, there is an even greater need to set a high culpability requirement and to insist on adherence to rule of law standards to ensure that the preliminary conduct is sufficiently blameworthy as to attract criminal liability.

In summary, the *actus reus* of an offence may, in certain exceptional circumstances, consist of conduct that has not yet passed the stage of 'mere preparation'. However, where offences reach beyond the proximity threshold to cover preparatory conduct, it is crucial that the offence has a high culpability requirement in terms of an intention to commit the ultimate harm; the *actus reus* should only extend to conduct that is taken in furtherance of that intention; and there must be provision for a defence of voluntary abandonment. Furthermore, it is submitted that proximity must play a factor in determining the severity of the sentence imposed in order to reflect the fact that moral blameworthiness increases in correlation with proximity. Such constraints would allay normative concerns regarding the moral blameworthiness of an actor for conduct that is remote from the ultimate harm while still allowing for the targeting of conduct that is considered to be sufficiently serious to warrant the imposition of the criminal law.

⁶³ See Ohana, D., 'Desert and Punishment for Acts Preparatory to the Commission of a Crime' (2007) 20 Canadian Journal of Law and Jurisprudence 113, 125-126 for a discussion of the possibility of including a defence of voluntary abandonment in preparatory offences.

2.4 Rule of Law Standards

The principles and constraints sketched above focus primarily on the issue of remoteness and the ways in which to impute liability for acts that are remote from the ultimate harm to which they relate. However, a further vital constraint in determining the justifiability of the preventive terrorism offences comes from the rule of law. The practical and procedural rule of law standards may not appear at first glance to have the moral force of the principles and constraints set out above. However, as alluded to in the paragraph above, they are fundamental to the safeguarding of individual autonomy, liberty and human rights and are vital factors to be taken into account in any assessment of such offences.⁶⁴

A particularly troubling feature of much counter-terrorism legislation, which is particularly marked in the preventive terrorism offences, is that the offences are drafted in broad terms and they are often unclear. This concern was raised in the Report of the Eminent Jurists Panel on Terrorism, Counter-Terrorism and Human Rights, which highlighted the dangers inherent in vague or overbroad legislation.⁶⁵ It stressed that ambiguous or broad definitions of terrorism could allow for laws to be applied arbitrarily or in a

⁶⁴ Simester and von Hirsch, *Crimes, Harms, and Wrongs: On the Principles of Criminalisation*, 189.

⁶⁵ International Commission of Jurists, *Assessing Damage, Urging Action - Report of the Eminent Jurists Panel on Terrorism, Counter-terrorism and Human Rights* (2009).

discriminatory way against minorities. Furthermore, it reported that lawyers who testified at the hearings were concerned that:⁶⁶

the language of the statutes was often so vague as to make it difficult for them, still less for members of the public, to predict, with a reasonable degree of certainty, what kinds of activities would constitute such offences.

The importance of legal certainty was emphasised and it was stated that all counter-terrorism measures should be reviewed to ensure that they were precise and did not contain overbroad and vague definitions.⁶⁷

According to the rule of law, that collection of legal values that aim to protect the rights and expectations of those who come into contact with the law, citizens should be able to clearly ascertain and be guided by the law in order to understand what is expected from them so as to avoid criminal liability.⁶⁸ Hart argued people must be given 'a fair opportunity' to exercise the capacity for 'doing what the law requires and abstaining from what it forbids'.⁶⁹ Without this opportunity, it would be wrong to convict and punish them of a criminal offence.⁷⁰ Rule of law standards, such as maximum certainty of definition, fair labelling, non-retroactivity, fair warning and so

⁶⁶ Ibid, 127.

⁶⁷ Ibid, 157.

⁶⁸ For further literature on the rule of law, see F A Hayek, *The Constitution of Liberty* (Chicago University Press 1960); L Fuller, *The Morality of Law* (Yale University Press 1969); Joseph Raz, 'The Rule of Law and its Virtue' (1977) 93 *Law Quarterly Review* 195; J C Jeffries, 'Legality, Vagueness, and the Construction of Penal Statutes' (1985) 71 *Virginia Law Review* 189; K S Gallant, *The Principle of Legality in International and Comparative Criminal Law* (Cambridge University Press 2010).

⁶⁹ H L A Hart, *Punishment and Responsibility* (J Gardner ed, OUP 2008), 152.

⁷⁰ Ibid, 152.

forth, should be adhered to in order to guide conduct and, in so doing, ensure that the criminal law treats people as autonomous rational agents capable of making decisions regarding compliance with the law.

A further problem with unclear and overbroad offences, and a reason why rule of law standards are vital, is that such offences may extend to cover far greater conduct than the wrong at which the offence is aimed. Laws are drafted so as to cover both wrongful and innocent conduct, giving a wide discretion to police and prosecutors to determine against whom the offences should be enforced. Offences that are drafted in such expansive terms fail to identify the particular wrong that is the target of the offence and for which a person committing the offence would deserve to be punished. Apart from the obvious danger of abuse that comes with leaving the exercise of such broad discretions in the hands of the police and prosecutors, Edwards argues that these offences are objectionable due to their capacity to 'oust' the jurisdiction of the court.⁷¹ Courts cannot adjudicate on the true wrong in question, but rather have no option but to apply the over-inclusive laws and base decisions on the application of these laws. Compliance with the rule of law standards of maximum certainty and fair labelling would ensure that offences adequately identify the true wrong targeted and do not cover broader, potentially non-wrongful conduct.

⁷¹ James Edwards, 'Justice Denied: The Criminal Law and the Ouster of the Courts' (2010) 30 *Oxford Journal of Legal Studies* 725. See, also, Ashworth and Zedner, *Preventive Justice*

2.5 Conclusion

Lord Lloyd of Berwick, in his report on counter-terrorism powers, set out the following four principles, which he said should govern counter-terrorism legislation:⁷²

- i. legislation against terrorism should approximate as closely as possible to the ordinary criminal law and procedure;
- ii. additional 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; and
- iv. the law should comply with the UK's obligations in international law.

These four principles were confirmed in the House of Commons debate on the Terrorism Act 2000 as informing the drafting of the Act.⁷³ Furthermore, it seems apparent from the following statement made during the debate that it was envisaged that offenders would, for the most part, be prosecuted under the existing criminal law:⁷⁴

⁷² Lord Lloyd of Berwick, *Inquiry into Legislation Against Terrorism* (cm 3420 October 1996)

⁷³ Hansard, *HC Debate vol 341*, col 153.

⁷⁴ *Ibid*, col 162.

I said before that the Bill does not create the separate offence of terrorism. When terrorists are brought to trial, they are typically prosecuted for offences in the ordinary criminal law—murder, explosives offences, conspiracy to cause explosions, unlawful possession of firearms and so on. The main purpose of the Bill is not to extend the criminal code, but to give the police special powers to enable them to prevent and investigate that special category of crime. The police have no interest in using those powers in circumstances in which the normal criminal law will suffice, nor do they have the resources to do so.

Despite this avowed intention, the preventive terrorism offences clearly constitute a significant departure from the ordinary criminal law. Furthermore, the quote is incoherent, since the Terrorism Act 2000, and the counter-terrorism legislation enacted thereafter, evidently was designed to extend the reach of the criminal law.

The government has repeatedly stated its commitment to prosecution as the preferred way of dealing with terrorists.⁷⁵ This priority of prosecution is set out in the CONTEST strategy, which states that prosecution is the preferred counter-terrorism method.⁷⁶ Further to this, it states that a key priority is to improve the ability to prosecute people for terrorism-related

⁷⁵ HC Deb 10 July 2006, vol 448, col 1117

⁷⁶ H M Government, *CONTEST: The United Kingdom's Strategy for Countering Terrorism* (Cm 8123, 2011), section 4.

offences.⁷⁷ This position has received support from academics and bodies such as the Joint Committee on Human Rights.⁷⁸ The merits of prosecuting terrorists within a criminal justice system are clear. Defendants have the benefit of all of the due process rights and guarantees that may not otherwise be available in other *fora*. The requirement that the state prove its case against a defendant in open court, and that the defendant has an opportunity to respond to the charged faced, provides prosecution with a moral legitimacy that other extra-judicial counter-terrorism measures lack.⁷⁹ However, it is argued that this appeal to moral legitimacy is not in fact what is driving the expansion of inchoate liability and the enactment of preventive terrorism offences. Rather, these offences have been enacted to pursue preventive goals, allowing for early intervention and increased powers of investigation, such that many of the due process protections that should attend prosecution are absent. Reverse burdens of proof, expansive and ambiguous offence definitions, disproportionate sentences, and now even the possibility that trials may be held in secret,⁸⁰ are all features of the preventive terrorism offences that diminish the moral force of prosecution.

⁷⁷ *Ibid*, 7

⁷⁸ "We welcome this commitment. We wish to re-affirm the importance of using the ordinary criminal process and of liberty only being deprived on the basis of evidence which can be fairly contested in a proper process before the courts." JCHR p 14, para 28. Walker, *Blackstone's Guide to the Anti-Terrorism Legislation*, 182 para 6.01. Walker, 'Prosecuting Terrorism: The Old Bailey versus Belmarsh'

⁷⁹ Macdonald, 'Prosecuting Suspected Terrorists: Precursor Crimes, Intercept Evidence and the Priority of Security', 130.

⁸⁰ Following the partially secret trial of Incedal and Rarmoul-Bouhadjar (2014), *Guardian News and Media Ltd v Incedal* [2014] EWCA Crim 1861. See I Cobain, 'Student Cleared of London Terror Charge After Partially Secret Trial' *The Guardian* (26 March 2015), <http://www.theguardian.com/uk-news/2015/mar/26/student-cleared-london-terror-secret-trial-erol-incedal-not-guilty> (last accessed 6 October 2015); I Cobain, 'Why is the Crux of the Incedal Case a Secret? You're Not Allowed to Know' *The Guardian* (26 March 2015),

When dealing with the gravest potential dangers or harms, such as those posed by the threat of a terrorist attack, the existing boundaries of the criminal law may need to be redrawn. However, where to redraw these lines so as to respect autonomy, protect individual liberty and ensure the legitimate exercise of state authority is of paramount concern. It may be that the preventive concerns provide particularly persuasive reasons for enacting certain offences. However, where such offences do not satisfy the framework outlined above, they are not justifiably criminalised. If the criminal law is to retain its legitimacy as a moral institution responsible for condemning and punishing wrongful conduct, clear limiting principles and constraints are essential to establish the justifiability of extensions to inchoate liability for preventive goals.

3. The Definition of Terrorism

Before embarking on an analysis of the specific preventive terrorism offences that form the subject of this thesis, it is necessary to examine the scope of the definition of terrorism in the UK's counter-terrorism legislation. Section 1 of the Terrorism Act 2000 includes a very expansive definition of terrorism. All of the preventive terrorism offences make reference to terrorism within the statement of the offence and depend on this definition of terrorism for their operation. Therefore, the very broad definition of this term further extends inchoate liability by virtue of its impact on the preventive terrorism offences.

That the term terrorism is a contested concept barely needs mentioning.¹ Attempting to settle on a definition of terrorism has been compared by one writer to the search for the Holy Grail,² and likened by another to the warning above the gates to hell to abandon all hope.³ While it may be cliché, the aphorism 'one man's terrorist is another man's freedom fighter' illustrates one of the fundamental difficulties in settling on a universally accepted definition of terrorism.⁴ This chapter does not attempt to

¹ Alex Schmid, 'Terrorism: The Definitional Problem' (2004) 36 Case Western Reserve Journal of International Law 375, 395.

² Geoffrey Levitt, 'Is "Terrorism" Worth Defining?' (1986) 13 Ohio Northern University Law Review 97, 97.

³ D Tucker, *Skirmishes at the Edge of Empire* (Praeger 1997)p.51.

⁴ See Jeremy Waldron, *Torture Terror and Trade-Offs* (Oxford University Press 2010), 67, where he argues that by focusing on the distinction between the means and the ends of terrorism

reconcile the contested notions of the term, nor answer intractable questions as to the nature of terrorism. Neither does it propose an alternative legal definition of terrorism. There is a wealth of academic literature covering these and related questions regarding the definition of terrorism.⁵ Rather, the

one can dispense with the 'one man's terrorist is another man's freedom fighter' in defining terrorism.

⁵ Arunabha Bhoomik, 'Democratic Responses to Terrorism: A Comparative Study of the United States, Israel and India' (2005) 33 *Denver Journal of International Law and Policy* 285 Thomas Butko, 'Terrorism Redefined' (2006) 18 *Peace Review* 145 Antonio Cassese, 'The Multifaceted Criminal Notion of Terrorism in International Law' (2006) 4 *Journal of International Criminal Justice* 933 Marcello Di Filippo, 'Terrorist Crimes and International Co-Operation: Critical Remarks on the Definition and Inclusion of Terrorism in the Category of International Crimes' (2008) 19 *European Journal of International Law* 533 George P. Fletcher, 'The Indefinable Concept of Terrorism' (2006) 4 *Journal of International Criminal Justice* 894 David F Forte, 'Terror and Terrorism: There is a Difference' [1986] 13 *Ohio Northern University Law Review* 39 Ben Golder and George Williams, 'What is "Terrorism"? Problems of Legal Definition' (2006) 27 *UNSW Law Journal* 270 Alan Green, 'The Quest for a Satisfactory Definition of Terrorism: R v Gul' (2014) 77 *Modern Law Review* 780 K Hardy and G Williams, 'What is "Terrorism"? Assessing Domestic Legal Definitions' (2011) 16 *UCLA Journal of International Law and Foreign Affairs* 77 Jacqueline S. Hodgson and Victor Tadros, 'The Impossibility of Defining Terrorism' (2013) 16 *New Criminal Law Review* 494 David Jenkins, 'In Support of Canada's Anti-Terrorism Act: A Comparison of Canadian, British and American Anti-Terrorism Law' (2003) 66 *Saskatchewan Law Review* 419 Levitt T. M. A Luey, 'Defining "Terrorism" in South and East Asia' (2008) [38] *Hong Kong Law Journal* 129 Kent Roach, 'A Comparison of South African and Canadian Anti-Terrorism Legislation' (2005) 18 *South African Journal of Criminal Justice* 127 Kent Roach, 'The Case for Defining Terrorism with Restraint and without Reference to Political or Religious Motive' in Andrew Lynch, Edwina MacDonald and George Williams (eds), *Law and Liberty in the War on Terror* (The Federation Press 2007) Ben Saul, 'Definition of "Terrorism" in the UN Security Council: 1985-2004' (2005) 4 *Chinese Journal of International Law* 141 Ben Saul, 'Speaking of Terror: Criminalising Incitement to Violence' (2005) 28 *UNSW Law Journal* 868 Ben Saul, 'Defending "Terrorism": Justifications and Excuses for Terrorism in International Criminal Law' (2006) 25 *Australian Yearbook of International Law* 177 Ben Saul, *Defining Terrorism in International Law* (OUP 2006) Ben Saul, 'The Curious Element of Motive in Definitions of Terrorism: Essential Ingredient or Criminalising Thought?' in Andrew Lynch, Edwina MacDonald and George Williams (eds), *Law and Liberty in the War on Terror* (The Federation Press 2007) Ben Saul, 'Criminality and Terrorism' (October 2010) 10/106 *Sydney Law School Legal Studies Research Paper* 1 Ben Saul, 'Civilising the Exception: Universally Defining Terrorism' in A Masferrer (ed), *Post 9/11 and the State of Permanent Legal Emergency: Security and Human Rights in Countering Terrorism* (Springer 2012) Michael P Scharf, 'Defining Terrorism as the Peacetime Equivalent of War Crimes: Problems and Prospects' (2004) 36 *Case Western Reserve Journal of International Law* 359 Alex Schmid, 'Frameworks for conceptualising terrorism' (2004) 16 *Terrorism and Political Violence* 197 Schmid, 'Terrorism: The Definitional Problem' Gabriel Soll, 'Terrorism: The Known Element No One Can Define' (2004) 11 *Willamette Journal of International Law* 123 Jean-Marc Sorel, 'Some Questions About the Definitions of Terrorism and the Fight Against Its Financing' (2003) [13] *European Journal of International Law* 365 Elisabeth Symeonidou-Kastanidou, 'Defining Terrorism' (2004) 12 *European Journal of Crime, Criminal Law & Criminal Justice* 14 George Syrota, 'The Definition of a "Terrorist Act" in Part 5.3 of the Commonwealth Criminal Code' (2007) 33 *University of Western Australia Law Review* 307 Clive Walker, 'The Legal Definition of "Terrorism" in United Kingdom Law and Beyond' [2007] *Public Law* 331 Jonathan

aim of this chapter is to critically assess the definition of terrorism in the Terrorism Act 2000 in order to determine how it affects the operation of the preventive terrorism offences and to establish whether the definition can provide a meaningful restraint on the breadth of the offences.

Before analysing the scope of the definition, this chapter engages briefly with the prior question of the necessity of a separate legal regime governing terrorism. In determining the justifiability of the preventive terrorism offences it is necessary to address this wider question as to why the ordinary criminal law has not been deemed adequate by the legislature to meet the terrorist threat. From this brief discussion, it appears that the most persuasive reasons for a separate body of counter-terrorism law are that of fair labelling and the expressive function of the criminal law, coupled with the specific complexities of policing terrorism resulting from particular features of terrorism itself. Even if a case could be made for responding to terrorism under the ordinary criminal law, ultimately such debate is now moot in the wake of 9/11, the London 7/7 bombings, and most recently and pressingly, the activities of IS. Terrorism is now firmly entrenched as a legal concept and forms the subject of specific legislation, triggering terrorist-specific powers. It is therefore important to ensure that terrorism is defined in a manner that clearly distinguishes it from other forms of crime so as to adequately capture the specific attributes of terrorism offences.

Weinberger, 'Defining Terror' (2003) 4 Seton Hall Journal of Diplomatic and International Relations

The definition of terrorism within a separate body of counter-terrorism legislation has two principal effects: it labels a person found guilty of an offence under the legislation as a terrorist, and thus liable to condemnation, censure and punishment for the moral wrongdoing of engaging in prohibited conduct as a terrorist;⁶ and it triggers the operation of various coercive counter-terrorism powers and procedures.⁷ Thus, the definition should be narrowly tailored to catch only conduct that should rightfully be described as terrorism so as to ensure that only those who deserve to be labelled as terrorists are caught within the definition, and that the required powers are available in the circumstances in which they are intended to operate. In light of this, the chapter then moves on to analyse the scope of the definition of terrorism in the Terrorism Act 2000, including some contextual background regarding the enactment of the definition. In analysing the scope of the definition, comparisons are drawn with various other definitions, particularly the two most authoritative international definitions of terrorism, namely the International Convention for the Suppression of the Financing of Terrorism⁸

⁶ Technically, section 1 of the Terrorism Act defines the conduct of the offence under which a person is prosecuted and not his/her status as a terrorist offender. This is in accordance with the rest of the criminal law, whereby an offence definition sets out conduct, not status. For example, the definition of the crime of rape defines the conduct of the person who commits the offence, not the status of the offender as a rapist. However, in terms of section 40(1) of the Terrorism Act 2000, any person who has committed an offence under the Act (excluding the uniform offence in section 13, discussed in chapter 7 of this thesis) or who has been 'concerned in the commission, preparation or instigation of acts of terrorism', is regarded as a 'terrorist'. The definition of terrorism determines the scope of the offences under the Act and also determines whether a person has been concerned in the preparation etc. of terrorism. Thus, the definition plays a significant role in the labeling of the offender as a terrorist.

⁷ Hodgson and Tadros, 'The Impossibility of Defining Terrorism'.

⁸ International Convention for the Suppression of the Financing of Terrorism, Dec 9 1999, 2178 UNTS 197.

and Security Council Resolution 1566,⁹ both of which are narrower than the UK definition.

Having undertaken a critical examination of the scope of the definition of terrorism, the chapter concludes that the UK definition is overly broad, and this has serious implications for the scope of the specific terrorist offences under consideration. One cannot rely on the definition of terrorism to limit the operation of the preventive terrorism offences or render them justifiable. Rather, the definition has the opposite effect. The wide-reaching definition serves to further extend the reach of the criminal law through the preventive terrorism offences to ever more remote situations or behaviour, such that it is possible to capture conduct that falls far outside any plausible understanding of terrorism. Thus, this chapter criticises the definition of terrorism and its effect on the preventive terrorism offences. While this chapter does not propose an alternative definition of terrorism, it highlights the fact that the broad definition in UK law means that it is critical that the preventive terrorism offences are adequately constrained so as to prevent the potential unjust operation of the law.

3.1 Ordinary Criminal Law vs Specific Counter-Terrorism Laws

Before examining the scope of the definition of terrorism in UK law, it is helpful to address a more fundamental question regarding the necessity of a

⁹ S.C. Res 1566, U.N. Doc. S/RES/1566 (Oct 8, 2004).

separate legal regime governing terrorism. In assessing the preventive terrorism offences and their justification, one cannot avoid exploring questions about the nature of terrorism. What is it about terrorism that makes it so special and different that it is thought to justify a differential response from the criminal law? The idea of terrorism as a particularly grave form of criminality may explain why legislators have felt it necessary to enact a separate legislative regime to address this perceived threat. However, it is necessary to interrogate this belief that such offences deserve extraordinary legal responses. Is this prevailing view of terrorism as special well founded or should terrorist crimes simply be dealt with under the ordinary criminal law? As explained in chapter 1, the Terrorism Act 2000 was enacted on the basis that the government at the time held that comprehensive and permanent legislation was required in order to effectively address the threat of terrorism. The Act was enacted to replace the many temporary legislative provisions enacted over the previous decades in addressing terrorism related to the political situation in Northern Ireland. However, it could be argued that the ordinary criminal law is sufficient to deal with terrorism and that specific counter-terrorism legislation need not be enacted for this purpose. Acts of terrorism, such as murder, hijacking, arson, assault, damage to property and so on, are all crimes under the ordinary criminal law. Furthermore, the inchoate offences of attempt, encouragement and conspiracy are equally applicable to these offences where they are carried out as terrorism. However, in spite of the availability of the ordinary criminal law offences to deal with terrorism, there was clearly a desire or perceived need to

distinguish crimes of terrorism from ordinary crimes, which is reflected in the vast body of law governing this type of crime.¹⁰

This preference for a distinction between terrorist crime and ordinary crime is not always quite so clear-cut. It has been argued that it is preferable to treat terrorists as ordinary criminals so as to avoid the potential for them to be portrayed as political martyrs and to deny any claims to legitimacy of their actions. This appears to have been the view of Margaret Thatcher in the context of Northern Ireland, as epitomised by her quote in response to the IRA hunger strikes that '[t]here is no such thing as political murder, political bombing, or political violence. There is only criminal murder, criminal bombing, and criminal violence . . .'.¹¹ However, in spite of this reluctance to afford political status to terrorists, they were still governed by specific terrorism legislation and were referred to as terrorists.¹² More recently, in the second reading of the Bill which would become the Terrorism Act 2000, it was stressed that:¹³

... the Bill does not create the separate offences of terrorism. When terrorists are brought to trial, they are typically prosecuted for offences in the ordinary criminal law – murder, explosive offences, conspiracy to cause explosions, unlawful possession of firearms and so on.

¹⁰ See chapter 1 for a summary of all counter-terrorism specific legislation that has been enacted since 2000.

¹¹ Speech given by Margaret Thatcher in Belfast on 5 March 1981, <http://www.margaretthatcher.org/document/104589> accessed 4 October 2015.

¹² See chapter 1 for brief summary of the counter-terrorist legislation that applied in Northern Ireland.

¹³ Hansard, *HC Debate vol 341*, col 162.

It was stated that the main purpose of the Bill was ‘not to extend the criminal code, but to give the police special powers to enable them to prevent and investigate that special category of crime’.¹⁴ This quote is very revealing as to the intention of the legislature in enacting counter-terrorism legislation and the focus on prevention and policing of terrorism. It indicates that preventive terrorism offences were enacted in furtherance of this preventive goal so as to allow investigation and policing in a way that would not be available under the ordinary criminal law, chiefly at an earlier point. In spite of the contention that terrorists are to be regarded as criminals who would usually fall within the ordinary criminal law, there is a voluminous body of specific terrorism legislation containing not only new and expanded police powers but also creating new criminal offences, thus extending the reach of the criminal law.¹⁵ As of 30 September 2014, a total of 488 persons had been charged under the terrorism legislation. This is in contrast to just 190 persons charged under non-terrorist legislation where the offence was considered to be related to terrorism.¹⁶ This gap closes somewhat in respect of prosecution and conviction figures, with a total of 235 persons convicted under terrorism legislation as of 30 September 2014 compared with 159 convicted under non-

¹⁴ Ibid, 162.

¹⁵ See chapter 1 for a brief summary of the specific terrorism legislation enacted since 2000.

¹⁶ Home Office, *Operation of Police Powers under the Terrorism Act 2000 and Subsequent Legislation: Arrests, Outcomes and Stops and Searches, Quarterly Update to 30 September 2014* (26 March 2015), para 3.5 <https://www.gov.uk/government/publications/operation-of-police-powers-under-the-terrorism-act-2000-quarterly-update-to-september-2014/operation-of-police-powers-under-the-terrorism-act-2000-and-subsequent-legislation-arrests-outcomes-and-stops-and-searches-quarterly-update-to-30-s>.

terrorism legislation.¹⁷ Thus, despite the assertion that most terrorists would be tried for offences under the ordinary criminal law, the statistics paint a rather different picture. The majority are being tried under specific counter-terrorism legislation. The difference in charge figures suggests that the terrorist legislation is favoured as an investigative tool, whereby suspects are arrested and charged under legislation that allows for early intervention and can be applied in circumstances where the ordinary criminal law isn't available. The fact that the charges under counter-terrorism legislation do not translate into convictions at the same rate as those charges under the ordinary criminal law further indicates that the counter-terrorism offences are being used as an investigative tool rather than as a means to convict culpable wrongdoing.

One of the primary arguments in favour of separate counter-terrorism legislation relates to the protection of public safety. The Home Office has stated that 'the first priority of any government is to ensure the security and safety of the nation and all members of the public'.¹⁸ An argument based on the need to enact specific legislation to target the terrorist threat to security and public safety is a legitimate one. It is accepted that terrorism presents a real and serious threat to society and that there is a clear and present danger in this regard. Furthermore, this threat is likely to be long-term.¹⁹ Terrorist

¹⁷ Ibid, para 3.6.

¹⁸ Home Office, *Pursue, Prevent, Protect, Prepare: The UK's Strategy for Countering International Terrorism* (Cm 75 47, London, 2009), 4.

¹⁹ Walker, *Blackstone's Guide to the Anti-Terrorism Legislation*, 22 para 1.61; Lord Lloyd of Berwick, *Inquiry into Legislation Against Terrorism*, 5.10; Report of the Eminent Jurists Panel on Terrorism, Counter-Terrorism and Human Rights, 23.

violence often targets civilians at random, potentially causing extensive casualties and creating a climate of fear among the public.²⁰ The catastrophic harm that can result from an act of terrorism provides one of the primary arguments in favour of a specific legal regime. As acknowledged in chapter 1, this goal of ensuring public safety from the threat of terrorism formed the rationale for the enactment of the counter terrorism legislation. However, while it is acknowledged that terrorism represents a threat of catastrophic harm to the public and that there may be particular policing and investigative difficulties in countering this threat due to the specific nature of terrorism, it is difficult to justify these claims without reference to empirical evidence that a separate legislative regime is in fact necessary and successful in preventing or reducing terrorism. The ordinary law is also available for prosecuting and policing those suspected of terrorist involvement and has been used in several instances to prevent acts of terrorism by targeting conduct that occurred before the commission of such an act.²¹

Without recourse to empirical evidence as to the efficacy of specific counter-terrorism legislation to prevent or reduce terrorist harm, what other arguments are there in support of the existence of this special body of law? Several arguments have been advanced, but it seems that the majority of them can broadly be related to two primary justifications, one related to the

²⁰ Lord Lloyd of Berwick, *Inquiry into Legislation Against Terrorism*, 5.11.

²¹ For example, Zaccarias Moussaoui, the so-called 20th hijacker, pleaded guilty to conspiracy to commit murder; Jack Roche was convicted of conspiring to bomb the Israeli embassy in Canberra; Richard Reid, the shoe bomber, was convicted of attempted murder; Abu Hamza was convicted of inciting or counselling murder in relation to his calls for violence at the Finsbury Park mosque.

expressive function of the criminal law²² and one related to the operational requirements of policing and prosecuting terrorism.²³

Starting, then, with the argument in favour of specific legislation based on the expressive function of the criminal law. According to this argument, terrorism represents a particularly grave form of criminality and this should be reflected in the criminal law.²⁴ This is tied to the principle of fair labelling, whereby offences should be accurately labelled so as to reflect the offender's wrongdoing.²⁵ Convicting terrorists of ordinary crimes under the existing criminal law fails to accurately label their particular wrongdoing and express appropriate condemnation for all acts of terrorism. Only by labelling an offender as a terrorist is there sufficient reflection of 'public revulsion at a particularly unpleasant offence'.²⁶ Furthermore, it has been argued that terrorism can be understood as action that subverts the democratic process and constitutes an attack on the State itself.²⁷ The fear occasioned by such acts of terrorism is seen as a tool for achieving political ends. Specific anti-terrorism legislation serves to reinforce the notion and communicate that it is

²² Saul, *Defining Terrorism in International Law*, 4.

²³ D Anderson, 'Shielding the Compass: How to Fight Terrorism without Defeating the Law' *European Human Rights Law Review* 233

²⁴ Lord Lloyd of Berwick, *Inquiry into Legislation Against Terrorism*, para 26.

²⁵ For further discussion of the principle of fair labelling, see Ashworth, *Principles of Criminal Law*, 78-80; Victor Tadros, 'Fair Labelling and Social Solidarity' in Julian V. Roberts and Lucia Zedner (eds), *Principles and Values in Criminal Law and Criminal Justice: Essays in Honour of Andrew Ashworth* (OUP 2012); J. Chalmers and F. Leverick, 'Fair Labelling in Criminal Law' (2008) 71 *Modern Law Review* 217.

²⁶ Anderson, 'Shielding the Compass: How to Fight Terrorism without Defeating the Law', para 21.

²⁷ Lord Lloyd of Berwick, *Inquiry into Legislation Against Terrorism*, 5.11.

illegitimate to use terrorism in order to achieve political aims, which is, of course, part of the very definition of terrorism in most legal definitions.²⁸

This argument for the creation of a specific body of terrorist law based on the expressive function of the criminal law goes some way but is not entirely convincing. The necessity of a terrorist label (under the criminal law) to reflect public revulsion is called into question when one considers the fact that the four men who attempted to perpetrate further bombing attacks in London two weeks after 7/7 were not convicted under specific counter-terrorism legislation. Rather, they were convicted of conspiracy to murder. The airline liquid bomb plot in 2006 also resulted in convictions for the eight accused of conspiracy for murder. At no time was it argued that these people should be convicted under terrorist legislation so as to accurately label the offenders as terrorists according to the law or more appropriately express their particular wrongdoing.²⁹ In fact, it seems that prosecutions for terrorist related offences have been made under ordinary criminal offences in cases where the harm caused or threatened and the wrong committed was far graver than in those cases where prosecutions occur under terrorist-specific legislation. This is due to the fact that convictions for specific terrorist offences seem to apply mostly in cases where plots are still at preparatory stages or where people are only peripherally involved with terrorism.³⁰ This is, of course, as one would expect, as the preventive terrorism offences are

²⁸ Walker, *Blackstone's Guide to the Anti-Terrorism Legislation*, 14 para 1.45.

²⁹ Anderson, 'Shielding the Compass: How to Fight Terrorism without Defeating the Law', para 21

³⁰ *Ibid*, para 21.

designed precisely to capture preparatory or pre-inchoate acts. Thus, the argument that the terrorist label is needed to accurately convey public revulsion does not reflect the reality that terrorism-related crimes that have progressed beyond the stage of preparation, and can thus be regarded as more serious and worthy of greater public condemnation and revulsion, are often prosecuted under the ordinary criminal law.

However, while this argument may not be completely convincing when attempting to justify the existence of a separate counter-terrorism regime, it is accepted that the expressive function of the criminal law and the principle of fair labelling are essential in ensuring that where laws are enacted they are justifiable. In other words, these arguments do not necessarily provide particularly strong justifications for creating specific terrorist legislation, but they do provide an essential restraint or limiting principle on such laws where they have been enacted. Ashworth includes the principle of fair labelling as one of the normative principles for criminal liability in his *Principles of Criminal Law*.³¹ As discussed in chapter 2, this principle operates to limit the labelling as terrorist of those for whom the label is not appropriate. Where offences have the potential to apply to those to whom the label of terrorist does not fit, the principle is infringed. This principle of fair labelling ought to be adhered to in order to ensure that the law has its appropriate condemnatory effect, such that 'it marks out an importantly

³¹ Andrew Ashworth, *Principles of Criminal Law* (5th edn, OUP 2006), 88.

distinctive wrong that has widespread public recognition'.³² Furthermore, by labelling an offender incorrectly, others may be misled as to the gravity or type of conduct in which the offender has engaged, resulting in unfairness to the offender.³³ Therefore, when assessing the definition of terrorism in the following section, this principle must be kept in mind in determining whether the definition has the required specificity to mark what it is that is distinctively wrongful about terrorism so that those who commit terrorist offences are deserving of the terrorist label.

The other main argument in favour of specific counter-terrorism legislation is that terrorism is a distinctive form of criminality, which necessitates different strategies in relation to policing and procedure. Ordinary methods of policing and procedure are not suitable or effective at dealing with this specialised form of crime. According to this argument, acts of terrorism are 'frequently perpetrated by well-trained, well-equipped and highly committed individuals acting on behalf of sophisticated and well-resourced organisations, often based overseas'.³⁴ Such organisations may have access to lethal technologies (although, if so, it is curious how little they use them) and sophisticated means of communication and make use of tactics such as suicide bombing, all of which necessitate specialised methods of policing.³⁵

³² Hodgson and Tadros, 'The Impossibility of Defining Terrorism', 497.

³³ Tadros, 'Fair Labelling and Social Solidarity', 68.

³⁴ Lord Lloyd of Berwick, *Inquiry into Legislation Against Terrorism*, 5.11.

³⁵ Report of the Eminent Jurists Panel on Terrorism, Counter-terrorism and Human Rights, 22.

Without the new offences and police powers available under specific counter-terrorism legislation, it is claimed to be very difficult to apprehend and successfully prosecute such terrorists.³⁶ However, the novelty of the current terrorist methods should not be overstated. While suicide attacks are a feature of terrorist action in Afghanistan, Pakistan and Iraq today, they are not a new phenomenon. They were perpetrated throughout history, for example by Japanese kamikaze pilots in World War II; by the Moro Juramentado during the Spanish-Moro conflicts of the 16th to the 19th century; and some have labelled the assassination of Tsar Alexander II of Russia in 1881 as a suicide attack. The practice has been used extensively in during the 20th century in the Lebanese Civil War and by the Tamil Tigers.³⁷ As to the fear of new, sophisticated lethal technologies, one should note that the vast majority of terrorist attacks are committed using readily available and unsophisticated weapons, specifically firearms and explosives.³⁸ This has been the case since the 1970s and remains so today.³⁹

Anderson has stated that one cannot simply rely on the seriousness or uniqueness of the problem of terrorism in order to justify the enactment of special powers. If special powers are to be justified, they must be justified 'by reference to the particular demands of policing and prosecuting terrorism'.⁴⁰

³⁶ Lord Lloyd of Berwick, *Inquiry into Legislation Against Terrorism*, 5.10.

³⁷ Anderson, 'Shielding the Compass: How to Fight Terrorism without Defeating the Law', para 22.

³⁸ LaFree, Dugan and Miller, *Putting Terrorism in Context: Lessons from the Global Terrorism Database*, 99-100

³⁹ *Ibid*, 104

⁴⁰ Anderson, 'Shielding the Compass: How to Fight Terrorism without Defeating the Law', para 23. See Ashworth and Zedner, *Preventive Justice*, 255, for a criticism of this statement and

He argues that the principal justification that can be advanced for specific terrorism laws is the need to 'defend further up the field'.⁴¹ According to this argument, the need for early intervention is based on the 'highly destructive potential of single, concentrated terrorist attacks' and 'the dangers of allowing such a plot to run'.⁴² This rationale accounts for the preventive terrorism offences, which are aimed at early intervention in order to prevent a terrorist plot reaching its conclusion. However, it also explains the various other counter-terrorism measures, such as special stop and search powers,⁴³ the ability to make arrests before an investigation is complete, executive measures such as TPIMs, and so-called 'soft' measures taken under the *Prevent* strategy.⁴⁴

This preventive rationale of defending up the field is the operational manifestation of the preventive principle that harms should be averted before they arise. Thus, while it may be that the specific operational demands of policing and prosecuting terrorism require broad powers that enable early arrests, as with preventive measures in general, there need to be certain limiting constraints in order to ensure that one does not defend so far up the

the argument that operational needs must be combined with principled restrictions on criminalisation of remote acts.

⁴¹ Anderson, 'Shielding the Compass: How to Fight Terrorism without Defeating the Law', para 27.

⁴² *Ibid*, paras 27, 29

⁴³ Section 44 of the Terrorism Act 2000, which allowed a person to be stopped within a designated area and searched for terrorist-related articles without suspicion of involvement in terrorism, has now been repealed. However, stop and search procedures for those traveling through ports or airports are still in force under Schedule 7 to the Terrorism Act 2000.

⁴⁴ See chapter 8 for a discussion of the *Prevent* strategy and discussion as to whether the so-called 'soft' measures are as soft as they are portrayed.

field as to unjustifiably infringe principles of liberty and autonomy. As Anderson himself states:⁴⁵

The fact that a specific operational objective is being pursued does not however mean that each measure operates in a just or acceptable manner. Indeed with such broad powers, the *potential* for abuse is rarely absent.

3.3 UK Definition of Terrorism

The current definition of terrorism is found in section 1 of the Terrorism Act of 2000.⁴⁶

- (1) In this Act 'terrorism' means the use or threat of action where
 - (a) the action falls within subsection (2),

⁴⁵ Anderson, 'Shielding the Compass: How to Fight Terrorism without Defeating the Law', para 44

⁴⁶ As amended by section 24 of the Terrorism Act 2006 and section 75 of the Counter-Terrorism Act 2008. Section 24 of the Terrorism Act 2006 amended sub-section(1)(b) so as to include within the definition of terrorism actions or the threat of actions that are designed to influence international governmental organisations. This was inserted to remove the disparity between the original UK definition and the definitions of terrorism in other international instruments, for example the EU Framework Decision of 13 June 2002 on Combating Terrorism, and the International Convention for the Suppression of Acts of Terrorism. This amendment allows the definition of terrorism to apply to acts committed or threatened against international bodies such as the United Nations. See Explanatory Notes to Terrorism Act 2006, para 158. Section 27 of the Counter-Terrorism Act 2008 amended sub-section(1)(c) to include acts committed for a racial cause. This is consistent with the recommendation by Lord Carlile in his 2007 report on the Definition of Terrorism. Carlile recommended that the definition should be amended to 'ensure that it is clear from the statutory language that terrorism motivated by a racial or ethnic cause is included'. Carlile, *The Definition of Terrorism: A Report by Lord Carlile of Berriew QC Independent Reviewer of Terrorism Legislation* (Cm 7052, March 2007), p 48, recommendation 12. While racial causes would often fall within political or ideological causes, this amendment was intended to 'put the matter beyond doubt that such a cause is included'. Explanatory notes to Terrorism Act 2008, para 203.

- (b) the use or threat is designed to influence the government or an international governmental organization 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, racial or ideological cause.
- (2) Action falls within this subsection if it
- (a) involves serious violence against a person,
 - (b) involves serious damage to property,
 - (c) endangers a person's life, other than that of the person committing the action,
 - (d) creates a serious risk to the health or safety of the public or a section of the public, or
 - (e) is designed seriously to interfere with or seriously to disrupt an electronic system.
- (3) The use or threat of action falling within subsection (2) which involves the use of firearms or explosives is terrorism whether or not subsection (1)(b) is satisfied.
- (4) In this section
- (a) "action" includes action outside the United Kingdom,
 - (b) a reference to any person or to property is a reference to any person, or to property, wherever situated,
 - (c) a reference to the public includes a reference to the public of a country other than the United Kingdom, and

- (d) “the government” means the government of the United Kingdom, of a Part of the United Kingdom or of a country other than the United Kingdom.
- (5) In this Act a reference to action taken for the purposes of terrorism includes a reference to action taken for the benefit of a proscribed organisation.

This very lengthy definition replaced the previous definition, set out in the Prevention of Terrorism (Temporary Provisions) Act 1989. According to this earlier formulation:

.... ‘terrorism’ means 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.

In his 1996 review of the UK’s counter-terrorism legislation, Lord Lloyd of Berwick recommended that the definition of terrorism contained in the PTA be amended. He accepted that in practice the definition had operated well, but that it was too narrow in that it did not capture ‘acts of terrorism perpetrated by single issue or religious fanatics’.⁴⁷ Instead, it was restricted to violence for ‘political ends’. However, he also criticised the definition for being too wide in that it ‘covers trivial as well as serious acts of violence’.⁴⁸ In

⁴⁷ Lord Lloyd of Berwick, *Inquiry into Legislation Against Terrorism*, p 25 para 5.22.

⁴⁸ *Ibid*, p 25 para 5.22.

order to address these criticisms, Lord Lloyd proposed a definition based on the working definition used by the FBI: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.

However, he noted that this definition could no doubt be improved.

The proposals set out in Lord Lloyd's report formed the basis of the Terrorism Act 2000. However, the definition that was adopted was not in fact the one suggested by Lord Lloyd. The current definition does resemble Lord Lloyd's proposal in certain key respects but seems to reach further than that proposed by him. In both definitions there is a requirement that violence must be serious; such violence can be against both persons and property; the definitions encompass acts of serious violence and the threat of such acts. There is a similarity in the requirement that such violence is used to coerce the government or the public. However, the definition in the Terrorism Act 2000 goes further than the definition proposed by Lord Lloyd in that it specifies violence against not only persons and property, but also endangerment to life, risk to public health or safety and interference with electronic systems. Also, such action need only 'influence' the government, or a governmental organisation, rather than intimidate or coerce. Finally, the

⁴⁹ Ibid p 26 para 5.23.

definition in the Terrorism Act 2000 includes a religious and a racial cause alongside a political and an ideological cause (but excludes a social cause).

The definition of terrorism in the Terrorism Act 2000 contains three elements, which shall be referred to here as the method, target and motive elements. It is important to remember that section 1 of the Terrorism Act 2000 does not create a separate offence of terrorism. For this reason, the elements of the definition do not correspond neatly with the typical elements of a criminal offence. However, the definition underpins the various preventive terrorism offences, as well as the other counter-terrorist powers, and it is therefore necessary to clearly articulate the elements of the definition in order to determine its scope and impact on the preventive terrorism offences.

The method element in the definition refers to the actions, or threats of actions, that constitute acts of terrorism. Section 1(2) specifies a list of actions or harms that could be classed as terrorism when accompanied by the target and motive elements, including serious violence against a person; serious damage to property; and actions which endanger life, create a serious risk to health or safety, or are designed seriously to interfere with or seriously to disrupt an electronic system.⁵⁰ Section 1(3) goes on to provide that where such action involves the use of firearms or explosives, it will be classed as terrorism whether or not the target element is satisfied.⁵¹ By section 1(4) of the Terrorism Act 2000, the definition of terrorism is given an international reach,

⁵⁰ Terrorism Act 2000, sections 1(1)(a) and 1(2)

⁵¹ Section 1(3)

specifying that it applies to action outside the UK and against people, property or governments anywhere in the world.⁵² As to the target element, according to the definition the action must be targeted towards influencing a government or international organisation, or to intimidating the public or a section of the public.⁵³ The motive element refers to the underlying purpose for which the action is performed. According to the definition, the motive for such action must be to advance a political, religious, racial or ideological cause.⁵⁴ The following sub-sections analyse these three elements of the definition in greater detail.

3.3.1 Method

As discussed above and in chapters 1 and 2, one of the primary rationales for the creation of the counter-terrorism legislation is to prevent the causing of catastrophic harm in the form of death and serious injury to the public. Public safety from the threat of terrorist harm is offered as the legitimating objective for these special laws and controls. However, the definition in section 1 extends far beyond harm in the form of death or serious bodily injury to cover various other forms of conduct. It is true that the level of violence required is raised from that which was required under the PTA in that it must be 'serious' violence. However, added to serious violence against persons are serious damage to property, endangerment of life, serious risk to

⁵² Section 1(4)

⁵³ Section 1(1)(b)

⁵⁴ Section 1(1)(c)

the health and safety of the public or a section of the public and serious interference or disruption of an electronic system. Furthermore, the threat of such action also falls within the scope of the definition. The notion of violence is therefore very broad. It is arguable that these types of damage or harm, beyond serious violence to a person, do not accurately reflect the violence that is commonly envisaged by the public or by government when contemplating terrorist violence. Whether or not damage to property or electronic systems engenders the level of human terror that is thought to be a necessary accompaniment to terrorist violence seems unlikely.⁵⁵ Furthermore, whether such lesser harms are deserving of the intrusions to liberty that accompany terrorist laws is also doubtful.⁵⁶

The UK definition is at variance with the two most authoritative international definitions of terrorism, namely the International Convention for the Suppression of the Financing of Terrorism⁵⁷ and Security Council Resolution 1566.⁵⁸ In both of these definitions, the focus of the definition is on the intentional killing or maiming of civilians. Article 2(1) of the Financing Convention defines an act of terrorism as an act that is already specified as an offence under an existing treaty, or as:⁵⁹

⁵⁵ Walker, *Blackstone's Guide to the Anti-Terrorism Legislation*, 7 para 1.19.

⁵⁶ Hodgson and Tadros, 'The Impossibility of Defining Terrorism', 510

⁵⁷ International Convention for the Suppression of the Financing of Terrorism, Dec 9 1999, 2178 UNTS 197.

⁵⁸ S.C. Res 1566, U.N. Doc. S/RES/1566 (Oct 8, 2004).

⁵⁹ International Convention for the Suppression of the Financing of Terrorism, Dec 9 1999, 2178 UNTS 197, Art 2(1)(a).

Any other act intended to cause death or serious bodily injury to a civilian, or to any other person not taking an active part in the hostilities in a situation of armed conflict, when the purpose of such act, by its nature or context, is to intimidate a population, or to compel a government or an international organization to do or to abstain from doing any act.

Security Council Resolution 1566 defines terrorism in almost exactly the same terms as the Financing Convention. While States are not required to implement this definition, it does provide evidence of the Security Council's conception of terrorism and is seen as providing guidelines for implementing the earlier Resolution 1373, which compelled States to enact counter-terrorism legislation. Resolution 1566 defines terrorism as:⁶⁰

Criminal acts, including against civilians, committed with the intent to cause death or serious bodily injury, or taking of hostages, with the purpose to provoke a state of terror in the general public or in a group of persons or particular persons, intimidate a population or compel a government or an international organization to do or abstain from doing any act.

In the case of *Suresh*, the Supreme Court of Canada held that the essence of terrorism was the intentional causing of 'death or serious bodily injury of a civilian.'⁶¹ The Court relied on the definition of terrorism set out in the International Convention for the Suppression of the Financing of Terrorism. Furthermore, in the UK case of *Al-Sirri v Secretary of State for the Home*

⁶⁰ S.C. Res 1566, U.N. Doc. S/RES/1566 (Oct 8, 2004), Art 3.

⁶¹ *Suresh v Canada* [2002] 1 SCR 3 [98].

Department, which was an immigration case concerning terrorism where the judges were not confined by a statutory definition of terrorism, the Court of Appeal relied on Resolution 1566 when determining the scope of section 54 of the Immigration, Asylum and Nationality Act 2006.⁶²

While these two international definitions have received express support from various international bodies,⁶³ they are not mandatory definitions that must be adopted in domestic legislation. Furthermore, there is not complete international agreement as to the authority or correctness of these definitions.⁶⁴ This is evident in the fact that the United Nations' attempts to draft a comprehensive Convention on Terrorism since 1996 has still not been possible, due largely to disputes as to whether the definition should acknowledge state terrorism and provide an exemption for national separatist movements.⁶⁵ Furthermore, the two definitions set out above do not cover all forms of terrorism and are potentially rather simplistic. For example, no guidance is given on how to respond to acts of cyber-terrorism or bio-terrorism or whether there should be exemptions provided for political

⁶² *Al-Sirri v Secretary of State for the Home Department* [2009] EWCA Civ 222.

⁶³ In 2004, the Secretary General of United Nation's High Level Panel on Threats, Challenges and Change recommended that these two definitions be referred to by domestic legislatures when drafting domestic definitions of terrorism; in 2006 the Special Rapporteur on Counter-Terrorism expressed support for the definition in Security Council Resolution 1566 to the United Nations Commission on Human Rights; the Office of the United Nations High Commissioner for Human Rights expressed support for the definition in Security Council Resolution 1566, stating that it was compatible with the principle of legality and was based on agreed parameters; in 2009 the Eminent Jurists Panel stated that the definitions in both the Financing Convention and Security Council Resolution 1566 represented a 'high degree of political consensus'. Hardy and Williams, 94.

⁶⁴ *Ibid*, 95.

⁶⁵ Anderson, 'Shielding the Compass: How to Fight Terrorism without Defeating the Law', para 52

protests or national separatist movements.⁶⁶ However, it is clear that the terrorist action that is covered by these definitions extends only to death or serious bodily injury. The definition of terrorism contained in the Terrorism Act 2000 does not accord with the view that death or serious bodily injury of a civilian is what constitutes the essence of terrorism.⁶⁷ The harm threshold that is set to constitute a terrorist action is fairly low and does not explicitly include these two most obvious forms of terrorist harms – death or serious bodily injury – as actions constituting terrorism, though they are averted to in the reference to endangering a person’s life.

3.3.2 Target

The target element of the definition of terrorism reflects the understanding that the target of a terrorist attack is not necessarily its immediate victim. Rather, a terrorist attack intends to reach a wider audience. In terms of this element, the action must be designed to influence the government or a governmental organisation or intimidate the public or a section of the public. Again, this is very broad and it could be argued that the word ‘influence’ in reference to the government is not stringent enough. Lord Carlile QC, a former Independent Reviewer of Terrorism Legislation, in his report on the definition of terrorism stated that the target element in the definition set the bar fairly low in using the word ‘influence’. He recommended that this be

⁶⁶ Hardy and Williams, 96

⁶⁷ Though section 1(2)(a) of the Act refers to ‘serious violence against a person’, and this could be seen to be an explicit reference to death or serious bodily injury, the definition encompasses far more than this harm.

replaced with the word 'intimidate', which he argued was in line with international definitions and the Council of Europe Convention on Terrorism and was a clear and easily referenced term that would raise the target requirement to a more appropriate level.⁶⁸ Walker, too, has suggested that the word 'intimidate' is preferable.⁶⁹ It is interesting to note that while the definition states that the act must be designed to 'influence' the government, it then uses the word 'intimidate' when referring to the designed effect on the public. This disjuncture, coupled with the use of 'intimidate' in relation to the government in other international definitions, makes the use of 'intimidate' preferable to 'influence' when referring to the intended effect on the government. The term is clear and consistent with international definitions and would also raise the required standard somewhat and thus narrow the scope of the target element.

3.3.3 *Motive*

The presence of a purpose or motive element in the definition of terrorism has generated much academic debate.⁷⁰ Under the UK definition, in order to be classed as an act of terrorism, an act must be made for the purpose of advancing a political, religious, racial or ideological cause. The international

⁶⁸ Carlile, *The Definition of Terrorism: A Report by Lord Carlile of Berriew QC Independent Reviewer of Terrorism Legislation*, para 59.

⁶⁹ Walker, *Blackstone's Guide to the Anti-Terrorism Legislation*, 10 para 1.30.

⁷⁰ For opposing views on the motive element see Saul, 'The Curious Element of Motive in Definitions of Terrorism: Essential Ingredient or Criminalising Thought?' and Roach, 'The Case for Defining Terrorism with Restraint and without Reference to Political or Religious Motive'.

definitions in the Financing Convention and Security Council Resolution 1566 do not include this requirement. The argument in favour of a motive requirement in the form of the underlying purpose for which the act is committed is that it more accurately describes what is considered to be characteristically wrongful about terrorism and it is necessary in order to distinguish terrorism from ordinary crime.⁷¹ However, there are very many strong arguments against the inclusion of this requirement. In brief, the arguments against such a requirement exist on three levels. First is the argument based on the characteristics of the criminal law. According to this argument, motive is not generally a required element in terms of the principles of criminal law. Therefore, introducing a motive requirement goes against general principles, which require *actus reus* and *mens rea*, but no motive or underlying purpose for liability. Intention or fault is, of course, distinct from motive or purpose. Secondly, there is a danger that in introducing a requirement that focuses on political, religious, ideological or racial beliefs, it could appear that the law is concerned with targeting people on the basis of those beliefs. Such a requirement could lead to the profiling of individuals or groups based on their religious or political affiliations and could also have a chilling effect generally on freedoms of speech, association and religion. Finally, there is the more practical argument that these motives may be difficult to prove, with the result that those who have committed acts

⁷¹ Saul, 'The Curious Element of Motive in Definitions of Terrorism: Essential Ingredient or Criminalising Thought?', 28-29.

of terrorism and should legitimately be caught by the legislation may escape liability.⁷²

Apart from the principled and practical dangers associated with including a political, religious, ideological or racial purpose requirement, it could be argued that the inclusion of a motive requirement is also unnecessary. Saul argues that this requirement is necessary to distinguish acts of terrorism from other criminal acts. However, there is already a distinguishing element in the requirement that the act must be intended to influence the government or intimidate the public. This is the view of Roach, who argues that no motive requirement is necessary. Anderson, in his report on the operation of UK counter-terrorism legislation in 2012 published in his role as Independent Reviewer, doubts that the various categories of motive are necessary from an operational perspective. He argues that religious, ideological and racial motives could be subsumed into one requirement for a political motive. However, while he acknowledges that the additional categories may be unnecessary, he ultimately does not recommend abolishing the motive requirement as he argues that this would significantly increase the reach of the definition.⁷³ For example, if there were no motive requirement, the assault of rival gang members could be classed as terrorism if it could be shown that the intention was to intimidate the rival gang's community; any offence with a firearm or explosive could be classed as terrorism, due to the

⁷² Roach, 'The Case for Defining Terrorism with Restraint and without Reference to Political or Religious Motive', 40-41.

⁷³ D Anderson, *The Terrorism Acts in 2012: Report of the Independent Reviewer on the Operation of the Terrorism Act 2000 and Part 1 of the Terrorism Act 2006* (July 2013), 58.

fact that the target element need not be proved in such cases; vandalism of a building could be classed as terrorism if it were done for the purpose of intimidating those members of the public who used that building; and so on. For this reason, it seems pragmatic and in the interests of 'fair labelling' to retain a motive requirement in order to add a degree of specificity to the definition of terrorism, thus narrowing its scope. Furthermore, while a motive requirement may not accord with general principles for criminal offences, it must be remembered that the definition of terrorism is not itself a criminal offence but only the definition upon which offences are based. Therefore, the fact that it does not have the typical characteristics of an offence is not, in itself, problematic.

3.4 A Vague and Overbroad Definition

The major criticism to be levelled against the definition of terrorism is that it is overbroad and consequently offends the principle of legality.⁷⁴ In their analysis of definitions of terrorism across various comparable jurisdictions, Hardy and Williams argue that the principle of legality provides the normative framework for drafting criminal legislation, including the drafting or amending of the definition of terrorism. They argue that the principle's strong foundations in classical liberalism, international law and public and

⁷⁴ On definitions of terrorism and conformity with the principle of legality see, Golder and Williams; Hardy and Williams; Kent Roach, 'Defining Terrorism: The Need for a Restrained Definition' in Nicola LaViolette and Craig Forcece (eds), *The Human Rights of Anti-Terrorism* (Irwin Law 2008); Cathleen Powell, 'Defining Terrorism: Why and How' in Nicola LaViolette and Craig Forcece (eds), *The Human Rights of Anti-Terrorism* (Irwin Law 2008)

criminal law in liberal-democratic societies legitimise this principle as the framework for drafting and assessing definitions of terrorism. They provide the following summary of the principle of legality, which they propose as the normative framework for assessing definitions of terrorism:⁷⁵

It is presumed that governments do not intend to interfere with the fundamental rights and freedoms of their citizens. That presumption can be displaced if a government specifies in legislation that a particular type of conduct will attract criminal punishment. In order for that criminal legislation to be valid and legitimate, it must specify a crime in advance by using language that is sufficiently clear, precise, and narrowly focussed on the prohibited conduct such that individuals can reasonably foresee whether their actions will attract criminal punishment.

Having examined the scope of the definition in the section above, it is arguable that the definition is not sufficiently narrowly focused on the prohibited conduct so as to satisfy the principle of legality. This is a criticism applicable to definitions of terrorism in many other jurisdictions. This was raised in 2001 by the United Nations High Commissioner for Human Rights, who reported that ‘many States have adopted national legislation with vague, unclear or overbroad definitions of terrorism’. He explained that:⁷⁶

⁷⁵ Hardy and Williams.

⁷⁶ Report on the protection of human rights and fundamental freedoms while countering terrorism (A/HRC/8/13), paras 20-23.

‘these ambiguous definitions have led to inappropriate restrictions on the legitimate exercise of fundamental liberties, such as association, expression and peaceful political and social opposition.

More recently this concern was echoed by the Eminent Jurists Panel of the International Commission of Jurists, who reported that several countries (including the UK) had enacted vague and overbroad definitions of terrorism or terrorist acts in domestic law. In its recommendations, the Panel stated that:⁷⁷

States should avoid the abuse of counter-terrorism measures by ensuring that persons suspected of involvement in terrorist acts are only charged with crimes that are strictly defined ... in conformity with the principle of legality (nullo crimen sine lege).

This question was addressed in the case of *Secretary of State for the Home Department v E*,⁷⁸ in which the respondent challenged the power to grant control orders conferred by the Prevention of Terrorism Act 2005, on the grounds that the definition of terrorism relied on was so broad as to infringe the principle of ‘legal certainty’ required by Articles 5, 10 and 11 of the ECHR.⁷⁹ The respondent submitted that the power to grant control orders

⁷⁷ Report of the Eminent Jurists Panel on Terrorism, Counter-terrorism and Human Rights, 124, 169.

⁷⁸ *Secretary of State for the Home Department v E* [2007] EWHC 233 (Admin)

⁷⁹ E was a Tunisian national who had claimed asylum on his arrival in the UK in 1994. He was detained in 1998 after having been convicted in absentia by a Tunisian military court of putting himself at the disposal of a terrorist organisation operating abroad, but was released after three days. In 2001 he was certified under the Anti-Terrorism Crime and Security Act 2001 and detained in Belmarsh prison. In 2005, he was one of ten detainees who were subjected to a control order under the Prevention of Terrorism Act 2005.

conferred by the Prevention of Terrorism Act violated the requirement for legal certainty due to the breadth of the definitions ‘terrorism’ and ‘terrorist-related activity’, which are to be considered when assessing whether to impose a control order. The Prevention of Terrorism Act relies on the definition of terrorism in section 1 of the Terrorism Act 2000, discussed in the previous section. In coming to its finding, the Administrative Division of the High Court stated that it is common for statutes and common law principles to be framed in broad terms and that such breadth is not in itself a cause of uncertainty.⁸⁰ It went on to rule that the provisions of the Prevention of Terrorism Act and the definition of terrorism did not violate the principle of legal certainty contrary to the ECHR. In reaching this finding, the Court held that:⁸¹

the provisions in the Prevention of Terrorism Act as to the circumstances in which a control order may be imposed are both accessible and, notwithstanding their width, are ... detailed, specific and unambiguous.

The decision in *Secretary of State for the Home Department v E* suggests that the definition of terrorism does not infringe the principle of legality due to a lack of legal certainty. However, the High Court acknowledged the clear breadth of the definition. If not vague and ambiguous, is the definition overly broad? Lord Carlile, a former Independent Reviewer of Terrorism Legislation held that the definition in section 1 of the Terrorism Act 2000 was not ‘too

⁸⁰ para 186

⁸¹ para 188

wide to satisfy the clarity required for the criminal law'.⁸² However, he acknowledged that the definition could extend inappropriately to cover people who should not be considered as terrorists. He gave as examples the suffragette protestor Emily Wilding Davison, who threw herself under a horse at Epsom racecourse in 1913, and the eco-protestor 'Swampy', who spent a week in tunnels dug in the path of a proposed road extension.⁸³ While acknowledging that 'there is no doubt that non-terrorist activities ... could fall within the definition as currently drawn',⁸⁴ Carlile ultimately did not consider this breadth to be problematic as he stated that this could be ameliorated by prosecutorial discretion.⁸⁵ However, surely if the legislation can easily apply to people who should not legitimately be labelled as terrorists it is, by definition, overbroad? While prosecutorial and police discretion may mitigate the negative effects of the breadth of the offence, it does not alter the fact that the definition is overbroad. Furthermore, allowing for this wide discretion also constitutes a delegation of legislative responsibility.

One way of assessing whether a definition is overly broad is to assess whether it operates outside of its intended purposes.⁸⁶ During the second reading of the Terrorism Bill, which would become the Terrorism Act 2000, it

⁸² Carlile, *The Definition of Terrorism: A Report by Lord Carlile of Berriew QC Independent Reviewer of Terrorism Legislation*, para 26

⁸³ *Ibid*, para 34.

⁸⁴ *Ibid*, para 60.

⁸⁵ *Ibid*, para 64

⁸⁶ Hardy and Williams suggest three criteria for assessing definitions of terrorism: (1) 'a legal definition of terrorism should be sufficiently clear and precise to give reasonable notice of the kinds of conduct it prohibits'; (2) 'a legal definition of terrorism should not encompass conduct which allows legislation to operate outside its intended purposes'; and (3) 'a legal definition of terrorism should be consistent with legal definitions of terrorism in comparable jurisdictions'. Hardy and Williams, 104, 105, 107.

was stated that the Act was designed to deter, prevent and investigate 'heinous crime', in the form of acts of terrorism, which are directed at destroying 'not only lives, but the foundation of our society'.⁸⁷ It was stated that the Act was designed to prevent an attack similar to the one perpetrated in Japan by the religious cult Aum Shinrikyo, who released sarin gas on the Japanese subway system.⁸⁸ However, it appears from the above analysis that the definition of terrorism in the Terrorism Act 2000 applies to a far wider and less certain category of conduct than something analogous to the Japanese subway attack.

A clear example of how the legislation operates outside of this intended purpose is the fact that it could extend to cover acts of political protest. Golder and Williams give the example of a long running nurses dispute as something that could fall within the definition of terrorism.⁸⁹ If, for example, such action were designed to influence the government to increase wages, this would satisfy both the target element and the political motive element. If the strike affected staffing levels in the hospital such that it affected the services provided, it could 'create a serious risk to the health or safety of the public', thus fulfilling the method element. This could also apply to other types of industrial action where essential services could be affected.⁹⁰ The definition of terrorism could also apply to public protests where some incidences of violence occur, for example protests against student fees or the

⁸⁷ Hansard, *HC Debate vol 341*, col 156.

⁸⁸ *Ibid*, col 159

⁸⁹ Golder and Williams, 289.

⁹⁰ Hodgson and Tadros, 'The Impossibility of Defining Terrorism', 501.

war in Iraq.⁹¹ There is a danger that terrorism legislation could be improperly used in these circumstances to target protests and action that should rather fall under the ambit of public order offences or regulation. It was explicitly stated during the debate on the Terrorism Bill that acts of public protest and trade disputes were not intended to fall within the definition of terrorism:⁹²

The Bill is not intended to threaten in any way the right to demonstrate peacefully – nor will it do so. It is not designed to be used in situations where demonstrations unaccountably turn ugly. Should any unlawful activities occur in such circumstances, the powers available under the ordinary criminal law will, as now, suffice.

However, despite this expressed intention, the lack of an exemption for political protest in the definition of terrorism means that such action does fall within the scope of the definition.⁹³ In this way, the definition clearly operates outside its intended purpose.

Another contentious area where the question of breadth has arisen relates to the international application of the definition of terrorism, provided for in section 1(4). This particular provision has attracted controversy due to the fact that it renders an already broad definition ‘remarkably broad –

⁹¹ *Ibid*, 501

⁹² Hansard, *HC Debate vol 341*, col 154.

⁹³ Hansard, ‘House of Commons Debate’, col 31. Australia, Canada, South Africa and New Zealand all include exemptions for political protest. See Criminal Code Act 1995 (Cth), s100.1(3) (Aus); Criminal Code, RSC 1985, c 46, s 83.01(b)(ii)(E)(Can); Protection of Constitutional Democracy Against Terrorist and Related Activities Act 2004 (South Africa) s1 (xxv)(3)-(4); Terrorism Suppression Act 2002 (NZ) s 5 (4)-(5).

absurdly so in some cases'.⁹⁴ Two particular issues that have arisen as a result of this international application relate to whether the definition should apply to acts that take place overseas in the context of national separatist movements, and whether it should apply to acts committed in armed conflicts that would be justified according to the laws of war. As to the first issue, whether there should be an exemption for national separatist movements, or so-called 'freedom fighters', this question was addressed in the case of *R v F*.⁹⁵ In this case, F, a Libyan national, was charged with the possession of documents likely to be useful for the preparation of a terrorist attack under section 58 of the Terrorism Act 2000. F argued that in interpreting the definition of terrorism, the word 'government' in relation to foreign governments should be limited to countries that are governed by democratic or representative principles. Any acts against oppressive or tyrannical foreign regimes should be regarded as justifiable acts of self-determination rather than terrorism. F contended that the documents that he possessed were possessed for the purpose of furthering an alleged plan to remove Colonel Gaddafi and his military forces from power in Libya. In reaching its decision, the Court of Appeal remarked on the striking breadth of the

⁹⁴ Anderson, *The Terrorism Acts in 2012: Report of the Independent Reviewer on the Operation of the Terrorism Act 2000 and Part 1 of the Terrorism Act 2006*, 53.

⁹⁵ *R v F* [2007] 2 All ER 193, EWCA Crim 342. See chapter 6 for a discussion of this case in the context of the offence of possession of documents likely to be useful in the preparation of a terrorist attack, under section 58 of the Terrorism Act 2000. The discussion in chapter 6 highlights how the breadth of the definition of terrorism impacts on the section 58 offence. See also the case of *R v AY* [2010] EWCA Crim 762, also discussed in chapter 6, where the court distinguished the facts from those in *R v F* by stating that in *R v AY* it was open to the respondent to argue that the possession was for the lawful defence of the Somali people. This distinction between the cases seems somewhat arbitrary.

definition, noting that the legislation does not provide any limitations or exemptions to section 1(4)(d). The Court stated:⁹⁶

What is striking about the language of section 1, read as a whole, is its breadth ... There is no list or schedule or statutory instrument which identifies the countries whose governments are included within section 1(4)(d) or excluded from the application of the Act ... [T]he legislation does not exempt, nor make an exception, nor create a defence for, nor exculpate what some would describe as terrorism in a just cause. Such a concept is foreign to the Act. Terrorism is terrorism, whatever the motives of the perpetrators.

The Court of Appeal held that although section 1 would capture acts taken against tyrannical or oppressive regimes, there was 'no ambiguity or absurdity in section 1(4)(d)'.⁹⁷ In consequence, it explained:⁹⁸

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

Despite its evident concern that the definition of terrorism could extend to capture action against an oppressive regime that may be morally justified, it declined to rein in the scope of the definition in this regard. Without

⁹⁶ *R v F* [2007] 2 All ER 193, [2007] EWCA Crim 342, 27.

⁹⁷ *Ibid*, 26.

⁹⁸ *Ibid*, 32

specifying a particular exemption in the definition, the legislation unavoidably captures the actions of freedom fighters.⁹⁹ According to David Anderson, Parliament attempted to come up with a means of distinguishing freedom fighters from terrorists but ultimately failed in this attempt.¹⁰⁰ It appears that rather than solving this problem, Parliament chose to err on the side of over inclusion. This, coupled with the judicial deference displayed by the courts in addressing this issue, has resulted in there being very little scope to limit the operation of the definition through judicial interpretation.

With regard to the second related issue as to whether the definition of terrorism should include acts that occur in armed conflicts but which would be considered to be lawful according to the laws of war, this was the subject of the recent influential case of *R v Gul*.¹⁰¹ Gul was convicted of disseminating terrorist publications contrary to section 2 of the Terrorism Act 2000 for uploading videos to YouTube showing attacks by insurgents on military targets in Chechnya and Coalition forces in Iraq and Afghanistan. The basis of Gul's appeal against conviction, and the question which the Supreme Court had to answer, was as follows:¹⁰²

Does the definition of terrorism in section 1 of the Terrorism Act 2000 operate so as to include within its scope any or all military attacks by a non-state armed group against any or all state or inter-governmental

⁹⁹ Hodgson and Tadros, 'The Impossibility of Defining Terrorism', 508.

¹⁰⁰ Anderson, 'Shielding the Compass: How to Fight Terrorism without Defeating the Law', 66.

¹⁰¹ *R v Gul* [2013] UKSC 64, [2013] 3 WLR 1207

¹⁰² *R v Gul* [2013] UKSC 64, [2013] 3 WLR 1207, 8.

organisation armed forces in the context of a non-international armed conflict?

Gul's argument was that the acts of the insurgents depicted in the videos should not be considered to fall within the definition of terrorism under the Terrorism Act 2000. In reaching its conclusion, the Supreme Court vigorously criticised the breadth of the definition. However, these criticisms were obiter dicta. Ultimately, despite its disquiet over the breadth of the definition, the Supreme Court held that the actions of the insurgents would be included within the definition of terrorism under section 1 of the Terrorism Act 2000, stating:¹⁰³

Despite the undesirable consequences of the combination of the very wide definition of "terrorism" and the provisions of section 117, it is difficult to see how the natural, very wide, meaning of the definition can properly be cut down by this Court.

The result of *Gul*, when coupled with the decision in *R v F*, is that any attacks on foreign targets would be considered to fall within the definition of terrorism, even where such targets are states that are considered unfriendly by the UK, such as Syria, Libya etc. By failing to make difficult and contentious political decisions as to the distinction between legitimate freedom fighters and illegitimate terrorists, the legislature left the courts with little scope to narrow the definition of terrorism in such cases. It is argued

¹⁰³ Ibid, 38

that courts do not have the expertise to make these difficult political judgments, nor should they enter into decisions of policy due to their role as a judicial body.¹⁰⁴ As a result of this judicial deference and resistance to interpret the legal definition of terrorism so as to narrow the scope and exclude freedom fighters, it is possible that a situation can exist where F can be convicted for possessing documents which he alleged were to further the overthrow of Gaddafi, despite the fact that shortly thereafter the UK played an important role in the NATO bombing campaign in which Gaddafi was killed.¹⁰⁵

From the above examples, it is incontrovertible that the definition of terrorism is remarkably broad and has the capacity to capture conduct that should not be described as terrorism. As mentioned above, even Lord Carlile noted the breadth of the definition and the fact that it could undoubtedly apply to 'non-terrorist activities'.¹⁰⁶ However, he held that this breadth could be satisfactorily mitigated by relying on police and prosecutorial discretion to ensure that the definition was applied appropriately.¹⁰⁷ Anderson, however, has cautioned against the dangers of relying too heavily on this discretion.

¹⁰⁴ See Adam Tomkins, 'National Security and the Role of the Court: A Changed Landscape?' (2010) 126 *Law Quarterly Review* 543 for a discussion of judicial deference and the argument that courts do not possess the expertise of the executive in making decisions on issues of national security.

¹⁰⁵ James Meikle, 'Muammar Gaddafi is Dead, says Libyan PM' *The Guardian* (20 October 2011), <http://www.theguardian.com/world/2011/oct/20/gaddafi-dead-says-libyan-pm>

¹⁰⁶ Carlile, *The Definition of Terrorism: A Report by Lord Carlile of Berriew QC Independent Reviewer of Terrorism Legislation*, 60.

¹⁰⁷ *Ibid*, 60-64

While noting that discretion has generally been exercised sensibly and with restraint, he warned that:¹⁰⁸

... it would be foolish to suppose that every decision will be a good one. The dangers of excessive reliance on the wise exercise of discretions are self-evident. A culture of restraint, precious asset though it is, cannot be considered sufficient.

The Supreme Court in the case of *Gul* also expressed concern over the heavy reliance on the wide discretion afforded to police and prosecutors in determining who should fall within the definition of terrorism. While acknowledging the role of prosecutorial discretion in general in determining whether to proceed, the Supreme Court clarified that it is not the role of such discretion to 'assist in the interpretation of legislation which involves the creation of a criminal offence or offences'. It stated that 'either specific activities are criminal ... or they are not'.¹⁰⁹ It went on to say that reliance on prosecutorial discretion is unattractive as it amounts to saying that the legislature has delegated its decision whether an activity should be treated as criminal or not to an appointee of the executive, thus 'abdicating a significant part of its legislative function to an unelected DPP'.¹¹⁰ Furthermore, it results in citizens being unclear as to whether their actions are liable to be treated as innocent or criminal. Such discretion should be used very rarely to avoid

¹⁰⁸ Anderson, 'Shielding the Compass: How to Fight Terrorism without Defeating the Law', 72.

¹⁰⁹ *R v Gul*, 35.

¹¹⁰ However, note that many other offences are so widely defined as to rely upon prosecutorial discretion to avoid overuse, for example the Sexual Offences Act 2003 that criminalises all sexual conduct among those under the age of 16, including kissing.

undermining the rule of law.¹¹¹ The same sentiment was expressed by Lord Bingham in the 2001 decision of *R v K*, where he stated:¹¹²

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

For the most part it appears as if the wide discretion given to police and prosecutors in determining the reach of the terrorism legislation has been exercised responsibly. However, there are two notable cases which provide worrying examples of the arguably irresponsible exercise of this discretion. The first example is that of Walter Wolfgang, an 82-year-old Labour Party Member. At an annual Labour Party conference in 2005, Wolfgang shouted the word 'nonsense' in response to a speech by Jack Straw on Britain's policy in Iraq. Wolfgang was removed and detained under Section 44 of the Terrorism Act 2000.¹¹³ Although he was subsequently released, this demonstrates how the legislation can be used in a manner that goes beyond what was envisaged by Parliament.

¹¹¹ *R v Gul*, 36.

¹¹² *R v K* [2001] UKHL 41, 24.

¹¹³ Andrew Sparrow, 'Heckler, 82, Who Dared Called Straw a Liar is Held Under Terrorist Law' *The Independent* (29 September 2005) <<http://www.telegraph.co.uk/news/uknews/1499466/Heckler-82-who-dared-called-Straw-a-liar-is-held-under-terrorist-law.html>> ; 'Labour Issues Apology to Heckler' *BBC News* (28 September 2005) <http://news.bbc.co.uk/2/hi/uk_news/politics/4291388.stm> .

The second instance of the arguably inappropriate exercise of the discretion to apply the terrorism legislation is the much-publicised recent case of David Miranda.¹¹⁴ Miranda was detained at Heathrow airport under Schedule 7 of the Terrorism Act 2000 and was questioned and had an encrypted storage device that he had been carrying removed from him.¹¹⁵ Schedule 7 allows for a person to be detained when traveling through a port in order to determine if they appear to be concerned or to have been concerned in the commission, preparation or instigation of acts of terrorism. The first request from MI5 to the counter-terrorist police to use their Schedule 7 powers to detain Miranda was denied, on the basis that the terms of the request did not make it clear that there was a lawful basis for the use of Schedule 7. This first request was framed as follows:¹¹⁶

Intelligence indicates that MIRANDA is likely to be involved in espionage activity which has the potential to act against the interests of UK national security.

MI5 was concerned that Miranda was carrying information that would assist Greenwald in publishing NSA and GCHQ material.¹¹⁷ From the terms of the

¹¹⁴ *R (Miranda) v Secretary of State for the Home Department and the Commissioner of the Police of the Metropolis* [2014] EWHC 255 (Admin)

¹¹⁵ Miranda is the spouse of Glenn Greenwald, who at the relevant time was a journalist working at The Guardian. Greenwald had been given encrypted data by Edward Snowden, who had stolen this data from the National Security Agency (NSA) of the United States. Miranda, who was carrying the encrypted data on a hard drive in order to assist Greenwald in his journalistic activities, was stopped at Heathrow airport and detained for 9 hours under Schedule 7 to the Terrorism Act 2000. He was questioned and had the encrypted storage device removed from him.

¹¹⁶ *R (Miranda) v SSHD*, 9.

¹¹⁷ *R (Miranda) v Secretary of State for the Home Department and The Commissioner of the Police of the Metropolis* [2014] EWHC 255 (Admin), 11.

original request, it appears that MI5 was concerned with espionage rather than terrorism. However, it then issued an amended request asking the police to exercise their powers under Schedule 7, which was granted. This amended request clearly mirrored the definition of terrorism in section 1 of the Terrorism Act:

We assess that MIRANDA is knowingly carrying material, the release of which would endanger people's lives. Additionally the disclosure, or threat of disclosure, is designed to influence a government, and is made for the purpose of promoting a political or ideological cause. This therefore falls within the definition of terrorism and as such we request that the subject is examined under Schedule 7.

Miranda challenged his detention under Schedule 7, arguing that his detention, questioning and the removal from his possession of the storage device was done without legal authority. The Divisional Court had to decide whether the use of the Schedule 7 powers was lawful. Schedule 7 can only be used if its purpose is to determine whether a person appears to be a person who is or has been concerned in the commission, preparation or instigation of acts of terrorism. The Court held that on the basis of the amended request from MI5, the purpose of the stop fell within Schedule 7 and the powers thereunder had therefore been exercised lawfully.¹¹⁸ This is not surprising, considering that the terms of the request precisely matched the elements required to fulfil the definition of terrorism. However, this decision

¹¹⁸ Ibid, 36.

highlights again the extraordinary breadth of the definition of terrorism. Furthermore, whether one can say that the carrying of intelligence documents for the purposes of journalism equates to the type of terrorism that was envisaged when enacting the legislation seems doubtful. This appears to be a clear case where the legislation and the very broad definition of terrorism was manipulated in order to facilitate intrusive investigation. While it may have been necessary to detain and question Miranda, the use of terrorism legislation to achieve this aim is disingenuous.

3.5 Conclusion

The definition of terrorism in the Terrorism Act 2000 has attracted a great deal of criticism, and it is not difficult to see why.¹¹⁹ The current definition is longer and more complicated than the earlier definition in the PTA; it extends further than influential international definitions of terrorism such as those in the Financing Convention and Security Council Resolution 1566; it is not restricted to the harms of death and serious injury of civilians but rather covers lesser harms such as disruption of electronic systems and property damage; and it applies to action committed anywhere in the world and action taken against foreign governments, including actions of freedom fighters. Furthermore, the definition applies to threats of such terrorist action. The

¹¹⁹ A Blick, T Choudhury and S Weir, *The Rules of the Game: Terrorism, Community and Human Rights* (A report by Democratic Audit, Human Rights Centre, University of Essex, for the Joseph Rowntree Reform Trust, 2006); Joint Committee on Human Rights, *Counter-Terrorism Policy and Human Rights: Terrorism Bill and Related Matters* (28 November 2005). See further, Green; Hardy and Williams; Hodgson and Tadros, 'The Impossibility of Defining Terrorism'; Walker, 'The Legal Definition of "Terrorism" in United Kingdom Law and Beyond', all of whom criticise the extreme breadth of the definition.

consequence of the breadth of the definition is that it could potentially apply to conduct that would not ordinarily equate to any commonly held understanding of terrorism. When combined with the preventive terrorism offences, which capture conduct on the very edges of a terrorist plot, the reach of these intrusive offences and powers is compounded. This breadth, coupled with offences covering instances of remote harm, results in a great deal of discretion being left with the police and prosecutors in determining whether and when to enforce terrorist laws and powers. While this may on occasion ameliorate the inappropriate use of terrorist powers, the examples mentioned above highlight the dangers of relying so heavily on wide discretions such as this.

This chapter has undertaken a critical examination of the definition of terrorism in the Terrorism Act 2000 in order to determine its effect on the preventive terrorism offences that rely upon it, that are to be analysed in the following chapters. It is clear from the cases discussed above that the very broad scope of the definition cannot be narrowed by the courts. It is therefore apparent that the definition cannot be relied on to provide sufficient restraint on the breadth of the preventive terrorism offences. Rather, the breadth of the definition extends the reach of the preventive terrorism offences to conduct that could fall far outside of any commonly held notion of terrorism and outside the government's intended operation of the legislation. It is acknowledged that the task of precisely defining terrorism is a difficult one. However, with such a broad definition, it is imperative that the preventive

terrorism offences are sufficiently limited to capture only conduct that should be liable for punishment under terrorism legislation so as to avoid injustice.

4. Preparation of a Terrorist Act

Section 5(1) of the Terrorism Act 2006 sets out that ‘a person commits an offence if, with the intention of committing acts of terrorism, or assisting another to commit such acts, he engages in any conduct in preparation for giving effect to his intention’, the penalty for which is life imprisonment.¹ The effect of this provision is to extend the scope of attempts liability to the early stages of preparation, contrary to long established principles of attempts liability. Liability is extended to steps that are merely preparatory and thus remote, both temporally and causally, from the commission of a substantive act of terrorism. However, in spite of this remoteness, the maximum penalty specified for this offence is life imprisonment.

The Criminal Attempts Act requires that liability for attempts is limited to conduct ‘which is more than merely preparatory to the commission of the offence’.² In contrast, section 5 of the Terrorism Act 2006 criminalises behaviour that is merely preparatory to the commission of such offences. Unlike traditional attempts, the preparatory offence may be proved in the absence of a terrorist act and the prohibited conduct need not even be related to a specific terrorist act.³ It is not required that any specific identified acts be

¹ Terrorism Act 2006, section 5(1).

² Criminal Attempts Act 1981, section 1.

³ Section 5(2) Terrorism Act 2006

attempted or even planned. This runs counter to long established principles of attempts liability.

Despite the significant change to the criminal law that this offence represents, it was passed into law in the Terrorism Act 2006 with very little debate or attention.⁴ Section 5 is the most frequent principal charge for persons convicted under terrorism legislation since 11 September 2001, accounting for 15% of those convicted of terrorism offences.⁵ Yet there has been relatively little commentary focussing specifically on the parameters of the offence or on whether this significant departure from the existing common law can be justified according to principles of criminalisation.⁶

This chapter analyses the scope of the preparation offence and whether it is a justified instance of criminalisation. It starts with an examination of the

⁴ During the House of Commons Debates on the Terrorism Bill 2005/06, debate centred on the proposals to criminalise speech glorifying terrorism and the extension of powers of investigative detention for preventive arrests under the Terrorism Act 2000 from 14 to 90 days. This was mirrored in contemporaneous press coverage. However, Liberty, in its report on the Terrorism Bill 2005, gave some attention to this new offence. It stated that it could see some scope for the creation of the offence, particularly in prosecuting individuals who were preparing terrorist acts and would not be caught by conspiracy laws. However, it raised concern with the drafting of the offence, specifically with the breadth and imprecision of the conduct requirement. Liberty, *Draft Terrorism Bill: Liberty's Briefing* (September 2005), <http://www.liberty-human-rights.org.uk/pdfs/policy05/draft-terrorism-bill.pdf> (last accessed 8 October 2015), para 23.

⁵ *Operation of police powers under the Terrorism Act 2000 and subsequent legislation: Arrests, outcomes and stops and searches, quarterly update to 31 December 2014* (25 June 2015), <https://www.gov.uk/government/publications/operation-of-police-powers-under-the-terrorism-act-2000-quarterly-update-to-december-2014/operation-of-police-powers-under-the-terrorism-act-2000-and-subsequent-legislation-arrests-outcomes-and-stops-and-searches-quarterly-update-to-31-d> last accessed 6 September 2015.

⁶ See, however, Simester, 'Prophylactic Crimes'; Ashworth, *Principles of Criminal Law*, 41-2, 437; Walker, *Blackstone's Guide to the Anti-Terrorism Legislation*, 195-7; Ramsay, 'Preparation Offences, Security Interests, Political Freedom', Carlile & Macdonald, S. (2014) 'The Criminalisation of Terrorists' Online Preparatory Acts' in Chen, T., Jarvis, L. & Macdonald, S. (eds) (2014) *Cyberterrorism: Understanding, Assessment and Response* (New York: Springer).

context and legislative background for the creation of the offence, highlighting the preventive rationale behind its enactment. It then moves onto an analysis of the offence in order to define its precise scope. While the main rationale for the creation of the offence is one of prevention, it is argued that the offence must still be measured against the framework of principles and constraints set out in chapter 2 in order to respect autonomy, liberty and other fundamental human rights. As explained in chapter 2, such a framework provides a check on the extension of the criminal law on preventive grounds. In particular, section 5 presents major difficulties in respect of the proximity requirement, in that it criminalises conduct that can be very remote from the commission of a terrorist act. A result of this remoteness is that the offence may capture conduct that should not be regarded as wrongful. These justificatory problems are reflected in the drafting of the offence, which provides for a conduct requirement that is extremely wide. It is acknowledged that there may be reason to extend the criminal law by criminalising preparatory conduct in cases of very grave or potentially catastrophic harm. Arguably the threat of terrorist harm is sufficiently grave to allow for an extension of the criminal law in this way. However, such extensions should be closely scrutinised to ensure that they are defined in terms that are sufficiently narrow to avoid unjustifiably extending the reach of the criminal law.

4.1 Legislative Background

Shortly after the events of 9/11, the United Nations passed Security Council Resolution 1373 (2001), which set out a series of obligations on all Member States with regard to international terrorism.⁷ According to section 2(e), States shall:

Ensure that any person who participates in the financing, planning, preparation or perpetration of terrorist acts or in supporting terrorist acts is brought to justice and ensure that, in addition to any other measures against them, such terrorist acts are established as serious criminal offences in domestic laws and regulations and that the punishment duly reflects the seriousness of such terrorist acts.

However, in spite of this international directive, an offence of preparation of terrorist acts was not enacted in UK legislation until 2006, following the London bombings of July 2005. While one may point to resolution 1373 to provide the necessary justification for such an offence, the significant time lapse between the resolution and the creation of the offence seems to indicate that the Government considered that its existing counter-terrorism legislation effectively met these international obligations. Rather, it was the radically increased perceived threat of terrorism within the UK caused by the London bombings in July 2005 that provided the impetus for the creation of this offence.

⁷ United Nations Security Council Resolution 1373 (2001), s 2(e).

Prior to July 2005, proposals for the enactment of an offence of terrorist preparations were unsuccessful. In 1996, Lord Lloyd, in the report of his Inquiry into Legislation against Terrorism, suggested the creation of an offence of 'being concerned in the preparation of an act of terrorism'.⁸ He argued that such an offence was necessary in order to target the actions of individual terrorists. While legislation focussing on the activities of terrorist organisations was already in existence, there was a gap in relation to individual terrorists that Lord Lloyd argued could be filled by the creation of a new offence of preparation. He accepted that as individual terrorist activity progressed it would be caught by existing legislation, for example attempts liability. Furthermore, that there were existing possession offences which could apply to individual terrorist activity in advance of the commission of an act of terrorism. However, he argued that such activity would not catch the very early preparatory conduct that it was necessary to target. Preparation for terrorism, according to Lord Lloyd, would stand prior to possession of explosives or possession of articles under the then extant offence of possession of articles under section 16A of the Prevention of Terrorism (Temporary Provisions) Act 1989 and there was, he argued, no sufficient legislative mechanism for targeting such preparatory conduct. He argued that it 'is important to be able to catch terrorists at the preparatory stage, and the earlier the better'.⁹ Lord Lloyd provided a further argument in favour of the creation of an offence of preparation of a terrorist act. He argued that

⁸ Lord Lloyd of Berwick, Inquiry into Legislation against Terrorism, at paras 6.13, 8.17.

⁹ Ibid, para 6.13.

such an offence would allow for the intervention of the police in the early, preparatory stages of terrorist activity, where there may not be grounds for arrest based on the commission of a substantive criminal offence or act of terrorism under existing laws, thus removing the need for special powers of arrest.¹⁰

Despite Lord Lloyd's recommendation for a new offence of being concerned in the preparation of a terrorist act, the Government decided that it was not necessary. In its consultation paper published in 1998, the Government stated that it had examined the consequences of enacting such an offence and came to the conclusion that it was not the way forward. It was satisfied that the powers of arrest and the way in which they were employed were compatible with Article 5(1)(c) of the ECHR and that it was not necessary to create a new offence of 'being involved in the preparation etc. of acts of terrorism'.¹¹ Rather, the Government stated that instead of enacting a new preparatory offence, the new legislation should 'empower the police to arrest anyone whom they reasonably suspect of "being involved in the preparation, commission or instigation of acts of terrorism"'.¹²

Eight years later, Lord Carlile again proposed the creation of an offence of acts preparatory to terrorism. In his 2003 Report on the Anti-Terrorism Crime and Security Act 2001, he stated that 'if the criminal law was amended

¹⁰ Ibid, para 8.7.

¹¹ , *Legislation Against Terrorism: A Consultation Paper*, para 7.15.

¹² Ibid, para 7.15

to include a broadly drawn offence of acts preparatory to terrorism, all could be prosecuted for criminal offences and none would suffer executive detention.’¹³ The following year, in his report on the operation of the Terrorism Act 2000, he reiterated his view that preparatory offences be enacted so as to criminalise ‘lower level terrorist activities and agreements’.¹⁴ By contrast, the Newton Committee was opposed to the creation of any new criminal offences and observed that there already existed a broad range of criminal offences available for the prosecution of terrorist suspects.¹⁵

Following the July 2005 bombings in London, it appears that the Government decided that it was necessary to create an offence of preparation of a terrorist act. In a letter to Lord Carlile, outlining the Government’s response to his report, the then Home Secretary Charles Clarke stated that he agreed with Lord Carlile’s recommendation and that the Terrorism Bill was to include an offence of knowingly doing an act connected with or preparatory to terrorism in the Terrorism Bill.¹⁶ Also in July, Clarke sent a letter to the Conservative and Liberal Democrat home affairs spokesmen, David Davis and Mark Oaten, setting out his views on a forthcoming Terrorism Bill. This letter sets out the Government’s intention to create new criminal offences, including an offence of acts preparatory to terrorism:¹⁷

¹³ Lord Carlile, *Anti-Terrorism, Crime and Security Act 2001 Part IV Section 28, Review 2003* (Home Office, 2004), para 101.

¹⁴ Lord Carlile, *Report on the Operation in 2004 of the Terrorism Act 2000* (2004), para 78.

¹⁵ Privy Counsellor Review Committee, *Anti-Terrorism, Crime and Security Act 2001, Review Report* (HC 100, 2003-04), para 207.

¹⁶ Letter from the Home Secretary to Lord Carlile of Berriew Q.C. 20 July 2005 Dep 05/966.

¹⁷ House of Commons Library Research, *The Terrorism Bill 2005/06 [Bill 55 of 2005-06]* (20 October 2005), p11.

Our aim is to ensure that the police and intelligence agencies have all the powers which they require to enable them to deal effectively with terrorism. Our priority is always to prosecute if at all possible. For this reason, and as we made clear in Parliament before the General Election, we are proposing that the Counterterrorism Bill should create new offences.

The first of these concerns acts preparatory to terrorism. This has been widely discussed. As you know, in suspected terrorist cases the police and intelligence agencies seek to intervene early to protect the public. This may mean that the precise details of the planned terrorist act are not known – indeed, the terrorists themselves may not have decided exactly how they will act. However, there may be clear evidence of an intention to commit a serious terrorist act. For example, instructions on how to build a bomb, evidence of intention to acquire chemicals and evidence that terrorist related websites have been accessed. It may be clear that there is very serious criminal intent. The proposed new offence is designed to address this.

This letter sets out quite clearly that it was intended that the offence should apply to remote instances of terrorist preparations, even where the suspects themselves may not have decided exactly how they will act or have settled on the precise details of the planned act of terrorism. The primary rationale given is to enable early intervention by police and intelligence agencies as a means of protecting the public from potential terrorist attacks. This is evidenced by the following statement from the House of Commons debate:¹⁸

¹⁸ Hansard, *House of Commons Debate* (26 October 2005) col 344.

The need to ensure public safety by preventing such attacks means that it is necessary to make arrests at an earlier stage than in the past, where there was a culture of warnings and where weapons of mass destruction did not exist as now.

Despite the fact that, prior to the London bombings, the prevailing Government view seemed to be that there was no need for the creation of this offence and that the criminal law adequately catered for the prosecution of terrorist suspects, the new offence passed through Parliament with almost no attention or debate. This is perhaps unsurprising given the timing of the Act. The London bombings provided a new context for the creation of criminal offences focussed primarily on the prevention of further such acts of terrorism.

4.2 Defining the Offence

Section 5 of the Terrorism Act 2006 reads as follows:

- (1) A person commits an offence if, with the intention of—
 - (a) committing acts of terrorism, or
 - (b) assisting another to commit such acts, he engages in any conduct in preparation for giving effect to his intention.
- (2) It is irrelevant for the purposes of subsection (1) whether the intention and preparations relate to one or more particular acts of terrorism, acts of terrorism of a particular description or acts of terrorism generally.

- (3) A person guilty of an offence under this section shall be liable, on conviction on indictment, to imprisonment for life.

The expansive terms in which this offence is defined make it difficult to identify the exact parameters of the offence. This is exacerbated by reliance on the definition of terrorism, which itself is very wide.¹⁹ The *actus reus* of the offence is particularly broad, and no guidance is given as to what could fall within this section. There must be some form of conduct, and that conduct must be in preparation for giving effect to an intention to carry out or assist others in carrying out acts of terrorism. The conduct is therefore tied to a culpability requirement, namely that there is an ulterior intention with regard to the commission of ultimate acts of terrorism. There must be conduct, or an act, rather than a state of affairs. This act can be *any* act in preparation for putting into effect an intention to commit or assist another to commit acts of terrorism. As will be explained below, the broad formulation of the conduct requirement could result in legislative overreach, whereby inherently innocent, non-wrongful acts, which cannot be transformed into wrongful acts even when accompanied by an ulterior intention, could be caught by the legislation.

The existence of an intention requirement in relation to the ultimate harm does ameliorate some of the concerns with the breadth of this offence. However, the intent requirement takes on such significant weight in constituting wrongfulness that there is a danger that this offence, in effect,

¹⁹ See chapter 3.

criminalises bad intentions. The conduct can be so remote from the commission of harm that it would fail to meet the proximity constraint outlined in chapter 2. By definition, the offence in section 5 extends to cover conduct that has not yet passed the stage of 'mere preparation', contrary to the standard set for inchoate liability. In a crime that relies so heavily on the intention of the offender, failure to meet this proximity constraint can be dangerous. Proving intention in the absence of proximate conduct is very difficult. Where intention provides the main basis for liability, it is imperative that determinations of such criminal intention are accurate. It is difficult to see how this would be possible where conduct is not sufficiently proximate to the commission of the ultimate harm. However, as stated in chapter 2, where preparatory conduct is deemed sufficiently serious as to attract criminal liability, it would be necessary to introduce a defence of voluntary abandonment or withdrawal from the criminal purpose, in order to ameliorate the lack of proximity and to ensure that there is a sufficient *locus poenitentiae* within which the actor can have a change of heart, thus ensuring respect for the actor's autonomy.

The *mens rea* of the offence is not limited to intention to commit the preparatory act that is the subject of the offence; it requires a further ulterior intention of committing acts of terrorism. The relevant standard is intention, rather than recklessness or negligence. It is expressly provided in section 5(2) that the intention does not need to relate to a specific act of terrorism but can relate to acts of terrorism in general. This has the effect of further widening

the offence. However, it is interesting to note that in the Parliamentary debate on the Terrorism Act 2006, the Government seemed to envisage something with more specificity. According to the government minister:²⁰

The purpose of the clause is clear. The accused must be engaged in preparing for a specific act of terror and, certainly, assisting to carry it out. There is a specific relationship between the act preparatory to terrorism and the act of terrorism itself.

This is evidently a misrepresentation of the legislation. The wording of the section in no way requires that the accused be engaged in preparing to commit or assist in the commission of a specific act of terror. Rather, it is stated very plainly that the intention need not relate to a specific act of terror.

It is difficult to know what conduct could be caught by this offence. No examples are given in the legislation. However, the Explanatory Memorandum for the Terrorism Act 2006 gives as an example the possession of items that could be used for terrorism, even if not immediately, provided the person has the necessary intention.²¹ However, such a scenario would already be caught by the possession offence in section 57 of the Terrorism Act 2000. Lord Carlile gives as examples 'the provision of accommodation for terrorists knowing they were such, and committing credit card fraud to assist

²⁰ Hansard, *House of Commons Debate vol 438* (3 November 2005), col 1003, Paul Goggins.

²¹ Home Office, *Terrorism Act 2006, Explanatory Notes* (2006), para 49.

in providing a living for terrorists'.²² However, in the House of Commons debate the government minister stated categorically that simple financial donations would not come within the ambit of the offence. He went on to state that what was relevant was "active involvement and engagement in planning to carry out an act of terrorism".²³ This does not accord with section 5(2), which specifically provides that the ultimate intention can be in respect of acts of terrorism generally and is not restricted to a specific planned act of terrorism. Further, the offence as drafted applies where a person intends to assist another to commit general acts of terrorism. Therefore, if someone gave a donation to a terrorist organisation, intending that that donation would be used to further the organisation's cause through acts of terrorism, this would fall within the ambit of the offence. It therefore appears as though the offence ultimately enacted was broader than originally envisaged.

There have been 63 successful prosecutions under section 5,²⁴ the facts of which are illustrative of what has so far been considered to fall within the ambit of the offence.²⁵ However, in the majority of cases, the defendants pleaded guilty to the offence and so there have not been many judicial pronouncements on the application of this section. Furthermore, many of the decisions are unreported and therefore not available to shed light on the

²² Lord Carlile, *Proposals by Her Majesty's Government for Changes to the Laws against Terrorism* (Home Office, London, 2005), para 30.

²³ Hansard HC vol 438, col 1001 (3 November 2005), Paul Goggins.

²⁴ Office, *Operation of police powers under the Terrorism Act 2000 and subsequent legislation: Arrests, outcomes, and stop and search, Great Britain, financial year ending 31 March 2015*, Data Table A 08a

²⁵ See <http://www.cps.gov.uk/publications/prosecution/ctd.html> (last accessed 6 October 2015) for the Counter-Terrorism Division of the Crown Prosecution Service's list of cases concluded since the end of 2006.

parameters of the offence as applied by the courts. The breadth of the offence has not been challenged, which may indicate that prosecutorial discretion is being employed to avoid using this section in borderline cases.²⁶ There are, however, two cases where the defendants appealed against conviction for breach of section 5.

In the case of *R v Nicholas Roddis*,²⁷ the court gave some guidance as to the *actus reus* of the offence. This case consists of an appeal against conviction under section 5. By way of factual background, the appellant visited his former employers and showed them various paraphernalia which he said were landmines, bullets etc. A week later, he came back to the offices and the manager called the police. After arrest, his bed-sit was searched and a good deal of material was found, including three bottles of acetone and a bottle of hydrogen peroxide, recipes for making explosives, nails, computer files and handwritten notes regarding explosives and bombs and video clips of beheadings carried out by terrorists.

The defendant argued that section 5 should be interpreted as involving something more than mere possession if it is to be fitted into the framework

²⁶ H Fenwick and G Phillipson, 'UK Counter-Terror Law Post-9/11: Initial Acceptance of Extraordinary Measures and the Partial Return to Human Rights Norms' in V Ramraj and others (eds), *Global Anti-Terrorism Law and Policy* (Cambridge University Press 2005), 481 at 507. However, without clear empirical evidence of how decisions to prosecute are made, it is difficult to assess the impact of these offences on civil liberties. This reflects the argument in chapter 1 on the lack of empirical evidence as to the efficacy of the offences in preventing terrorism. Empirical work is necessary both in order to support arguments in favour of the enactment of these offences, but also in order to determine whether concerns regarding the erosion of civil liberties due to overly broad discretions afforded to prosecutors are valid.

²⁷ *R v Nicholas Roddis* [2009] EWCA Crim 585; 2009 WL 64880

of the other existing offences.²⁸ The court acknowledged that there might be some overlap with existing legislation, specifically sections 57 and 58 of the Terrorism Act 2000.²⁹ The court expressed the opinion that with the welter of anti-terrorism legislation that now exists, the court needs to exercise caution in making any assumptions as to the exact Parliamentary intent. It stated that some overlap between offences even in the same statute undoubtedly exists. The court went on to explain that it may well be that there could be possession without conduct.³⁰ For example, where a chemical has been acquired years previously for an innocent purpose or has been inherited from a predecessor of the house, then merely being in possession of it might not amount to conduct, even if coupled with a private intent to use it for a terrorist purpose. On the other hand, possession is often likely to be part of conduct in preparation for giving effect to the intention. For example, if the householder takes down the chemical, goes to the library to find out how to make the bomb, searches out other ingredients, etc, then it seems that possession will be deemed to be part of the conduct in preparation of the act of terrorism. However, this was *obiter dicta* – the court did not need to decide this issue as the case was not left to the jury on the basis of simple possession. The case put to the jury was that there were successive acts of acquisition of ingredients but also of documents, electronic information and other forms of knowledge in respect of making an explosive device. The Crown argued that

²⁸ Para 9

²⁹ Para 8.

³⁰ See discussion on conduct and the so-called act requirement for possession offences in chapter 6.

this was a case of acquisition of knowledge, which was a continuing process.³¹ The Court of Appeal confirmed that this continuing process of collecting of information needed to manufacture explosives and then acquiring the necessary materials for bomb making would, on the facts of this case, suffice as conduct in preparation.³²

In interpreting the word 'conduct' in section 5, the court indicated (without having to decide) that mere possession of certain articles might not be sufficient to constitute conduct. However, it is often likely to be a very strong component of such conduct. The continued acquisition of terrorism-related material and knowledge will, however, suffice. The effect of this judgment is that section 5 may be used as an alternative to, or in addition to, a charge under section 58 of the Terrorism Act 2000.

The overlap between section 5 and other available offences is further evidenced in the case of *R v Iqbal*.³³ Two brothers, Abbas and Ilyas Iqbal, were convicted of various terrorism-related offences and applied for leave to appeal against their convictions. Abbas was arrested at Manchester airport where he was intending to fly to Finland. He was found in possession of, *inter alia*, six discharged blank cartridges, images on his mobile phone of himself holding a knife and of his brother firing a blank gun and holding a pistol, images of terrorists and audio files containing speeches in Arabic.

³¹ Para 9.

³² Para 10.

³³ *R v Abbas Niazi Iqbal, Ilyas Niazi Iqbal* [2010] EWCA Crim 3215.

Following a search at the applicants' home, police uncovered a variety of terrorism-related paraphernalia, including knives, machetes, crossbows, BB guns, air rifles, a poster of Osama Bin Laden, printed documents on guerrilla warfare and books, one of which was entitled "Jihad". The prosecution contended that the applicants were fascinated with Jihad and were preparing for future violent acts in pursuance of their extreme Islamic beliefs. They were in possession of material that would facilitate the commission of terrorist attacks by themselves and others. The defence argued that they were dreamers and that while they were sympathetic to Al Qaeda, they were not intending to carry out any acts of terrorism. Abbas was convicted under section 5, as well as for dissemination of terrorism material under section 2 of the Terrorism Act 2006. Ilyas was convicted under section 58 of the Terrorism Act 2000 but acquitted of the section 5 offence. These convictions were upheld on appeal.

In considering the operation of section 5, the Court of Appeal stated that some degree of overlap between offences within the Act was acceptable and logical. The Court of Appeal rejected a narrow interpretation of the offence and highlighted its breadth. It explained that it 'casts the net wide' to catch acts of preparation, which would not be caught by the existing common law offences of attempt or conspiracy.³⁴ Where conspiracy requires agreement between the parties and attempt requires conduct that is more

³⁴ Para 29.

than merely preparatory, section 5 is not limited by such constraints.³⁵ This case highlights the weight that is placed on the intention of the offender in section 5. Following this reasoning, it appears that provided intention can be proved, any conduct in preparation would suffice, presumably even very remote instances of such preparatory conduct.

A case that addresses, though somewhat obliquely, the issue of remoteness of the preparatory conduct in the context of determining the seriousness of the offence under section 5 is *R v Parviz Khan*.³⁶ In this case, the appellant pleaded guilty to four counts, two under section 5 and two under section 58 of the 2000 Terrorism Act. However, the appellant appealed against the sentence passed in respect of one of the counts under section 5, which was referred to as 'the soldier plot'. This was a plot to identify and kidnap a Muslim serving in the British Army, take him to a suitable place, behead him in front of a camera and make a film to be distributed to the world news networks. The object was to undermine morale in the British armed forces and specifically to deter others, especially those of Muslim faith, from serving in those forces and to strike a political blow at the government.³⁷

The appellant argued that the victim of this plot was yet to be identified. Based on this fact, it was argued that the sentence passed was too long. The Court of Appeal stated that while it was correct that no target had

³⁵ Para 29.

³⁶ *R v Parviz Khan* [2010] 1 Cr App R (S) 35; [2009] EWCA Crim 1085

³⁷ Para 5.

been identified, the plan was already well formulated. The appellant had a plan of action and had asked for help from others; he had decided how to ensnare the soldier, how to kidnap him and he had decided on the place of execution.³⁸ The Court of Appeal stated that it is enough to say that this case satisfied the well-known test for the imposition of a life sentence set out in *R v Hodgson*³⁹ and subsequent cases. The defendant had committed very grave offences and he represented a risk of very grave harm for a period, which could not be reliably determined.⁴⁰

The Court of Appeal identified that the question to be answered, based upon the prosecution's argument, was whether a determinate term of 28 years was too long in light of the fact that no specific soldier had been identified. The Court of Appeal accepted that it would've been more serious if a soldier had been identified and still more if the plot had advanced to the stage of setting out on a particular day to execute a kidnap. However, it went on to state that had this offence been carried out, it would have called for a whole life sentence, in accordance with schedule 21 to the Criminal Justice Act 2003. The application was therefore refused. The fact that the plan to commit murder was still quite some way from being viable did not appear to affect the seriousness or culpability with which the court regarded the offence for sentencing purposes.

³⁸ Para 6.

³⁹ (1968) 52 Cr App R (S) 113

⁴⁰ Para 8. See also *R v Dühren Barot* [2008] 1 Cr. App. R. (S.) 31, where this approach is taken, reflecting the idea that today's terrorists now represent a risk of grave harm for a period, which cannot be determined.

It appears as though the Court of Appeal recognised that proximity of the preparatory conduct to the ultimate terrorist act is a factor to be considered in determining the seriousness of an offence and in sentencing. The further a plot progresses, the more serious it is. However, despite the fact that this plot was some way from being viable, the Court of Appeal considered it sufficiently detailed and technical to be considered very serious. It appears, therefore, that the plot was considered to be relatively proximate to the ultimate terrorist act, thus justifying the lengthy sentence of imprisonment. A further basis for the sentence seems to relate to the perceived 'fanaticism' or 'dangerousness' of the defendant. The Court of Appeal justified the length of the sentence by referring to the defendant as having a 'fanatical determination' and presenting a risk of grave harm for a period that could not be determined.⁴¹ The perceived dangerousness of the defendant was also relied on in the earlier case of *R v Barot* to justify a lengthy sentence. Although the defendant was convicted of the offence of conspiracy rather than preparation for terrorism under section 5 of the Terrorism Act 2006, this case is illustrative of the focus on the perceived dangerousness of terrorist offenders in sentencing decisions. In this case, the Court held that due to the fanaticism of today's terrorists, it is justifiable to impose longer sentences for terrorism offences 'because it will often be impossible to say when, if ever, such terrorists will cease to pose a danger'.⁴² As will be seen below, this approach is followed in the more recent case of *R v Usman Khan*.⁴³

⁴¹ *R v Parviz Khan*, [8]

⁴² *R v Barot* [54]

⁴³ *Usman Khan and others v R* [2013] EWCA Crim 468.

While *R v Parviz Khan* hints at the issue of remoteness, there has only been one case in which the Court of Appeal has explicitly acknowledged the fact that the preparatory offences are not as serious or morally blameworthy as an attempt or the commission of a terrorist act. It is also the only case to refer to the fact that the offences in the Terrorism Acts 2000 and 2006 cover a wide spectrum of activity, with differing levels of seriousness and moral blameworthiness. In the case of *R v Qureshi*,⁴⁴ the offender pleaded guilty to preparing for the commission of terrorist acts (under section 5 of the Terrorism Act 2006), possessing an article for a terrorist purpose (section 57 Terrorism Act 2000) and possessing a record likely to be useful to a person committing or preparing an act of terrorism (section 58 Terrorism Act 2000).⁴⁵ This case consists of an appeal against sentence by the Attorney General on the ground that the total sentence of four and a half years' imprisonment was unduly lenient.⁴⁶ In passing sentence, the Common Serjeant remarked on the fact that while it was agreed that there was evidence that the defendant was travelling to a military hotbed with money and equipment in order to make himself available to support his cause, there was no evidence of his connection with any plot or plans of any sort. It was further stated that offences under section 5 and section 57 are clearly not as culpable as attempting to commit, or actually committing, a terrorist act. However, the evils of terrorism in whatever form were stressed. In conclusion, it was held

⁴⁴ *R v Sohail Anjum Qureshi* [2008] EWCA Crim 1054

⁴⁵ Para 1.

⁴⁶ Para 2.

that on the very wide spectrum covered by section 5 and section 57, the facts of this case fell at the lower end.⁴⁷ The Court of Appeal agreed with the finding of the trial judge that the offending in this case fell at the lower end of the scale of these offences. The nexus between the acts committed by the offender and the potential terrorist activity was relatively remote.⁴⁸ Thus, the Court of Appeal held that the sentence was lenient, but not unduly lenient, and the appeal was dismissed.⁴⁹ This case suggests that remoteness from, or proximity to, the ultimate planned terrorist act is a factor to be considered in sentencing. The Court of Appeal relied on the fact that the plan was incomplete and there was no evidence of the conduct being linked to any settled plot. Thus, the remoteness of the offence provided a mitigating factor in sentencing.

While the above cases indicate that the remote nature of the preparatory conduct could provide a mitigating factor in sentencing, the more recent case of *Usman Khan v R*⁵⁰ appears to contradict this position. In this case, there were nine defendants consisting of a group from London and a group from Stoke. The London group were alleged to be planning to detonate a pipe bomb in the London Stock Exchange, although they had not procured any material nor had they set a date. The Stoke group had discussed plans to set up a training camp in Pakistan, which they would fund, recruit and participate in, and would then potentially return to the UK to

⁴⁷ Para 10.

⁴⁸ Para 17.

⁴⁹ Para 20.

⁵⁰ [2013] EWCA Crim 468

commit acts of terror. It was argued that the Stoke defendants had no intention to commit acts of terror in the near future, and there was a chance that by the time they returned to the UK they would no longer hold any terrorist intentions. Furthermore, no targets had been identified, the method had not been planned and no date was set. Despite the remoteness of the Stoke defendants' conduct from the perpetration of a terrorist attack, the trial judge held that their plot posed very serious consequences in the long term. Further, he found that they 'regard themselves as significantly more advanced both in terms of experience, technique, ambition, facility' than the London group.⁵¹ He held that while the plot to place the bomb in the London Stock Exchange was more immediate, the two plots were equally serious.⁵² The London defendants were sentenced to 18.5 and 17 years imprisonment and the Stoke defendants were given indeterminate sentences of imprisonment for public protection. On Appeal, the Court of Appeal acknowledged that there was no suggestion that the Stoke defendants were trained, 'let alone that they would be in a position to activate, operate or participate within a training facility not then built, however keen they might have been to do so'.⁵³ It held that the risk from the Stoke defendants could not be greater than that posed by the London defendants, who were far closer to achieving their terrorist goal. The Stoke defendants' indeterminate sentences were quashed and replaced with sentences equivalent to the London defendants. This case highlights the potential for severe sentences to be imposed for very remote

⁵¹ Para 39

⁵² Para 41

⁵³ Para 71.

conduct. The Stoke defendants had no training, no funding to set up the camp and no weapons. Yet despite the fact that their conduct was very distant from the commission of a terrorist attack they received heavy sentences of imprisonment.

Section 5 was clearly envisaged as a catchall provision, to be used as an alternative or in addition to the various other available offences in the counter-terrorism arsenal. There has been explicit recognition and acceptance by the courts of the overlapping of offences and the breadth of section 5. It is possible that possession may suffice for conduct in preparation, provided it is accompanied by the relevant intention. While remoteness may be taken into account in the sentencing of offenders, this will not always be the case. The breadth of the offence allows courts a very wide discretion to determine the parameters of this offence and thus determine the scope of the extension to inchoate liability (and the criminal law) that this offence entails. Furthermore, the broad nature of the conduct requirement enables very early police intervention, evidencing the use of section 5 as a means of enhancing the state's investigative and policing powers. The fact that this offence can be used as a catchall provision allows great leeway for prosecutorial discretion. While such discretion may be exercised responsibly so that only legitimate cases are prosecuted, this delegation of legislative function to prosecutors is a troubling feature of the offence.

4.3 Criminalising Intentions? The Wrongfulness of Preparation - A Question of Proximity

Section 5 prohibits conduct in preparation for giving effect to an intention to commit or assist another to commit an act of terrorism. As set out in chapter 2, such conduct must be wrongful in order to be considered as a justifiable instance of criminalisation. However, it is not simply the conduct that is relevant in this offence, but the coincidence of the conduct and an intention to commit or assist in the commission of a future act of terrorism. What is being prohibited is not simply preparatory conduct, but rather preparatory conduct undertaken with intention in respect of the commission of a future harm. Thus, it must be established that the preparatory conduct, when committed with the relevant underlying intent, is wrongful in considering whether the offence is defensible.

English criminal law contains several examples of offences that criminalise conduct that must be committed with an underlying, or ulterior, intent.⁵⁴ According to Horder, the normative significance of a person's conduct can be transformed by the intention with which such conduct is undertaken.⁵⁵ The result being that conduct which may appear objectively innocent and non-wrongful may become wrongful, and thus liable to

⁵⁴ See Jeremy Horder, 'Crimes of Ulterior Intent' in A P Simester and A T H Smith (eds), *Harm and Culpability* (Clarendon Press 1996) for a survey of crimes of ulterior intent in English criminal law.

⁵⁵ *Ibid*, 153.

criminalisation, if undertaken with the ulterior intention to commit a crime.⁵⁶ Section 5 is a clear example of an offence of ulterior intent. The preparatory act must be proved to be committed with an ulterior intention to commit or assist another to commit acts of terrorism. The intention to commit this terrorist harm is the essential element in establishing wrongfulness, transforming conduct that may appear to be objectively innocent into wrongful conduct. Repeating the example given in chapter 2, while it may not be wrongful to buy bleach, it would be wrongful to buy bleach intending to use it to make a bomb that will be detonated in a terrorist attack.

Does this mean that absolutely any act taken on the road to committing a terrorist act, when accompanied with the intention to commit the act, is wrongful? Can there be conduct that is inherently innocent and that cannot be transformed into wrongful conduct, irrespective of the ulterior intent with which it is performed? For example, is the act of getting dressed in the morning in black clothes in order to look inconspicuous when committing a terrorist act later that day wrongful? In terms of section 5, *any* act in preparation for giving effect to an intention to commit or assist in the commission of acts of terrorism is criminalised. It therefore seems possible that getting dressed in these circumstances would, in theory, be caught by the offence. However, is it not too great a stretch to suggest that getting dressed in black is wrongful, even when accompanied by the relevant intention?

⁵⁶ Ibid, 153.

In response to this difficulty, Simester has suggested that a distinction be drawn between '(i) behaviour that is not wrongful and is not made wrongful by the intentions with which it is done, and behaviour that is either (ii) in itself wrongful (eg killing) or is (iii) capable of being made wrongful when done for certain kinds of reasons'.⁵⁷ This distinction is drawn from the former law of indecent assault. In the case of *Court*,⁵⁸ the House of Lords drew a distinction between conduct that is inherently decent, conduct that is inherently indecent and conduct that may or may not be indecent. Where conduct is inherently decent, it cannot constitute an indecent assault, irrespective of the intention with which it was committed.

If there are examples of inherently innocent conduct that cannot be transformed into wrongful conduct even when undertaken with the intention to commit a terrorist act, then it follows that section 5 does not satisfy the wrongfulness principle. However, introducing a distinction between inherently innocent conduct that is incapable of being transformed into something wrongful by virtue of intent and that which is capable of being considered wrongful by virtue of intent would introduce an element of vagueness to the offence. Rather, it is submitted that this problem could be overcome by introducing a distinction between acts that are in furtherance of the relevant intention and those that are wholly disconnected to the intention. While there may well be many instances of preparatory conduct that can be considered wrongful due to the intention with which they are committed,

⁵⁷ Simester, 'Prophylactic Crimes', 73.

⁵⁸ *Court* [1989] AC 28

there may also be some remote instances of conduct that are incapable of being transformed into something wrongful by virtue of intent, due to the fact that the conduct is not in furtherance of the intention. The above-mentioned example of getting dressed in black with the intention of committing an act of terrorism would be addressed if such a distinction were introduced, as getting dressed in black could not be said to be in furtherance of the ultimate intention. Such action is wholly disconnected from the ultimate intention. The all-encompassing conduct requirement in section 5, which prohibits 'any conduct in preparation for giving effect to his intention', would include such examples of inherently innocent conduct that is wholly disconnected to the relevant intention, and therefore encounters difficulties in satisfying the wrongfulness requirement.⁵⁹

A further related consideration in assessing the preparatory terrorism offence is the question of proximity. While the offence includes an intention requirement, thus satisfying the culpability constraint, it captures conduct that is very distant from the commission of the ultimate harm at which the offence is aimed. This presents a justificatory difficulty in terms of proximity. Due to the weight that is placed on the intention of the offender in grounding wrongfulness, there is a danger that failing to meet a proximity threshold of more than 'mere preparation' would result in the offence effectively criminalising intentions - the offence starts to resemble thought crime. Furthermore, proving intention in the absence of proximate conduct is very

⁵⁹ Simester, 'Prophylactic Crimes', 74.

difficult. Without some form of proximate conduct, it is difficult to see how there could be convincing evidence of a definite terrorist intent. It seems clear that many instances of very remote acts of preparation would not satisfy the proximity constraint. As a result, the preparatory offence fails to allow an offender what Duff refers to as a sufficient *locus poenitentiae*.⁶⁰ While a person may undertake an act of preparation with an intention to commit an act of terrorism, there is still the opportunity for them to change their mind and decide to abandon the planned terrorist act. As discussed in chapter 2, where a person has a change of intention before committing a criminal act this would affect their culpability and thus, their criminal liability. Failing to allow them sufficient opportunity to renounce their criminal intention and choose to obey the law fails to treat them as autonomous moral agents.⁶¹

Although the preparatory offence in section 5 does not satisfy the proximity constraint, this does not necessarily preclude the criminalisation of an offence of preparation. As set out in chapter 2, proximity is one of the factors to be considered in questions of criminalisation. It may be possible to address proximity concerns by narrowing the *actus reus* of the offence to only apply to acts that are taken in furtherance of the relevant intention, and to provide for a defence of voluntary abandonment or withdrawal. In this way, the offence could not capture acts which are wholly disconnected to the relevant intention (such as the example of getting dressed in black, set out above) and would create a *locus poenitentia* for the actor to have a change of

⁶⁰ Duff, *Criminal Attempts* See chapter 2 for a discussion of this concept.

⁶¹ *Ibid*, 391-392

heart and withdraw from the criminal purpose, thus negating liability under section 5. Limiting the ambit of the offence in this way would assist in its justification.

Proximity also has a role to play in the sentencing of preparatory offences.⁶² Preparatory conduct occurs on a spectrum. As an actor moves from thinking about or planning a terrorist act towards the commission of that act, he will move through various stages of preparation. With each task that is performed, he gets closer to realising his terrorist intention. As the actor gets closer to the ultimate harm he intends, navigating various obstacles that may be presented on the way, it becomes more likely that he will succeed in his plan.⁶³ The risk of the ultimate harm being perpetrated increases. Furthermore, as the actor approaches the commission of the intended act of terror, he must constantly reaffirm his intention to go through with the plan. As Blackstone observed:⁶⁴

Evil, the nearer we approach it, is the more disagreeable and shocking, so that it requires more obstinacy in wickedness to perpetrate an unlawful action, than barely to entertain the thought of it.

It follows that the moral blameworthiness of the actor increases the further he moves towards the ultimate harm. Moral blameworthiness corresponds with

⁶² Z Scanlon, 'Punishing Proximity: Sentencing Preparatory Terrorism in Australia and the United Kingdom' (2014) 25 *Current Issues in Criminal Justice* 765

⁶³ D Ohana, 'Desert and Punishment for Acts Preparatory to the Commission of a Crime' (2007) 20 *Canadian Journal of Law and Jurisprudence* 113, 117-118.

⁶⁴ W Blackstone, *4 Commentaries on the Laws of England* (G Sharswood ed, 1908)

proximity to the ultimate harm. For this reason, it is generally accepted that attempts are less serious than the commission of the ultimate crime that was attempted, and that this should be reflected in sentencing.⁶⁵ Thus, proximity plays a role in terms of determining the culpability of the offender and the appropriate level of sentence to be imposed.

The overly broad *actus reus* in section 5 can capture a wide range of preparatory conduct, as evidenced by the case law examined above. Such conduct can range from travelling to the airport intending to go to Pakistan to join a terrorist operation (*R v Qureshi*), to planning to place a bomb in an identified location in the near future (*Usman Khan v R*), to producing ricin sufficient to kill nine people (*R v Davison*).⁶⁶ It is therefore not surprising that the sentences imposed for these offences vary significantly. However, section 5 provides for a maximum sentence of life imprisonment, and many offenders who have been convicted of this offence have received lengthy sentences of twenty years or more, despite the remoteness of their conduct. Such harsh sentences seem to be disproportionate to the risk of harm, due to the lack of proximity to the commission of the ultimate harm.⁶⁷ These severe sentences are justified by reference to the danger posed by the offender due to their fanatical or extremist beliefs.⁶⁸ Despite the fact that several cases refer to the

⁶⁵ Duff, *Criminal Attempts*; A Ashworth and L Zedner, 'Prevention and Criminalization: Justifications and Limits' (2012) 15 *New Criminal Law Review* 542.

⁶⁶ *R v Davison* (Unreported, Newcastle Crown Court, Milford J, 14 May 2010)

⁶⁷ Due to the constraints of the thesis, it is not possible to undertake a detailed examination of the sentencing of preventive terrorism offences. However, it is noted that this is an important area which needs further research. Assessing the justifiability of the preventive terrorism offences would be enhanced by further research on the sentencing of these offences.

⁶⁸ See, for example, *R v Barot* and *Usman Khan v R*.

offenders as being 'dreamers',⁶⁹ or having 'talked up' their prospects of success,⁷⁰ courts are prepared to overlook the remoteness of the preparatory conduct in sentencing decisions in favour of considerations based on the fanatical or extremist beliefs held by the offender. If the preparatory offence is to be made more palatable, proximity must provide a mitigating factor in sentencing.

It is interesting to note that the Law Commission, in 2007, suggested introducing an offence of criminal preparation.⁷¹ It was felt that the requirement that an act be 'more than merely preparatory' in order to constitute an attempt was vague and uncertain⁷² and that the courts' interpretation of this provision has resulted in an unduly narrow offence.⁷³ In order to address this, the Commission proposed the enactment of two separate offences - (1) an offence of criminal attempt limited to last acts needed to commit the intended offence,⁷⁴ (2) an offence of criminal preparation, limited to acts of preparation which are 'properly to be regarded as part of the execution of the plan to commit the intended offence'.⁷⁵ Ultimately, the recommendation was unsuccessful and was later withdrawn. However, even when suggesting an offence of preparation, it was not suggested that the offence should catch acts of preparation. The preparatory

⁶⁹ *R v Iqbal* para 11

⁷⁰ *Usman Khan v R*

⁷¹ Law Commission, '*Conspiracy and Attempts*' *Law Commission Consultation Paper No 183* (HMSO, 2007)

⁷² Para 12.14

⁷³ Para 12.15

⁷⁴ Para 12.6

⁷⁵ Para 12.7

conduct would have to be regarded as forming 'part of the execution of the plan to commit the intended offence'. This is a narrower formulation than that in section 5.

4.4 Conclusion

The above analysis has highlighted the significant extension to inchoate liability that has occurred as a result of the preparatory offence in section 5 of the Terrorism Act. The well-established parameters of attempts liability have been extended by this offence to include remote acts of preparation. As explained, the rationale for the creation of this offence was one of prevention - to prevent the perpetration of an act of terrorism. The offence was enacted in the wake of the London bombings and this event provided the immediate context for the creation of this preventive offence. While it is accepted that prevention is a legitimate goal of the criminal law and that the state has an interest in protecting the public from harm from a terrorist attack, it is argued that preventive offences must be subject to normative limits and constraints in order to protect liberty and autonomy and ensure that the reach of the criminal law is not unjustifiably extended in pursuing preventive goals.

Section 5 struggles to satisfy the framework of principles and constraints, thus affecting the justifiability of the offence. This offence has the potential to criminalise non-wrongful conduct as a result of the breadth of the

actus reus. Another particular difficulty for the justification of this offence is its inability to satisfy the proximity constraint. By criminalising preparatory conduct, the offence fails to allow a sufficient *locus poenitentiae* for a potential offender to withdraw from his criminal purpose, resulting in an infringement of the actor's autonomy by failing to treat him or her as a rational moral agent. Furthermore, the remote nature of the conduct required allows for the possibility of conviction and punishment based in the main on the intention of the actor. This results in an offence that appears to permit something that is verging on the criminalisation of bad intentions. In order to render this offence justifiable, the *actus reus* would need to be narrowed in order to catch only such conduct that could be assessed to be wrongful due to the fact that it is carried out in furtherance of the ultimate terrorist intention. Furthermore, a defence of voluntary abandonment should be introduced, so as to incentivise and leave space for withdrawal from the criminal purpose. Finally, proximity considerations should play a role in determining the appropriate sentences to be imposed so as to recognise the fact that moral blameworthiness correlates to proximity to the ultimate harm.

From an examination of the case law, it is clear that the courts have substantial power to determine the scope of the offences, and thus the limits of the criminal law in respect of this extension to inchoate liability. The courts have stressed the breadth of this offence and have stated that there is a considerable overlap between this offence and other terrorism offences extending criminal liability. Furthermore, this offence allows for a large

degree of prosecutorial discretion. It appears from the case law examined above that this discretion is being exercised responsibly, in that it is not being used to convict people who are wholly uninvolved in any terrorist-related activity. Rather, those who have been convicted under these offences have been involved in some form of terrorist-related activity, albeit in some cases only very peripherally. However, the offence is drafted in terms that are so expansive as to catch all conceivable potentially risky conduct, including people who would not be engaged in preparing for terrorism, allowing for intrusive police practices and investigations. Relying on the responsible exercise of police and prosecutorial discretion in preventing the improper use of this offence is not a sufficient safeguard against abuse. The offence is focused on enhancing the powers of the police by allowing for earlier intervention rather than on the punishment of culpable wrongdoing.

5. Encouragement of Terrorism

Of all of the terrorism offences to extend the boundaries of inchoate liability, the ones generating the greatest controversy are the offences dealing with encouragement of terrorism found in sections 1 and 2 of the Terrorism Act 2006.¹ These sections create two new offences prohibiting direct or indirect encouragement of terrorism, extending the common law inchoate offence of incitement.² Section 1 prohibits the publication of 'a statement that is likely to be understood by some or all of the members of the public to whom it is published as a direct or indirect encouragement or other inducement to them to the commission, preparation or instigation of acts of terrorism or Convention offences'. Section 2 prohibits the dissemination of such material or its possession with a view to its dissemination.

These sections are both long and complex, running to over 1,500 words in total. Thus, an explanation of the precise scope and limits of these offences is a complicated task. Apart from the complex nature of the offences, they raise various problems in relation to the framework of principles and constraints on criminalisation of offences extending inchoate liability outlined

¹ See, for example, Amnesty International, *A Broken Promise*, <http://www.amnesty.org/en/library/asset/EUR45/004/2006/en/cc167867-d45b-11dd-8743-d305bea2b2c7/eur450042006en.pdf>, last accessed 8 October 2015; Liberty, *Terrorism Bill: Liberty's Briefing for Second Reading in the House of Lords*, November 2005.

² The common law inchoate offence of incitement was replaced by the new statutory offences of assisting and encouraging crime by the Serious Crime Act 2007.

in chapter 2 against which the offences should be judged in determining whether criminalisation is justified.

This chapter begins by setting out the legislative context in which the offences were enacted in order to ascertain the intention with which they were created. It then undertakes a detailed analysis of the precise scope of the offences in order to establish whether the offence definitions satisfy rule of law standards. Finally, the offences are analysed according to the framework of principles and constraints developed in chapter 2 in order to identify whether there are particular justificatory problems presented by these offences. While most attention and debate regarding the encouragement offences has centred on the controversial 'glorification of terrorism' part of the offence, the analysis below suggests that this is by no means the only concerning feature of these offences.

5.1 Legislative Background

The offences in sections 1 and 2 of the Terrorism Act 2006 were enacted in the aftermath of the July bombings in London. However, the then Labour government had been planning to enact speech type offences in relation to

terrorism prior to this, as evidenced in their election manifesto published a few months before the bombings:³

Wherever possible, suspects should be prosecuted through the courts in the normal way. So we will introduce new laws to help catch and convict those involved in helping to plan terrorist activity or who glorify or condone acts of terror.

The bombings of 7 July 2005 provided further justification and impetus for the creation of these planned offences. They were seen as necessary to prevent the radicalisation of young Muslims, who, it was feared, were vulnerable to the preaching of radical imams. The intention of Parliament in enacting the offence was explained in the following statement by Charles Clarke:⁴

Now, I believe that it is certainly the case that the July events indicate that there are people in this country who are susceptible to the preaching—and I do not use that in the religious sense—of an argument or a message that terrorism is a worthy thing, a thing to be admired, a thing to be celebrated and then act on the basis of that. I think there is clear evidence in that sense. What this Bill is about is trying to make that more difficult, that transition from people encouraging, glorifying to then an act being undertaken.

³ Labour Party Manifesto, *Britain Forward Not Back* (London, 2005), p 53. Note that the 'priority of prosecution' approach so welcomed by liberal lawyers was accompanied by a less welcome expansion of criminal liability, as clearly evidenced by this quote.

⁴ House of Commons, *Hansard Commons Draft Terrorism Bill, Written and Oral Evidence*, HC 515-I, 11 October 2005, Q.3.

This intention is confirmed in the case of *R v Ahmed Faraz*,⁵ where the judge stated that the intention of Parliament in creating these and other offences under the Terrorism Acts of 2000 and 2006 was twofold. First, 'to prevent, so far as possible, the commission of terrorist offences either here or abroad'. Secondly, 'to prevent or at least drastically reduce the number of young men and women who would be 'radicalised' by propaganda of various kinds to believe that the commission of such offences is desirable and from there to begin to plan to carry out or to help others to carry out such acts'.⁶

It appears from the above that the intention behind the enactment of these offences is twofold. Most immediately, the offences are aimed at preventing radicalisation, in particular radicalisation of young Muslims attracted to a terrorist cause. However, the broader aim, in common with all of the preventive terrorist offences, is to prevent the perpetration of a future act of terrorism. The rationale is that by criminalising the encouragement of terrorism, the risk of a terrorist act is reduced. While the rationale is to prevent the commission of an ultimate act of terrorism, the offence targets only the encouraging statement. The focus is on the person publishing the statement, not on the one who may then go on to commit an act of terrorism.

The Government gave two justifications for the enactment of these offences. First, that enactment of such provisions was required by international law. Secondly, that there were gaps in the existing law that

⁵ *R v Ahmed Faraz* [2012] EWCA Crim 2820

⁶ *R v Ahmed Faraz*, ruling of 27 May 2011, Calvert-Smith J at transcript p14.

necessitated the creation of these provisions. In the House of Lords debate on the Terrorism Bill, Baroness Scotland stated:⁷

It is not an offence ... to incite people to engage in terrorist activities generally, or to incite them obliquely by creating the climate in which they may come to believe that terrorist acts are acceptable. That is the gap that we want to close, both to enable us to fulfil our international obligations and because we believe that it is desirable in its own right.

Both of these justifications require closer examination in order to determine whether they are defensible and, if so, whether the offences as drafted properly address these justifications. The international law obligations that the government is referring to as providing a justification for the enactment of sections 1 and 2 emanate from both the Council of Europe and the United Nations. The Council of Europe Convention on the Prevention of Terrorism (CECPT), adopted in May 2005, requires states to establish 'public provocation to commit a terrorist offence' as a criminal offence in domestic law. Article 5 of the Convention states as follows:

1. For the purposes of this Convention, "public provocation to commit a terrorist offence" means the distribution, or otherwise making available of a message to the public, with the intent to incite the commission of a terrorist offence, where such conduct, whether or not directly advocating terrorist offences, causes a danger that one or more such offences may be committed.

⁷ Hansard, *House of Lords Debate vol 676* (5 December 2005), col 455, Baroness Scotland.

2. Each Party shall adopt such measures as may be necessary to establish public provocation to commit a terrorist offence, as defined in paragraph 1, when committed unlawfully and intentionally, as a criminal offence under its domestic law.

Public provocation therefore covers both direct and indirect advocacy of terrorist offences. The Explanatory Memorandum to the Convention provides examples of conduct that is intended to be caught by the offence of 'public provocation'. These include 'presenting a terrorist offence as necessary and justified',⁸ 'the dissemination of messages praising the perpetrator of an attack, the denigration of victims, calls for funding of terrorist organisations or other similar behaviour'.⁹ However, there are two conditions that narrow the scope of the offence. First, there is a requirement for specific intent. The offender must intend to incite the commission of a terrorist offence. Secondly, there must be an objective danger that a terrorist offence may be committed as a result of the provocation. Furthermore, according to Article 12 of the Convention, the creation of such an offence in domestic law must respect "human rights obligations, in particular the right to freedom of expression, freedom of association and freedom of religion". These conditions clearly limit the scope of the required offence. However, as will be seen when analysing the scope of the offences in sections 1 and 2 later in this chapter, similar restrictions do not inform the UK offences, which permit both offences to be committed recklessly and with no requirement that

⁸ *Explanatory Report on Council of Europe Convention on the Prevention of Terrorism* (CM, 2005), 34, para 98.

⁹ *Ibid*, 34, para 95.

anyone is actually encouraged to commit an act of terrorism. Therefore, these offences do not faithfully implement Article 5 and, as such, go beyond the obligation under the Convention to criminalise public provocation to commit a terrorist offence.

In September 2005, the UK-sponsored Resolution 1624 was adopted by the United Nations Security Council.¹⁰ According to this Resolution, the Security Council called on states to

adopt such measures as may be necessary and appropriate and in accordance with their obligations under international law to:

- (a) Prohibit by law incitement to commit a terrorist act or acts;
- (b) Prevent such conduct;
- (c) Deny safe haven to any persons with respect to whom there is credible and relevant information giving serious reasons for considering that they have been guilty of such conduct.

The preamble to the Resolution states that the Security Council condemns the 'incitement of terrorist acts' and repudiates 'attempts at the justification or glorification (*apologie*) of terrorist acts that may incite further acts'.

Resolution 1624 thus imposes a further international obligation to enact an offence of incitement to commit a terrorist act, with a focus on prevention. However, the Resolution does not go as far as the CECPT, in that it calls on

¹⁰ United Nations Security Council Resolution 1624 (2005)

states to criminalise incitement to terrorism, but only condemns the justification or glorification of terrorism. As the term 'incitement' is not defined, it is unclear whether this refers to only direct incitement or if it is intended to cover both direct and indirect incitement.¹¹ However, it is arguable that since incitement was a crime under English law at the time, it was not necessary to create a new offence.

The government's claim that sections 1 and 2 were necessary to close a gap in the law also merits closer examination. There are a variety of available offences, both within the ordinary criminal law as well as specific terrorist legislation, which could be used to address incitement to the commission of a terrorist act. As mentioned, the common law inchoate offence of incitement formed part of the English law from the nineteenth century until 2007, when it was replaced by the broader statutory offences of assisting and encouraging crime.¹² Section 4 of the Offences Against the Person Act 1861 creates an offence of solicitation to murder. The Public Order Act 1986 prohibits causing fear or provocation of violence in section 4. The same Act criminalises incitement to racial and religious hatred.¹³ Apart from these 'ordinary' criminal law offences, section 59 of the Terrorism Act 2000 criminalises incitement to commit a terrorist act overseas.¹⁴ It is therefore clear that there

¹¹ Saul, 'Speaking of Terror: Criminalising Incitement to Violence', 870

¹² Ashworth, *Principles of Criminal Law*, 456, and see chapter 11.7 for a discussion of the statutory offences of assisting and encouraging crime.

¹³ The Public Order Act 1986 was amended by the Racial and Religious Hatred Act 2006 to include incitement to religious, as well as racial, hatred.

¹⁴ Although it is acknowledged that this does not apply to incitement of terrorist violence in the UK.

is a wide range of offences dealing with incitement that could apply to incitement to terrorist violence.

It was the government's contention that while incitement of a specific terrorist act was already an offence attracting criminal liability, more generalised incitement was not adequately covered and was thus difficult to prosecute. These offences therefore sought to close this gap by criminalising general forms of incitement. However, it is interesting to note that prior to the enactment of sections 1 and 2, the existing offences were successfully used to prosecute extremist speech. In the case of *R v El-Faisal*,¹⁵ an Islamic cleric was convicted of soliciting murder under section 4 of the Offences Against the Person Act 1861 and incitement to racial hatred under the Public Order Act 1986. The court emphasised the breadth of the offence under section 4 of the Offences of the Persons act. Similarly, Abu Hamza was convicted for extremist speech under the same offences.¹⁶ In light of the variety of available offences and the breadth accorded to the offence of solicitation to murder by the courts, it is difficult to identify a gap in the law. However, the Joint Committee on Human Rights accepted that an argument could justifiably be made for the enactment of a 'new, narrowly defined criminal offence of indirect incitement to terrorist acts' on the basis that the precise scope of the existing offences was somewhat uncertain.¹⁷

¹⁵ *R v El Faisal* [2004] EWCA Crim 624

¹⁶ *R v Abu Hamza* [2006] EWCA Crim 2918

¹⁷ Joint Committee on Human Rights, *Third Report of Session 2005-06*, para 25.

Arguably, there was a gap in the existing law, in that provision was not explicitly made for generalised or oblique encouragement of terrorism. However, the relevant question is whether this was a gap that needed to be closed by the enactment of a criminal offence? Is generalised or oblique encouragement of terrorism something that can justifiably be criminalised or did this gap reflect the fact that such conduct should not legitimately fall within the scope of the criminal law? Furthermore, if it is determined that this is a gap that can legitimately be closed by the creation of new criminal offences, such offences must be narrowly and precisely defined. This definition of the offences will be analysed in the following section in order to determine the scope of the offence and to establish whether this requirement for a precise and narrow definition has been met.

5.2 Defining the Offences

5.2.1 *Section 1: Encouragement of Terrorism*

In essence, section 1 of the Terrorism Act 2006 criminalises the publication of a statement that is likely to be understood as a direct or indirect encouragement to engage in acts of terrorism. This is a long and complex section. However, before undertaking an analysis of the scope of the offence, it is helpful to set out the wording of the first three subsections, which specify the main parameters of the offence, specifically the *actus reus* and *mens rea* requirements. According to section 1:

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

- (2) A person commits an offence if
 - (a) he publishes a statement to which this section applies or causes another to publish such a statement; and
 - (b) at the time he publishes it or causes it to be published, he
 - (i) intends members of the public to be directly or indirectly encouraged or otherwise induced by the statement to commit, prepare or instigate acts of terrorism or Convention offences; or
 - (ii) is reckless as to whether members of the public will be directly or indirectly encouraged or otherwise induced by the statement to commit, prepare or instigate such acts or offences.

The *actus reus* of this offence is that the offender 'publishes ... or causes another to publish' a statement that is 'likely to be understood by some or all of the members of the public to whom it is published as a direct or indirect encouragement or other inducement to them to the commission, preparation

or instigation of acts of terrorism or Convention offences'.¹⁸ There are various facets that make up this conduct element.¹⁹

The core of the *actus reus* is that there must be a publication of a statement.²⁰ According to the Act, a statement consists of 'a communication of any description' and includes 'a communication without words consisting of sounds or images or both'.²¹ Publication of a statement refers to 'publishing it in any manner to the public'.²² This is clearly very broad, but the act specifically includes in its definition of 'publishing a statement' provision for electronic publication, thus widening its application. Publication includes 'providing electronically any service by means of which the public have access to the statement'.²³ It also includes using a service provided 'electronically by another so as to enable or to facilitate access by the public to the statement'.²⁴ So where, for example, a statement is posted on a website run by someone other than the poster, various people would be considered to be publishers under this offence. Not only is the person who creates the statement liable under this offence, but also the owner of the website upon which it is posted, as well as the internet service provider that provides the

¹⁸ Section 1(1) Terrorism Act 2006. 'Convention offences' are set out in Schedule I.

¹⁹ See Adrian Hunt, 'Criminal Prohibitions on Direct and Indirect Encouragement of Terrorism' [2007] Criminal Law Review 441 for a detailed examination of the *actus reus* of the offence.

²⁰ But note, it is not required that the offender actually publishes the statement. It is enough that he cause another to do so.

²¹ Section 20(6).

²² Section 20(4)(a)

²³ Section 20(4)(b)

²⁴ Section 20(4)(c)

service whereby the public has access to the statement.²⁵ The net of liability is cast much wider than the originator of the statement, pushing back the boundaries of the old common law crime of incitement.²⁶

One restriction on the publication of the statement is that it must be made to the 'public'. It cannot consist of a statement made in a private setting or from one person to another.²⁷ This is curious considering that one of the primary rationales for this offence was to prevent radicalisation.²⁸ Radicalisation, or encouragement to commit a terrorist act, could just as plausibly be carried out in a private or one-on-one setting. This restriction could be due to the fact that this offence was ostensibly enacted to fulfil international obligations under CECPT, which calls for the criminalisation of public provocation.²⁹ Not all members of the public to whom the statement is published need to be affected. The section provides that 'some or all' of them must be so affected.³⁰ It is therefore possible that provided the statement is made to a public group, if only one person within that group is likely to be affected the statement would fall within the scope of the offence.

²⁵ Hunt, 444. It is interesting to note that Al Shabaab and other terrorist organisations have Twitter accounts from which they tweet updates, many of which could be caught under this offence. <http://www.theatlanticwire.com/global/2012/01/most-infamous-terrorists-twitter/46852/#>] (last accessed 8 October 2015)

²⁶ However, the new offences of assisting and encouraging crime are so broad as to potentially cover such conduct. But specific provision is not made for electronic publication of statements.

²⁷ Hansard HL vol 676 col 435 (5 December 2005).

²⁸ It is also interesting to contrast this with section 4 of the Public Order Act 1986, which criminalises provocation to violence in both a public and a private setting and the statutory offences of assisting and encouraging crime, which can be done in a private setting.

²⁹ Hansard HL vol 676 col 435 (5 December 2005).

³⁰ Section 1(1)

Section 1 does not require that anyone is in fact encouraged to commit an act of terrorism as a result of publication of the statement. Rather, the requirement is that the statement must be 'likely to be understood' as an encouragement to the commission, preparation or instigation of acts of terrorism or Convention offences. There is therefore no requirement for there to be an actual encouragement. Rather, the offence focuses on the objective likelihood of the statement to encourage. This is further clarified in section 1(5)(b), which states that it is irrelevant 'whether any person is in fact encouraged or induced by the statement to commit, prepare or instigate any such act or offence'.³¹ Whether a statement is likely to be understood as such must be determined having regard to 'the contents of the statement as a whole',³² and 'the circumstances and manner of its publication'.³³ So while the rationale for the enactment of this offence is one of risk prevention, with the underlying aim of preventing people from being radicalised or encouraged to commit a terrorist act and thus ultimately aimed at preventing the perpetration of such an act of terrorism, there is no requirement that someone is so encouraged. The risk of the perpetration of a terrorist act that this offence ultimately aims to prevent is even more remote than in the case of an act of preparation covered by section 5 of the Terrorism Act 2006. This can be contrasted with the requirement in the CECPT that in order to qualify as 'public provocation to commit a terrorist offence' the conduct (ie. 'the distribution, or otherwise making available of a message to the public') must

³¹ Section 1(5)(b)

³² Section 4(a)

³³ Section 4(b)

cause 'a danger that one or more such [terrorist] offences may be committed'. Section 1 contains no such restriction as to an objective danger of the commission of a terrorist offence as a result of publication of a statement directly or indirectly encouraging terrorism.

The offence focuses on 'direct or indirect encouragement'. However, these terms are not clearly defined. As explained above, it has been assumed that 'direct encouragement' is analogous to the old common law offence of incitement.³⁴ For this reason there has been very little attention or controversy as to the meaning of 'direct encouragement'.³⁵ 'Indirect encouragement', however, is the part of the offence that extends the law to cover the generalised, or 'oblique' incitement that the government argued was not adequately covered by the existing law. This term is not clearly defined. According to section 1(3), indirect encouragement of acts of terrorism or Convention offences includes every statement which:

- (a) glorifies the commission or preparation (whether in the past, in the future or generally) of such acts or offences; and
- (b) is a statement from which those members of the public could reasonably be expected to infer that what is being glorified is being glorified as conduct that should be emulated by them in existing circumstances.

³⁴ Hunt, 448.

³⁵ However, see the argument in section 4.2 on wrongfulness where it is asserted that 'direct encouragement' was intended as something different to 'direct incitement'.

This clarification sets out what is included in the term indirect encouragement. Glorification of terrorism is included as something that could constitute indirect encouragement. However, it is not the only form of indirect encouragement. This clarification is not an exhaustive definition. Beyond glorification, there is no guidance as to what else could constitute indirect incitement.

It is this part of the offence, the 'indirect encouragement' part, that has generated the most controversy, particularly the focus on the glorification of terrorism. In section 20(2), 'glorification' is partially defined as including 'any form of praise or celebration'. However, the scope of glorification is limited somewhat, in that it only falls within the scope of the offence if members of the public could reasonably infer that they should emulate the glorified conduct. This wording provides a potential restriction on the scope of the offence. However, note that this restriction applies only to glorification of terrorism and not to the remainder of indirect encouragement. There has been strong opposition to the inclusion of 'glorification' in this offence, based on the vagueness and uncertainty of the term. The Joint Committee on Human Rights expressed its concern with this term on the grounds of legal uncertainty as follows:³⁶

The legal certainty concern is that terms such as glorification, praise and celebration are too vague to form part of a criminal offence which can be committed by speaking. The Home Secretary draws a distinction between

³⁶ Joint Committee on Human Rights, *Third Report of Session 2005-06*, paras 27-28.

encouraging and glorifying on the one hand and explaining or understanding on the other. The last two, he says would not be caught by the new offence, because they do not amount to encouraging, glorifying, praising or celebrating. In our view, the difficulty with the Home Secretary's response is that his distinction is not self-executing: the content of comments and remarks will have to be carefully analysed in each case, including the context in which they were spoken, and there will be enormous scope for disagreement between reasonable people as to whether a particular comment is merely an explanation or an expression of understanding or goes further and amounts to encouragement, praise or glorification.

The breadth of the *actus reus* of this offence is here, yet again, exacerbated by reliance on the expansive definition of terrorism.³⁷ Section 1 applies to statements encouraging the commission, preparation or instigation of acts of terrorism or of Convention offences. Convention offences are specified in Schedule 1 of the Act, and are those offences that have been defined in International Counter-Terrorist Conventions. However, 'an act of terrorism' relies on the definition of terrorism in section 1 of the Terrorism Act 2000. 'Terrorism' as defined in section 1 is not in itself a criminal offence. The encouragement of terrorism offence therefore criminalises the encouragement of something that itself is not an offence. Extending this breadth even further is the provision in section 1(5)(a) of the 2006 Act that it is irrelevant whether the encouragement 'relates to the commission, preparation or instigation of one or more particular acts of terrorism or Convention offences, of acts of

³⁷ As discussed in Chapter 3.

terrorism or Convention offences of a particular description or of acts of terrorism or Convention offences generally'. This can be contrasted with the statutory offences of assisting or encouraging an offence under the Serious Crime Act 2007, where it is required that what is encouraged is an act that would amount to one or more offences.

As regards the *mens rea* requirement, section 1(2)(b) provides that at the time of publication, the publisher must either intend that members of the public are 'directly or indirectly encouraged or otherwise induced by the statement to commit, prepare or instigate' acts of terrorism or Convention offences, or be 'reckless as to whether members of the public' will be so encouraged. In instances where only recklessness is proved, the defendant has a partial defence in section 1(6) if he can show that 'the statement neither expressed his views nor had his endorsement'³⁸ and that this is clear 'in all the circumstances of the statement's publication'.³⁹

The *actus reus* of the offence is clearly problematic. Terms such as 'indirect encouragement' and 'glorification' are not clearly defined and the offence relies on the equally problematic definition of 'terrorism' for its effect. Even though this offence aims to prevent radicalisation and, consequently, reduce the risk of a terrorist act, there is no requirement that anyone is actually encouraged by the statement or even that there is a clear danger that someone would be so encouraged. As to the *mens rea*, the fact that the offence

³⁸ Section 1(6)(a)

³⁹ Section 1(6)(b)

can be committed recklessly is counter to the general principle that inchoate offences should require the highest *mens rea* test due to the remoteness of the offence from the commission of the ultimate harm which it is designed to prevent.⁴⁰ While there is a partial defence in cases where only recklessness is proved, this defence places the onus on the defendant to prove that the statement did not reflect his views and did not have his endorsement and that this is clear in all the circumstances.

The government's justification for enacting this offence was to fulfil its international law obligations and to close the gap in the law with regard to oblique or generalised encouragement of terrorism. With regard to the international obligations, the offence in section 1 goes beyond what was required by the Council of Europe Convention on the Prevention of Terrorism in that it does not include the two provisos that there be a danger of a terrorist attack as a result of the encouragement and that the person publishing the statement intends such a result. As regards closing the gap in the law, it is arguable that this has been achieved in that there is now a very broad offence of generalised encouragement. However, this is the result of a very broad *actus reus* requirement and an unduly low *mens rea* requirement.

⁴⁰ Liability for attempts, for example, requires intention.

5.2.2 *Section 2: Dissemination of Terrorist Publications*

Whereas section 1 is concerned with the publication of a statement, section 2 is concerned with the dissemination of such a statement. This section extends liability even further in that the disseminator need not be the person who publishes the statement. Furthermore, it covers conduct beyond encouragement, including assistance as well as possession within the scope of the offence.⁴¹ Again, this is a very long and complex offence, suffering from the same deficiencies as section 1.

Section 2 prohibits dissemination of terrorist publications. In order to constitute a terrorist publication, the publication must contain matter that is likely:⁴²

- (a) to be understood, by some or all of the persons to whom it is or may become available as a consequence of that conduct, as a direct or indirect encouragement or other inducement to them to the commission, preparation or instigation of acts of terrorism; or
- (b) to be useful in the commission or preparation of such acts and to be understood, by some or all of those persons, as contained in the publication, or made available to them, wholly or mainly for the purpose of being so useful to them.

⁴¹ This chapter is concerned primarily with the encouragement and assistance elements of the offence. It is therefore restricted to a consideration of section 2 in relation specifically to encouragement and assistance. The possession element will be covered in greater detail in the chapter dealing with possession offences and sections 57 and 58 of the Terrorism Act 2000.

⁴² Section 2(3)

Thus, the publication is extended to cover material that not only directly or indirectly encourages acts of terrorism but that may also be useful in the commission or preparation of acts of terrorism.

Section 2(2) sets out the various types of conduct that are prohibited by the offence. The offence prohibits dissemination of terrorist publications by way of distribution or circulation;⁴³ giving, selling or lending;⁴⁴ offering it for sale or loan;⁴⁵ providing a service enabling others to obtain, read, listen to or look at it or acquire it by means of a gift or loan;⁴⁶ or by electronic publication.⁴⁷ It also prohibits the possession of such a publication with a view to dissemination by way of the types of conduct listed in section 2(2).⁴⁸ Unlike section 1, the audience is not restricted to the public. Reference is made to 'persons'. Therefore, giving a terrorist publication to a single person, in one of the ways set out in section 2(2), would be caught by the offence. The *mens rea* requirement again is one of either intention or recklessness. However, it covers both encouragement and assistance. A person must either intend 'an effect of his conduct to be a direct or indirect encouragement or other inducement to the commission, preparation or instigation of acts of

⁴³ Section 2(2)(a)

⁴⁴ Section 2(2)(b)

⁴⁵ Section 2(2)(c)

⁴⁶ Section 2(2)(d)

⁴⁷ Section 2(2)(e)

⁴⁸ Section 2(2)(f)

terrorism',⁴⁹ or intend that an effect is the 'provision of assistance in the commission or preparation of such acts',⁵⁰ or be reckless in either regard.⁵¹

In other respects, the section follows the drafting in section 1 and suffers from the same defects. Indirect encouragement is defined in the same broad terms;⁵² it does not matter whether anyone is in fact encouraged or assisted by the material that has been disseminated;⁵³ nor does it matter if the material encourages or assists particular acts of terrorism or acts of terrorism generally.⁵⁴ There is a partial defence in the case of recklessness, provided the defendant proves that the publication did not express his views and did not have his endorsement and that this is clear from the circumstances.⁵⁵ However, this defence is only available in relation to dissemination of publications that are likely to be understood as a direct or indirect encouragement. It is not available if the publication is likely to be useful to the commission or preparation of such acts.⁵⁶

Despite the government's insistence on the necessity of these offences in the face of strong opposition, they have not been widely used since their enactment. According to the most recent statistics published by the Home Office, there have been a total of four convictions where the principal offence

⁴⁹ Section 2(1)(a)

⁵⁰ Section 2(1)(b)

⁵¹ Section 2(1)(c)

⁵² Section 2(4)

⁵³ Section 2(8)

⁵⁴ Section 2(7)

⁵⁵ Section 2(9)

⁵⁶ Section 2(10)

was encouragement of terrorism under section 1, and twelve convictions under section 2.⁵⁷

5.3 Is Criminalisation Justified? Identifying Wrongfulness

The rationale provided by the government for the enactment of sections 1 and 2 of the Terrorism Act 2006 was to prevent radicalisation of those who may proceed to commit a terrorist act and thus to prevent the commission of acts of terrorism. In common with all of the terrorism offences extending inchoate liability (and inchoate liability in general), these offences are focused on prevention. In the case of these offences, this prevention occurs on two levels. First, there is prevention aimed at the ultimate harm, which is the commission of a terrorist attack. The offences are ultimately aimed at preventing such an eventuality. This is evidenced by the quote mentioned above, where it was stated by Charles Clarke that the Bill was aimed at making the 'transition from people encouraging, glorifying to then an act being undertaken'⁵⁸ more difficult, and confirmed in *R v Ahmed Faraz* as being intended to 'prevent, so far as possible, the commission of terrorist offences either here or abroad'.⁵⁹ However, there is a second level of prevention that targets an intermediate step on the way to the commission of an act of terrorism. This second level of

⁵⁷ Home Office, *Operation of police powers under the Terrorism Act 2000 and subsequent legislation: Arrests, outcomes, and stop and search, Great Britain, financial year ending 31 March 2015*, Data Table A 08a

⁵⁸ *Hansard Commons Draft Terrorism Bill, Written and Oral Evidence*, HC 515-I, 11 October 2005, Q5.

⁵⁹ *R v Ahmed Faraz* ruling of 27 May 2011, Calbert-Smith J at transcript 14.

prevention relates to the specific aim of the offences, to prevent radicalisation of those who may be susceptible to encouragement by others. This is done by prohibiting encouragement of terrorism. Thus criminal liability attaches to the person who does the encouraging or disseminating. While the ultimate aim of the offences is to prevent the commission of a terrorist offence by a person who may be encouraged to do so as a result of hearing or reading the words of another, this is not what is criminalised by this section.⁶⁰ Sections 1 and 2 criminalise the conduct of the person who intentionally or recklessly publishes, or causes to be published, or disseminates a statement prohibited by the Terrorism Act 2006. There is therefore a sense in which the law here criminalises one act as a proxy for another.

Sections 1 and 2 are examples of the criminalisation of remote harms. They are remote harms in that the offence targets conduct that in itself does not cause harm. Rather, such conduct creates the risk of harm. The publication or dissemination of statements that directly or indirectly encourage terrorism creates a risk that someone will be encouraged to perform an act of terrorism. This remoteness operates not only temporally but is rather evident in the fact that the commission of harm is contingent upon the actions of another. Someone who is exposed to a statement encouraging terrorism must decide to act as a result of that statement. Therefore, the harm of a terrorist attack will only eventuate if an independent actor is encouraged to commit an act of terrorism as a result of exposure to

⁶⁰ Although clearly any future acts of terrorism would be caught by one or more of the many other offences within the ordinary criminal law or specific terrorism offences.

the statement. In this way, the offence does not prohibit harmful conduct but rather conduct that threatens or risks future harm by another.⁶¹

What is interesting about the manner in which these offences are drafted is that even though the underlying rationale is one of prevention of an act by an independent actor, the ultimate harm is not relevant to the liability of the offender. It is irrelevant 'whether any person is in fact encouraged or induced by the statement to commit, prepare or instigate any such act or offence'⁶² as a result of exposure to a statement or publication encouraging such acts. The focus of the offence as drafted is on the actions of the encourager. At first glance, it therefore appears that the offence would satisfy principles based on retributive notions of desert and the subjective culpability of the offender. The implication is that a person who encourages terrorism is doing something blameworthy, something that is sufficiently wrongful so as to come within the bounds of the criminal law, and therefore something for which criminal liability is deserved. The offence prohibits this morally blameworthy behaviour and punishes the wrongdoer only in respect of this behaviour. It takes no heed of whether or not other actors may be encouraged to go on and commit terrorist attacks. This would not affect the moral blameworthiness of the offender's actions. The question then is why should the publication of a statement that is likely to be understood as a direct or indirect encouragement to the commission of an act of terrorism, or the

⁶¹ See chapter 2 for a fuller discussion of the Harm Principle and why it does not provide a meaningful restraint on criminalisation of inchoate offences or offences extending inchoate liability, and how it licenses the criminalisation of offences that criminalise the risk of harm as a means of preventing harm.

⁶² Section 1(5)(b) Terrorism Act 2006.

dissemination of such a statement, be something that is sufficiently blameworthy to attract criminal liability? Furthermore, even if such conduct is blameworthy, it is necessary to question whether the extent of criminal liability imposed by these offences is justified.

It is possible that an argument for the encouragement offences could be based on the offence principle, whereby the offences are justified in order to protect the sensibilities of victims of terrorist attacks, victims' families and the public at large. According to Feinberg:⁶³

It is always a good reason in support of a proposed criminal prohibition that it would probably be an effective way of preventing serious offense (as opposed to injury or harm) to persons other than the actor, and that it is probably a necessary means to that end ...

Based on Feinberg's account of the offence principle, it is only the consequences of conduct that are relevant, namely that the conduct causes offence in the form of an affront to personal sensibilities. Provided enough people would suffer such offense, the reasons for offence and the reasonableness of taking offence is irrelevant:

Provided that very real and intense offense is taken predictably by virtually everyone, and the offending conduct has hardly any countervailing personal

⁶³ Feinberg, *Offense to Others* (1985) 1

or social value of its own, prohibition seems reasonable even when the protected sensibilities are not.

However, Simester and von Hirsch argue that something more is required in order to invoke the offence principle beyond affront to sensibility. They argue that in order to legitimately invoke this principle, there must be the added element of wrongfulness.⁶⁴ The argument for an additional requirement of wrongfulness is persuasive. If conduct were to be criminalised based on it causing offence or affront to the sensibilities of others, then those who cause such offence would be subject to criminal punishment. As discussed in chapter 2, punishment involves censure, whereby an offender is treated by the law as having committed an act of culpable wrongdoing for which he or she should be punished. In labelling an offender as deserving of censure, it is necessary to demonstrate that they have acted wrongfully. Thus, even if the offence principle provided positive reasons for criminalising the encouragement of terrorism, it would still be necessary to identify the wrongfulness in such conduct. Furthermore, there are various mediating considerations that need to be taken into account before conduct can be criminalised under the offence principle. One such mediating consideration that would be relevant to the encouragement offences would be the protection of the right to freedom of expression, which is discussed in section 5.4 below.

⁶⁴ Simester, A. P. and von Hirsch, A, 'Rethinking the Offense Principle' (2002) 8 *Legal Theory* 269, 273-5

The difficulty in identifying wrongfulness in offences that are aimed at preventing the occurrence of future harm is evident when analysing sections 1 and 2 of the Terrorism Act 2006. Section 1 prohibits the publication of a statement that is likely to be understood as a direct or indirect encouragement to the commission, preparation or instigation of acts of terrorism and section 2 prohibits the dissemination of such a statement. As explained above, the conduct requirement in each of these offences is drafted in imprecise terms and captures a wide range of conduct. In essence what is being prohibited is the publication or dissemination of statements that directly or indirectly encourage of terrorism. This is the core of the conduct that one needs to examine in order to make a determination of wrongfulness. Is the direct or indirect encouragement of terrorism wrongful, such that when it is committed with the necessary level of culpability it is sufficiently blameworthy so as to deserve the censure and punishment of the criminal law?

In answering these questions, one needs to make a distinction between direct and indirect encouragement. However, as was explained above, it is not clear from the Act exactly what these terms mean. They are not clearly defined within the Act. It has been assumed that 'direct encouragement' is analogous to the old common law offence of incitement.⁶⁵ According to Barnum, who conducted a survey of the US and UK jurisprudence, the term 'direct incitement' is used to refer to messages that 'consist of an unambiguous, affirmative exhortation to engage in unlawful action' and that

⁶⁵ Hunt, 448.

‘the “incitees” must be exhorted to engage in unlawful action that is “particular”, “concrete”, or “specific”’.⁶⁶ It seems fairly uncontroversial to say that this conduct would be wrongful. However, direct incitement as so defined seems to be something different to what is intended to be covered by direct or indirect encouragement of terrorism under the Terrorism Act 2006. During the second reading of the Bill, the Home Secretary contrasted the new offences with the then existing law of incitement and referred to the new offence as ‘indirect incitement’:⁶⁷

The first [new offence in the Bill] is the offence of encouragement of terrorism, also known as indirect incitement. It is already an offence under our law to incite people directly to commit specific terrorist acts. We now want to be able to deal with those who incite terrorism more obliquely, but who nevertheless contribute to the creation of a climate in which impressionable people might believe that terrorism was acceptable.

This is echoed in his oral testimony before the Home Affairs Committee, where he stated as follows:⁶⁸

The current law of incitement essentially deals with a very particular event which an individual [is] incited to commit. [That] makes it difficult to prosecute in the more general circumstance where an individual organisation is inciting in general but not linked to a very particular crime.

⁶⁶ David G Barnum, ‘Indirect incitement and freedom of speech in Anglo-American law’ (2006) 3 European Human Rights Law Review 258, 262-3.

⁶⁷ Hansard HC Vol 438 col 334 (26 October 2005)

⁶⁸ Response to Q3, Home Affairs Committee, 11 October 2005.

From this it appears that the offence of direct or indirect encouragement is intended to cover a more generalised type of incitement, in contrast to the then existing direct incitement. Direct encouragement of terrorism, therefore, does not equate to direct incitement. Rather, it is something less specific than direct incitement, but something more specific than indirect encouragement. In order to make a determination of wrongfulness, it will therefore be assumed that direct encouragement of terrorism refers to a direct exhortation to commit an act of terrorism, but that the act of terrorism does not have to be expressed with any degree of specificity. In other words, direct encouragement is a direct and clear advocacy for the commission of general acts of terrorism. Indirect encouragement refers to a more oblique form of advocacy, whereby there is no specific exhortation to commit an act of terrorism, but rather statements that provide oblique and generalised support for terrorism by, for example, praise or glorification.

Whether or not the conduct as described above is wrongful is not easy to determine. Direct incitement is clearly wrong. There can surely be no argument that directly exhorting another to commit a particular offence, with the intention that the offence will be committed, is wrongful. Incitement in this form was a settled part of the English criminal law until its replacement by the statutory offences of assisting and encouraging crime. But as one moves to more generalised incitement, determinations of wrongfulness become harder. The closer the encouragement is to a direct advocacy of a terrorist act, the more wrongful it appears. However, the further one moves

from this form of direct encouragement, the harder this becomes. There may be instances of indirect encouragement that are not wrongful, specifically where they are committed recklessly. Without an intention to encourage the commission of a terrorist act, there is a danger that these offences criminalise the non-wrongful. The arguments that were raised in the parliamentary debates regarding whether Cherie Booth's statement that she could understand the motivation for Palestinians to become terrorists, or whether support for Nelson Mandela and the ANC during apartheid would be caught by this offence reflect this concern.⁶⁹ Such statements lack the element of wrongfulness that is necessary for criminalisation. Fears about criminalisation of statements such as these could be partially allayed if the *mens rea* requirement were limited to intention. Where there is no intention to encourage terrorism, it is hard to see how these statements are wrongful. This applies even more so to the dissemination of statements of direct or indirect encouragement where such disseminators lack intention and are merely reckless.

The culpability constraint represents a significant obstacle in any attempt to justify the encouragement offences in sections 1 and 2 of the Terrorism Act 2006. As has just been explained above, it is very difficult to identify wrongful conduct under these offences without the presence of a high culpability requirement in the form of intention. Without an intention requirement there is a danger that the offences could apply to conduct that is

⁶⁹ BBC News, 'Cherie Blair's Comments: Did She Overstep the Mark?' (24 June 2002), http://news.bbc.co.uk/1/hi/talking_point/2052507.stm (last accessed 8 October 2015)

objectively innocent and non-wrongful. With these remote harm offences determinations of wrongfulness are inextricably bound up with the intention with which the relevant conduct was performed. Absent this intention, the connection between the conduct prohibited and the ultimate harm that the offence aims to prevent is not sufficiently direct for the justifiable imposition of liability. Despite the requirement that inchoate offences should be subject to the highest *mens rea* standard, the encouragement offences in sections 1 and 2 can be committed recklessly, allowing for the potential criminalisation of non-wrongful conduct. It may be possible to argue that by encouraging terrorism a person underwrites the potential future acts of terror performed by those who are encouraged, thus displaying sufficient normative involvement in the commission of the ultimate harm to allow for the imputation of responsibility. This position is easier to accept when dealing with direct incitement of specific acts of terrorism. It may still be defensible when dealing with direct encouragement of general acts of terrorism. However, it would be unjustified to impute responsibility where the supposed normative involvement in the ultimate harm consists of oblique generalised statements of indirect encouragement.

5.4 The Right to Freedom of Expression

Another concern with the encouragement offences is their impact on the right to freedom of expression. Criminalising incitement or encouragement

restricts freedom of expression, and the further one moves from direct incitement to the commission of an act of terrorism towards a more oblique or generalised indirect encouragement, the greater the impact on the right to freedom of expression.

Article 10 of the ECHR protects the right to freedom of expression, including 'the freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers'.⁷⁰ However, this right can be limited in certain circumstances, including 'in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime'.⁷¹ However, any such limitation must be 'prescribed by law' and must be 'necessary in a democratic society'.⁷²

The Joint Committee on Human Rights thoroughly considered the question of whether the encouragement offences are compatible with Article 10 of the ECHR.⁷³ It held that the criminalising of direct incitement to commit violence would not be problematic under Article 10 and was indeed already a criminal offence. It also indicated that based on the Strasbourg jurisprudence it was possible that certain forms of indirect incitement to commit violent acts of terrorism would also be acceptable. However, it stated that these offences would only be compatible with Article 10 if they were necessary,

⁷⁰ Art 10(1) ECHR

⁷¹ Art (10)(2) ECHR

⁷² Art 10(2) ECHR

⁷³ Joint Committee on Human Rights, Third Report of Session 2005-06

proportionate and defined so as to satisfy requirements of legal certainty.⁷⁴ After an examination of the offence in section 1 of the Terrorism Act 2006, it concluded that the offence as drafted was incompatible with Article 10. It argued that due to the vaguely drafted glorification requirement, reliance on the overbroad definition of terrorism in Terrorism Act 2000, and absence of a requirement for an intention to incite terrorism the offence as drafted did not satisfy the requirements of Article 10.⁷⁵ It also proposed that a public interest or reasonable excuse provision should be included in the offence in order to protect the right to freedom of expression and increase the likelihood of compatibility of the offence with Article 10.⁷⁶

The freedom of expression issue was again addressed by the Joint Committee on Human Rights the following year, in the context of assessing whether section 1 of the Terrorism Act 2006 was compatible with CECPT. In particular, it examined whether the offence in section 1 met the requirement set out in Article 12 of CECPT that any offence of public provocation must respect 'human rights obligations, in particular the right to freedom of expression, freedom of association and freedom of religion'.⁷⁷ It considered that the offence as drafted would be likely to disproportionately interfere with the right to freedom of expression. Thus, it concluded that section 1 of

⁷⁴ Ibid, para 20.

⁷⁵ Ibid, p3 and paras 27-33.

⁷⁶ Ibid, para 35.

⁷⁷ Art 12 CECPT

the Terrorism Act 2006 did not satisfy the requirement in Article 12 CECPT and was therefore incompatible with CECPT.⁷⁸

The conclusions reached by the Joint Committee on Human Rights indicate that the offences in sections 1 and 2 could face significant problems if they were to be challenged under Article 10 of the ECHR. This position seems well founded. Article 10 specifically states that any restriction on the right to freedom of expression must be 'prescribed by law' and must be 'necessary in a democratic society'. Determining whether the encouragement offences are 'necessary in a democratic' society is a difficult task, especially without access to empirical data as to whether such offences are successful in preventing radicalisation. However, as explained in section 2 of this chapter, there were already a variety of available offences that could be employed to target the harm at which these offences are aimed. It is therefore debatable whether these offences could be said to be necessary.

Added to the legal argument that the offences as currently drafted may contravene Article 10 of the ECHR are various compelling political arguments regarding the dangers of infringing the right to freedom of expression. One argument that is particularly persuasive is that these offences could have a chilling effect on legitimate political speech. This was a specific concern raised by Liberty. It argued that these provisions 'cast the net of criminality so wide' that it would discourage people from engaging in any speech or

⁷⁸ Joint Committee on Human Rights, *First Report of Session 2006-07* Joint Committee on Human Rights, First Report of Session 2006-07, para 47.

distributing any materials that could potentially fall within the ambit of the offence.⁷⁹ Another concern is that restricting expression in this way could result in these statements being forced underground.⁸⁰ There is a public interest in these statements being aired openly. This allows for the public and the government to seek to understand why these views are held and to know who holds them.⁸¹ This way, extremist views can be challenged and subject to public scrutiny.⁸² Finally, there is a danger that laws that infringe the right to freedom of expression and that suffer from broad drafting allow the government a discretion to only punish expressions with which it does not agree.

5.5 Conclusion

The above analysis of the encouragement offences in sections 1 and 2 of the Terrorism Act 2006 highlights some very troubling features of the offences and raises significant obstacles to their justification. The breadth of the offences present serious rule of law concerns. Critical terms such as 'direct incitement', 'indirect incitement' and 'glorification' are not adequately defined. The offences are not subject to the strictest fault requirement of intention, in contrast with the generally accepted position for inchoate

⁷⁹ Liberty, *Terrorism Bill* – Liberty's briefing for Second Reading in the House of Lords, November 2005, para 17.

⁸⁰ Saul, 'Speaking of Terror: Criminalising Incitement to Violence', 885.

⁸¹ Eric Barendt, 'Incitement to, and Glorification of, Terrorism' in Ivan Hare and James Weinstein (eds), *Extreme Speech and Democracy* (ch 22, 2009), 453.

⁸² Eric Barendt, 'Threats to Freedom of Speech in the United Kingdom?' (2005) 28 *UNSW Law Journal* 895, 898.

offences. This allows for the possibility that these offences criminalise non-wrongful conduct and conduct that cannot be said to be sufficiently morally blameworthy as to attract criminal liability. A consequence of this breadth is that it leaves a large margin of discretion to police and prosecutors to determine who will be arrested and prosecuted under these offences. The net of potential liability is spread so wide as to allow for the use of these offences as an investigative tool. As with the offence of preparation examined in the previous chapter, it appears that the offences are not aimed at condemning and punishing culpable wrongdoing, but rather with increasing the counter-terrorism armoury and allowing for enhanced investigations and early intervention based on the rationale of prevention.

It is true that a feature of contemporary terrorism, and a problem that needs to be addressed, is the proliferation and easy availability of extremist material and statements containing provocative and often deeply unpalatable views. However, it is questionable whether the way to effectively deal with this problem is by enacting criminal offences that prohibit and punish the expression of these ideas. There is a danger that doing so could be counter-productive to the government's broader counter-terrorism strategy. This is something that will be explored more fully in chapter 8 when examining the relationship between criminal prosecution and other supposedly 'soft' counter-terrorism strategies which are intended to be reintegrative.

6. Possession of Terrorist Materials

The offences examined in chapters 4 and 5 were introduced in the Terrorism Act 2006 at a time when new terrorism offences were being enacted with alarming frequency in the UK and internationally. However, the offences that are to be analysed in this chapter predate 9/11 and the rash of counter-terrorism legislation enacted in its wake. Sections 57 and 58 of the Terrorism Act 2000, which consist of broadly drafted possession offences, are not new offences. Earlier incarnations of these offences have existed since 1991 in Northern Ireland,¹ and they have applied in largely the same form in Britain for just over 20 years.² One cannot therefore point to the events of 9/11 or the July bombings and the increased focus on preventing further acts of terror in order to explain these offences. These offences were not the result of hastily drafted legislation enacted in the wake of a terrorist outrage. They reflect the fact that the UK, unlike many other countries, has a long history of counter-terrorism legislation due to the situation in Northern Ireland.³ Much of the

¹ Northern Ireland (Emergency Provisions) Act 1991, ss 30 and 33

² Prevention of Terrorism (Temporary Provisions) Act 1989, ss 16A and 16B, introduced in section 63 of the Criminal Justice and Public Order Act 1994.

³ The historical background to current UK counter-terrorism legislation and earlier counter-terrorism legislation in Northern Ireland is discussed in the Introduction to this thesis. See further G Hogan and C Walker, *Political Violence and the Law in Ireland* (Manchester University Press 1989); C Walker, *The Prevention of Terrorism in British Law* (Manchester University Press 1988); Donohue, *Counter-Terrorist Laws and Emergency Powers in the UK 1922 - 2000*; Laura K. Donohue, *Counter-Terrorism Law* (Irish Academic Press 2001); C Walker, 'Clamping Down on Terrorism in the United Kingdom' (2006) 4 *Journal of International Criminal Justice* 1137; *Report of the Commission to Consider Legal Procedures to Deal with Terrorist Activities in Northern Ireland* (Cm 3420, London, 1972, 'the Diplock Report').

current counter-terrorism legislation is indeed new, to address the perceived changing nature of the threat posed by domestic and international terrorism. However, some of the offences are simply re-enactments of previously existing legislation, due to the fact that the Terrorism Act 2000 was in part a consolidating Act. Much of the Terrorism Act 2000 is drawn from the Northern Ireland counter-terrorism legislation passed in response to the Troubles, with previous offences being given general and permanent application.⁴ It is interesting to note that these older forms of offences share many of the same defects as the newer offences, suggesting that the turn to preventive offences that are not focussed on wrongfulness and culpability is not a new phenomenon, certainly not in the context of counter-terrorism legislation.

Both of the offences examined in this chapter concern possession, although section 58 also targets the collection of information. Section 57 addresses the possession of an article for terrorist purposes. It prohibits the possession of 'an article in circumstances which give rise to a reasonable suspicion' that 'possession is for a purpose connected with the commission, preparation or instigation of an act of terrorism'.⁵ Section 58 addresses the collection of information and also deals with possession, although it covers possession of information rather than possession of an article. The offence is committed if a person 'collects or makes a record of information of a kind

⁴ Anderson, 'Shielding the Compass: How to Fight Terrorism without Defeating the Law', para 9.

⁵ Section 57(1)

likely to be useful to a person committing or preparing an act of terrorism'⁶ or if 'he possesses a document or record containing information of that kind'.⁷ Although the two offences operate distinctly and have specific and important differences, they are often charged as alternatives or in combination and so it makes sense to analyse them together. Section 2 of the Terrorism Act 2006 also includes a possession offence in sub-section (2)(f). According to this section, which deals with the dissemination of terrorist publications, a person is guilty of an offence if he possesses a 'terrorist publication' with a view to it being disseminated.⁸ As discussed in the previous chapter on the encouragement offences, a terrorist publication is defined as material that directly or indirectly encourages acts of terrorism or that may be useful in the commission, preparation or instigation of acts of terrorism. There is great overlap between the offence in section 2(2)(f) of the 2006 Act and those in sections 57 and 58 of the 2000 Act, although each contains certain particular features. The three offences are very often charged alongside each other. This is symptomatic of the scattergun approach of much of the counter-terrorism legislation.

This chapter undertakes a detailed analysis of the scope and effect of sections 57 and 58 of the Terrorism Act 2000. In doing so, it highlights certain troubling features of the offences, particularly relating to the unclear and expansive *actus reus* and the lack of a true culpability requirement. In

⁶ Section 58(1)(a)

⁷ Section 58(1)(b)

⁸ Section 2(2)(f) Terrorism Act 2006

analysing the scope and effect of the offences, the attempts by the courts to narrow the interpretation of these offences is assessed in order to determine whether such judgments have managed to ameliorate the problematic drafting of the offences so as to render them compatible with rule of law requirements. The problematic features of these offences are shared by many possession offences found throughout the criminal law. It is generally acknowledged that possession offences are particularly difficult to accommodate within criminal law doctrine. As explained by Ashworth:⁹

... possession offences appear to flout several basic tenets of the criminal law – that liability requires an act by the defendant, that liability should be for an act unless the situation gives rise to a positive duty that the defendant fails to fulfil, that in principle *mens rea* should be required for liability, that the prosecution should bear the burden of proving guilt beyond a reasonable doubt, that the law of attempts should set the limits of inchoate liability, and that a person should only be liable for what he or she causes, encourages, assists or otherwise becomes normatively involved in.

Despite these difficulties, possession offences are a significant part of the criminal law.¹⁰ However, the offences that are to be examined in this chapter are particularly egregious, carrying substantial sanctions in the form of long periods of imprisonment, and together they have resulted in the second

⁹ Ashworth, 'The Unfairness of Risk-Based Possession Offences', 240.

¹⁰ See Ashworth, *The Unfairness of Risk Based Possession Offences*; M D Dubber, *The Police Power: Patriarchy and the Foundations of American Government* (Columbia University Press 2005), M Dubber, 'The Possession Paradigm: The Special Part and the Police Power Model of the Criminal Process' in A Duff and S Green (eds), *Defining Crimes: Essays on the Special Part of the Criminal Law* (OUP 2005); M Dubber, 'Policing Possession: The War on Crime and the End of the Criminal Law' (2001) *Journal of Criminal Law and Criminology* 91.

largest number of charges and convictions under terrorism legislation to date.¹¹ They therefore require strong justification – one cannot simply point to the fact that possession offences in general suffer from these defects as a means of justifying the offences. The question of whether possession offences in general can be justified is one that has attracted some academic attention already, and will not be rehearsed here.¹² However, the case for justification in terms of the possession offences under terrorism legislation is particularly urgent due to substantial sentences and frequent use.

6.1 Legislative Background

Sections 57 and 58 of the Terrorism Act 2000 have been subject to much controversy and debate, both during their passage through Parliament and thereafter.¹³ Debate has centred on the breadth of the offences, specifically the broad *actus reus* of the offence, as well as the reverse burden of proof that is incorporated into both offences.

Section 57 originated as section 30 of the Northern Ireland (Emergency Provisions) Act 1991. This offence was enacted following the recommendation of the Review of the Northern Ireland (Emergency

¹¹ Home Office, *Operation of police powers under the Terrorism Act 2000 and subsequent legislation: Arrests, outcomes, and stop and search, Great Britain, financial year ending 31 March 2015*, data table A 08a.

¹² In particular, see Ashworth, 'The Unfairness of Risk-Based Possession Offences'.

¹³ C Walker, 'Cyber-Terrorism: Legal Principle and Law in the UK' (2006) 110 Penn State Law Review 625, 647; Hansard HL vol 613 cols 751-755; Tadros, 'Justice and Terrorism'; Hodgson and Tadros, 'How to Make a Terrorist Out of Nothing'.

Provisions) Acts 1978 and 1987, which called for the creation of an offence of possession for a terrorist purpose, though the offence was only to apply to possession in public places and covered only Northern Ireland.¹⁴ In 1994, the offence was extended to cover mainland Britain in section 63 of the Criminal Justice and Public Order Act 1994, by way of section 16A of the Prevention of Terrorism (Temporary Provisions) Act 1989.

Lord Lloyd, in his report on the *Inquiry into Legislation against Terrorism*, supported the continuance of this offence in future counter-terrorism legislation.¹⁵ In discussing this offence, he explained its purpose as follows:¹⁶

The purpose of the provision is to allow action to be taken against a person who is found in possession of articles which, though perhaps commonplace in normal circumstances, are well known to be used in the manufacture of bombs. It is, of course, not the possession of the items themselves which constitutes the offence, but possession in such circumstances as to give rise to a reasonable suspicion of their connection with terrorism.

The focus of the offence as understood by Lord Lloyd appears to be to prevent the manufacture of homemade explosives. While the possession of everyday articles, such as nail polish remover, that could be used in the manufacture of bombs is clearly remote from the causing of harm through a

¹⁴ Review of the Northern Ireland (Emergency Provisions) Acts 1978 and 1987, 1990, Cm 1115, para 2.9 as cited in Walker, C., 'Cyber-Terrorism: Legal Principle and Law in the UK', 646.

¹⁵ Lord Lloyd, *Inquiry into Legislation against Terrorism*, para 14.6.

¹⁶ *Ibid*, para 14.4.

terrorist bombing, there is a connection between the articles used to produce bombs and the causing of harm by way of a bomb. The connection is remote, but there is still a clear and direct nexus between possession of the articles and a terrorist act in the form of a bomb. In contrast, as will be seen when analysing section 57, the section 57 offence is not limited to the prohibition of articles that could themselves be used to produce a harm causing device. Rather, section 57 can apply to the possession of any item at all, including recorded information in the form of documents or electronic storage devices. It is harder to argue that such items are connected to the causing of harm in the way that one could with components used in the manufacture of explosives. The offence is therefore broader in scope than that which Lord Lloyd seemed to envisage when stating the purpose of the offence.

Lord Lloyd clarifies that the *actus reus* of the offence is not simply the possession of certain articles, but rather the possession of articles in particular circumstances: circumstances that give rise to a reasonable suspicion of a connection with terrorism. The *actus reus* consists of two parts: possession, together with the existence of certain accompanying circumstances. This relationship will be considered further when analysing the scope of the offence.

In justifying the offence, Lord Lloyd argues for the necessity of early police intervention in order to prevent harm, a point that is still made today.¹⁷ Again, he makes the argument in the context of the planting of a bomb, referring once more to homemade explosives:¹⁸

The need for the police to intervene against the terrorist at an early stage, before he has an opportunity to plant a bomb is well recognised. Given that terrorist bombs are usually home made, it is quite possible that, during a search of premises occupied by a suspected terrorist, the police will find materials such as timers or chemicals in highly incriminating circumstances without finding explosives or other prohibited materials. If other evidence exists, he might be charged with conspiracy to cause explosions, or with the new offence of being concerned in the preparation of a terrorist act. Otherwise I see no reason why the person should not be required to account to the court for his possession of the articles.

Lord Lloyd mentions the fact that there may be other offences that could be charged in the circumstances described. However, he appears to regard possession that would be covered by this section as occurring in advance of his proposed preparatory offence¹⁹ and of conspiracy to cause explosions. Possession in circumstances that give rise to a reasonable suspicion of a connection with terrorism, on his understanding, stands prior to other forms

¹⁷ See Anderson, 'Shielding the Compass: How to Fight Terrorism without Defeating the Law', in which he stresses the need to create operational spaces for early police intervention – as he calls it: 'defending further up the field'.

¹⁸ Lord Lloyd, *Inquiry into Legislation against Terrorism*, para 14.5

¹⁹ Although there was no offence of preparation for terrorism yet in existence, Lord Lloyd had recommended such an offence and clearly contemplated its enactment in mentioning 'the new offence of being concerned in the preparation of a terrorist act'.

of preparatory conduct that could be covered by other offences. Thus, the offence is intended to catch situations that are so remote from the actual causing of harm that they could take place before even crossing the already remote threshold of preparation of a terrorist act.

Section 58 has a similar history, also starting out in the Northern Ireland counter-terrorism legislation. It appeared in section 33 of the Northern Ireland (Emergency Provisions) Act 1996 and was incorporated into British law by section 63 of the Criminal Justice and Public Order Act 1994 as section 16B of the Prevention of Terrorism (Temporary Provisions) Act 1989. In recommending the offence in section 58, Lord Lloyd stated that its purpose was similar to the purpose of the possession offence in section 57, but that it was 'designed to catch possession of targeting lists and similar information'.²⁰ From Lord Lloyd's recommendations, it appears as though sections 57 and 58 were intended as complementary possession offences, with section 57 covering the possession of specific articles or concrete things (particularly articles that could be used in the making of explosives) and section 58 covering information and records. This distinction, however, has not been maintained by the courts, nor is it reflected in the broad drafting of the current offences, as will be seen in the next section of this chapter.

²⁰ Lord Lloyd, *Inquiry into Legislation against Terrorism*, para 14.8

6.2 Defining the Offences

6.2.1 *Section 57: Possession for Terrorist Purposes*

6.2.1.1 *Preliminary Issues: Definitions and terms*

Section 57 of the Terrorism Act 2000 creates the offence of possession for terrorist purposes as follows:

- (1) A person commits an offence if he possesses an article in circumstances which give rise to a reasonable suspicion that his possession is for a purpose connected with the commission, preparation or instigation of an act of terrorism.
- (2) It is a defence for a person charged with an offence under this section to prove that his possession of the article was not for a purpose connected with the commission, preparation or instigation of an act of terrorism.
- (3) In proceedings for an offence under this section, if it is proved that an article
 - (a) was on any premises at the same time as the accused, or
 - (b) was on premises of which the accused was the occupier or which he habitually used otherwise than as a member of the public,the court may assume that the accused possessed the article, unless he proves that he did not know of its presence on the premises or that he had no control over it.
- (4) A person guilty of an offence under this section shall be liable
 - (a) on conviction on indictment, to imprisonment for a term not exceeding 15 years, to a fine or to both, or

- (b) on summary conviction, to imprisonment for a term not exceeding six months, to a fine not exceeding the statutory maximum or to both.

Before turning to examine the elements of the offence itself, it is necessary to explain some of the definitions used in the offence. Section 57 applies to the possession of 'articles'. Section 121 of the Terrorism Act 2000 defines an 'article' to include a 'substance and any other thing':²¹ a very broad term. An article can cover any otherwise lawful or commonplace article. It does not need to be dangerous in and of itself nor subject to any form of legal regulation. In contrast to offences for the possession of materials such as explosives, firearms, ammunition, offensive weapons or tools for theft or burglary, which are the subject of specific possession offences,²² section 57 could cover anything from clothing to kitchen equipment, fertiliser to storage boxes, books to rope. As Anderson points out, this section could 'catch even such articles as cars, which are not designed for terrorism'.²³ There is no restriction on the type of article that is covered, provided it is possessed in circumstances which give rise to a reasonable suspicion that the possession is for a purpose connected with terrorism.

There was some debate as to whether an article can include documents and records or whether such information is covered exclusively by section 58.

²¹ Terrorism Act 2000, section 121.

²² Clive Walker, *Blackstone's guide to the anti-terrorism legislation* (2nd edn, Oxford University Press 2009), 187.

²³ David Anderson QC, Report of the Operation in 2010 of the Terrorism Act 2000 and of Par 1 of the Terrorism Act 2006 (July 2011), para 10.11.

However, this was settled in the case of *R v Rowe*,²⁴ which held that documents and records can be 'articles' for the purposes of section 57. Rowe was convicted under section 57 for the possession of a notebook containing handwritten instructions for assembling and operating a mortar, and a substitution code listing components of explosives and various places that were susceptible to terrorist bombing.²⁵ It is thus clear that information (whether written down or stored electronically), as well as tangible articles, can fall within the ambit of section 57. This decision has been upheld in subsequent cases,²⁶ although it has been noted that this may not have been the Parliamentary intent.²⁷ Where an article can have multiple uses, both innocent or dangerous, it appears that the offence only requires that 'a' purpose is connected with terrorism. It is not required that the sole or main purpose of the article is connected with terrorism.²⁸

The second definitional issue with this offence relates to the reference within the statement of the offence to 'terrorism'. In common with all of the precursor offences examined in this thesis, section 57 relies on the definition of 'terrorism' for its operation. 'Terrorism' in the context of this offence does not refer to the actions of proscribed organisations.²⁹ Rather, the 'terrorism' referred to is any conduct that falls within the ambit of the definition of

²⁴ *R v Rowe* [2007] EWCA Crim 635; [2007] 2 Cr. App. R. 14 (p171); [2007] Q.B. 975

²⁵ *Ibid*, para 6

²⁶ *R v Zafar* [2008] EWCA Crim 184; *R v G, R v J* [2009] UKHL 13

²⁷ *R v Zafar*, para 31

²⁸ *Ibid*, para 22. The court left the question open, but indicated that an object with multiple uses could be regarded as being possessed for the purpose connected with terrorism where only one such use was connected in that way. Walker, *Blackstone's*, 187

²⁹ Walker, *Blackstone's Guide to the Anti-Terrorism Legislation*, p187

terrorism, as set out in section 1 of the Terrorism Act 2000.³⁰ The broad definition of 'terrorism' in section 1 of the Terrorism Act 2000 thus widens the scope of the offence even further.³¹ Some specific implications of the effect of the breadth of the definition of terrorism on these possession offences is evidenced by the case law. This issue will be considered in greater detail in section 6.2.2 below, when analysing the scope of section 58.

6.2.1.2 The 'Actus Reus' of the Offence

Section 57(1) sets out the *actus reus* of the offence. According to this subsection, the conduct requirement for the offence is the possession of an article, but this possession must be in circumstances that give rise to a reasonable suspicion that the possession is for a purpose connected with the commission, preparation or instigation of an act of terrorism. This does not mean that the offender must in fact have such a purpose. What is required is that in the circumstances, the possession gives rise to a reasonable suspicion of such a purpose on the part of the offender. Therefore, the condition is dependent upon the impressions created in the mind of a reasonable person as a result of the offender's behaviour, and not on the thoughts or intentions of the offender (no *mens rea* requirement is brought into the *actus reus* in this way). The *actus reus* of this offence is made up not only of a behavioural element

³⁰ See chapter 3 for an analysis of the definition of terrorism in section 1 Terrorism Act 2000.

³¹ See chapter 3

constituting the conduct of the offender (ie. possession),³² but contains a further requirement of suspicion by another of a terrorist purpose.

The formulation of the offence in section 57(1) is unusual and it is difficult to know exactly what needs to be proved in order to fulfil the elements of the offence. As to the first step, that there must be possession, this requirement is helped by section 57(3), which states that possession can be presumed in certain circumstances. According to this provision, if it is proved that an article was 'on any premises at the same time as the accused' or if it 'was on premises of which the accused was the occupier or which he habitually used otherwise than as a member of the public' possession of the article can be presumed. This presumption can be rebutted by the accused if he proves that he had no knowledge of the presence of the article on the premises or that he did not have control over it.³³

The Court in the case of *R v G, R v J*³⁴ clarified the elements that need to be proved by the Crown in establishing an offence under section 57. It stated that the prosecution must prove possession, both that the defendant knew he had the article and had control of it, but explained the operation of the presumption of possession in section 57(3).³⁵ Next, the prosecution must prove beyond a reasonable doubt that the circumstances in which the

³² As to whether or not one can say that possession constitutes conduct in the form of an act, this will be discussed in further detail in the following section of this chapter when analysing the offences against the principles and constraints for criminalisation.

³³ Section 57(3)

³⁴ [2009] UKHL 13

³⁵ Para 53.

defendant possessed the article gave rise to a reasonable suspicion that his possession was for a purpose connected with the commission, preparation or instigation of an act of terrorism. The Court recognised that this differs from section 58(1) in that the circumstances of the possession form one of the elements of the offence.³⁶ It then goes on to explain that the prosecution does not need to prove the accused's purpose connected with the commission, preparation or instigation of an act of terrorism. Rather, it must prove beyond reasonable doubt that the circumstances gave rise to a reasonable suspicion that the possession was for the relevant purpose.³⁷

While the decision in *R v G, R v J* clarifies the specific elements of the offence, and the order in which they need to be proved, the circumstances which give rise to reasonable suspicion remain in question. This was addressed by the Court of Appeal in the earlier case of *R v Zafar*,³⁸ which considered the scope of section 57. This case concerned four university students and a schoolboy who had been found to be in possession of various documents, computer disks and hard drives on which information of an extremist nature was stored. The information contained ideological propaganda and also included communications between the accused. It was submitted by the prosecution that this material was to be used by the five defendants to incite themselves and each other to go to Pakistan to receive training and then to commit an act or acts of terrorism against the

³⁶ Para 54.

³⁷ Para 55.

³⁸ *R v Zafar* [2008] EWCA Crim 184

government in Afghanistan. It was alleged that the communications between the defendants that were electronically stored showed evidence of a settled plan in this regard. All five of the accused were convicted of offences under section 57.

On an appeal, the appellants submitted that an offence could only be committed under section 57 if there was a direct connection between the article possessed by the defendant and an intended act of terrorism. It was submitted that there was no such connection, nor could there be having regard to the nature of the relevant articles, and therefore there was no case to go to the jury.³⁹ The Court of Appeal examined the scope of section 57, stating that the principal issue upon which the appeal lay related to the construction of this section. The Court explained that the critical issue of fact which was to be determined was whether there was a sufficient connection between the articles possessed by the appellants and the alleged future acts of terrorism that were to be perpetrated in Afghanistan.⁴⁰ The main issue was how to interpret the words 'for a purpose connected with'; should this be understood to cover only a direct connection to the commission, preparation or instigation of terrorism or could it cover more indirect or remote connections?

After considering Lord Lloyd's report recommending the provision that became section 57, the court stated that there was no problem with the

³⁹ Para 13.

⁴⁰ Para 18.

phrase 'possession for a purpose in connection with the commission, preparation or instigation of an act of terrorism' where the article was intended to be incorporated in a bomb or explosive, such as the situation envisaged by Lord Lloyd. However, the court seems to suggest that this is more difficult where the articles are documents or stored information, as in this case. With bomb or explosive making ingredients, there is clearly a direct and obvious connection between the article and the intended act of terror.⁴¹ In this case it was necessary for the prosecution to prove the purpose for which the appellants held the stored material and then to prove that this purpose was connected with the commission, preparation or instigation of the act of terrorism, namely fighting in Afghanistan.⁴²

The Court of Appeal considered the effect of the words 'connected with' in section 57 and whether this widens the ambit of the section further than if it had provided that 'a person commits an offence if he possesses an article ... for the purpose of the commission, preparation or instigation of an act of terrorism'.⁴³ The court concluded that in order for the section to have the certainty necessary to satisfy the requirements of legality, it must be interpreted in a way that requires a direct connection between the object possessed and the act of terrorism. It stated that the section should be interpreted as if it reads:⁴⁴

⁴¹ Para 19-20.

⁴² Para 26.

⁴³ Para 27.

⁴⁴ Para 29.

A person commits an offence if he possesses an article in circumstances which give rise to a reasonable suspicion that he intends it to be used for the purpose of the commission, preparation or instigation of an act of terrorism.

Thus bringing in a requirement not only of a direct connection between the article possessed and the act of terrorism, but also reference to the intention of the defendant, which was arguably lacking in the section as drafted. However, even on this construction, the defendant is not required to have the intention that the possession is for a purpose connected with terrorism. Rather, the circumstances of the possession must give rise to a reasonable suspicion of such an intention. One cannot therefore say that this interpretation provides for a requirement of an ulterior intention as to the ultimate harm that the offence aims to prevent.

The Court of Appeal concluded with some hesitation that possessing a document for the purpose of inciting a person to commit an act of terrorism falls within section 57. This was based on the conclusion that section 57 must be construed having regard to the normal meaning of instigate. However, the court seemed reluctant to make this finding as it stated that it did not believe that it was envisaged that this section would extend to possessing propaganda for the purpose of incitement to terrorist acts. This belief is evidenced by the later enactment of section 2(2)(f) of the Terrorism Act 2006, which deals specifically with the possession of propaganda with the intention

of inducing acts of terrorism.⁴⁵ The court's decision confirms the decision in *Rowe* that articles can include information and documents. However, these decisions differ from the view of Lord Lloyd as suggested by his report that sections 57 and 58 should be complementary offences that operate without this overlap; one offence to cover articles and things and one to cover information and documents. The result is that there are now three offences that could all be used to prosecute the same conduct, namely the possession of information, documents and extremist or propagandist material, in sections 57 and 58 of the Terrorism Act 2000 and section 2(2)(f) of the Terrorism Act 2006.

In reaching its decision, the Court of Appeal stated that while the articles lent support to the prosecution's case that the appellants had formed a plan to go to train in Pakistan and later fight in Afghanistan, there was nothing that evidenced expressly the use or intended use of the articles to incite each other to do this.⁴⁶ The court held that it was not made plain to the jury that the appellants had to possess the material for future use to incite the commission of terrorist acts. It doubted that the evidence would have supported such a case.⁴⁷ Consequently, the appeals were allowed and the convictions quashed.

⁴⁵ Para 31.

⁴⁶ Para 37.

⁴⁷ Para 48.

The Court of Appeal noted that this case raises difficult questions of interpretation due to the fact that section 57 is being used for a purpose for which it was not intended.⁴⁸ It appears that this refers to the fact that construing documents and information as ‘articles’ under this section stretches the applicability of the section beyond its originally intended purpose, which is why the court gave a more restrictive interpretation.

The Court of Appeal based its interpretation of section 57 on an attempt to interpret the broad drafting of the offence in such a way as to be consistent with rule of law requirements, in particular legal certainty. However, this judgment suggests that the court is concerned with narrowing the ambit of the offence and not simply with ensuring legal certainty. By insisting on a direct connection between the article possessed and an alleged future act of terrorism, the Court appeared to acknowledge that the offence targets possession that is remote from the commission of harm. This interpretation seems to be an attempt to remedy the remoteness of the offence by limiting the conditions in which a conviction would be made out.

6.1.2.3 The Mens Rea Requirement: A Strict Liability Offence

The *mens rea* requirement under section 57 was clarified by the House of Lords in *R v G, R v J*.⁴⁹ When setting out the elements that need to be proved

⁴⁸ Para 49.

⁴⁹ *R v G, R v J*

for a conviction under section 57, the House of Lords stated that what is required is that the defendant had knowledge of his or her possession and control over the article possessed.⁵⁰ In this way, a mental element is read into the offence. There is no explicit *mens rea* requirement in the wording of the offence, but possession is generally understood by the courts as requiring knowledge and control, thus incorporating a mental element into the *actus reus* itself, albeit a restricted one.⁵¹ However, section 57 includes a provision that allows possession to be presumed in certain circumstances. According to section 57(3), if the prosecution proves that an article was either 'on any premises at the same time as the accused' or 'was on premises of which the accused was the occupier or which he habitually used otherwise than as a member of the public', the court can presume that the defendant was in possession of the article, thus negating the implied *mens rea* of knowledge and control. This presumption can be rebutted by the defendant if he proves that he had no knowledge of the possession or that he had no control over the article. The conditions of section 57(3) are broad and could be easily satisfied. Thus, despite the fact that possession offences in general only require a restricted mental element in the form of knowledge and control, section 57 dilutes this requirement even further by providing a presumption of

⁵⁰ Para 53.

⁵¹ *Warner v Metropolitan Police Commissioner* HL 1968. It is difficult to find a clear *ratio decidendi* in this case, but Lord Morris stated that possession consisted of "being knowingly in control of a thing in circumstances which have involved an opportunity (whether availed of or not) to learn or to discover, at least in a general way, what the thing is.", at 289. The requirement for knowledge and control are taken to be incorporated into possession offences, where there may not be a specific *mens rea* requirement in the statement of the offence definition.

possession in very broad circumstances and placing the onus on the defendant to prove that he or she did not have knowledge or control.

Apart from the fact that this offence has a culpability component in only the most limited sense, there is also no requirement for a further or ulterior intention relating to the ultimate harm that the offence aims to prevent. In other words, the offence does not require that the defendant possesses the article for the purpose or with the intention of committing, preparing or instigating an act of terrorism. This was clarified in *R v G; R v J*, where the House of Lords explained that the prosecution does not need to prove what the accused's purpose connected with the commission, preparation or instigation of an act of terrorism actually was. Rather, it must be proved beyond reasonable doubt that the circumstances give rise to a reasonable suspicion that the possession was for the relevant purpose.⁵² This lack of a requirement for further intention, together with the presumption of possession in section 57(3), and the burden of proof placed on the defendant to rebut this presumption of possession, effectively renders this offence one of strict liability.

6.2.1.4 A defence to the Offence: Reversing the Burden of Proof

From the above analysis, it is clear that both the *actus reus* and *mens rea* elements of section 57 leave much to be desired. The breadth of the offence

⁵² *R v G, R v J* para 55

and the lack of a true intention requirement mean that the prosecution's task in proving the elements of the offence is not particularly onerous and the offence could potentially have a very wide reach and application. However, recognising this potential overreach, section 57 provides a defence by way of section 57(2).

Section 57(2) provides as follows:

It is a defence for a person charged with an offence under this section to prove that his possession of the article was not for a purpose connected with the commission, preparation or instigation of an act of terrorism.

According to this defence, it is up to the defendant to prove that he did not possess the article for a purpose connected with terrorism. In doing so, he does not negate the elements of the offence that have been proven by the prosecution, namely possession in circumstances giving rise to a reasonable suspicion of a connection with terrorism. Rather, by proving that the possession was not for a terrorist purpose, the defendant provides an excuse for possession in such circumstances. It is then up to the prosecution to disprove the defendant's excuse beyond reasonable doubt in order to secure a conviction.

There has been some controversy as to whether this offence breaches the presumption of innocence by placing the burden of proof on the defence by way of section 57(2). The nature of the burden on the defendant was

considered in the case of *R v Director of Public Prosecutions Ex Parte Kebeline*,⁵³ in the context of section 16A of the Prevention of Terrorism (Temporary Provisions) Act, which was the previous incarnation of section 57. In this case, the House of Lords considered whether section 16A might breach the presumption of innocence under Article 6(2) of the ECHR. In doing so, the court made a distinction between an 'evidential burden' and a 'persuasive burden'. Lord Hope described the distinction as follows:

a 'persuasive' burden of proof requires the accused to prove, on a balance of probabilities, a fact which is essential to the determination of his guilt or innocence. It reverses the burden of proof by removing it from the prosecution and transferring it to the accused. An 'evidential' burden requires only that the accused must adduce sufficient evidence to raise an issue before it has to be determined as one of the facts in the case. The prosecution does not need to lead any evidence about it, so the accused needs to do this if he wishes to put the point in issue. But if it is put in issue, the burden of proof remains with the prosecution. The accused need only raise a reasonable doubt about his guilt.

Accordingly, the Court held that it was not clear that the offence would breach the presumption of innocence in Article 6(2). It held that it was possible that section 16A could be seen to place an evidential burden on the accused, rather than a persuasive burden, and could therefore be compatible with Article 6(2). Furthermore, it was recognised that the ECHR did not regard Article 6(2) as placing an absolute prohibition on reverse burdens of

⁵³ *R v Director of Public Prosecutions Ex Parte Kebeline* [1999] UKHL 43

proof. Rather, this right could be limited in certain circumstances, provided the limitation was reasonable.

Following the decision in *Kebilene*, the government sought to enact section 57 in exactly the same form as section 16A of the PTA. However, there was much criticism of the proposed offence and so the government introduced section 118 of the Terrorism Act 2000, which clarifies the nature of the burden placed on the accused as an evidential one.⁵⁴ According to section 118, which applies to both the presumption of possession in section 57(3) and the defence in section 57(2):

If the person adduces evidence which is sufficient to raise an issue with respect to the matter the court or jury shall assume that the defence is satisfied unless the prosecution proves beyond reasonable doubt that it is not.

The inclusion of section 118 was intended by the government to clarify the nature of the burden of proof on the defendant.⁵⁵ Section 118 sets out that the defendant is only required to raise an issue in order to rebut the presumption or provide a defence or excuse for the possession, which the prosecution will then have to disprove beyond a reasonable doubt. No 'persuasive' burden is placed on the accused to prove a fact that is essential to determining his guilty or innocence.

⁵⁴ Walker, *Blackstone's Guide to the Anti-Terrorism Legislation*, p189

⁵⁵ Hansard, *House of Lords Debate vol 613* (23 May 2000) Lord Bassam

Although the burden of proof ultimately rests on the prosecution to prove beyond reasonable doubt that the defendant's defence is not satisfied, this does not require the prosecution to show that the purpose of the possession was connected to the commission, preparation or instigation of an act of terrorism. This was set down in the case of *R v G*.⁵⁶ Using the example of possession of fertiliser, which the defendant claimed was for gardening and not for a purpose connected with terrorism, the court explained that the prosecution need not prove beyond reasonable doubt that the fertiliser was possessed for a terrorist purpose. Rather, the prosecution must prove beyond a reasonable doubt that the fertiliser was not used for gardening by leading evidence 'that the garden had been consistently neglected, that there were no gardening tools in the house, and that the quantity of fertiliser was more than would be required for the garden in question.'⁵⁷ The prosecution only need disprove beyond reasonable doubt the defence provided by the accused but does not need to prove that the possession was for the purpose of committing, preparing or instigating an act of terrorism. Therefore, no intention requirement is brought into the offence by way of this defence, thus potentially allowing for a conviction in circumstances where the substantive terrorist wrong has not been made out.

It is true that section 57(2) only places an 'evidential' burden on the accused. However, where an offence contains a broad *actus reus* and no *mens*

⁵⁶ *R v G, R v J*

⁵⁷ *R v G, R v J*, para 68

rea requirement, it becomes very easy for the prosecution to prove the elements of the offence. As a result, much weight is placed on the defence in section 57(2) to protect against unjust application of the offence. The accused is obliged to provide an excuse for his or her possession and to account for his or her conduct. It appears that the intention of the legislature was to require such an account from the accused due to the suspicion of an involvement with terrorism. Where so much rests on the accused's account, it is hard to argue that this reversal of the burden does not adversely affect the presumption of innocence. Furthermore, requiring an accused to account for behaviour where the underlying wrongfulness or blameworthiness of such behaviour is not apparent or is so equivocal surely extends the ambit of liability too far. Possession of articles that create a reasonable suspicion of being for a purpose connected with terrorism, without needing to prove such a purpose and where any number of ordinary, innocuous articles would suffice, is hardly wrongful or blameworthy conduct.⁵⁸

⁵⁸ Ashworth, 'The Unfairness of Risk-Based Possession Offences'

6.2.2 *Section 58: Collection of Information*

Section 58 covers the collection of information that may be useful to someone with a terrorist purpose or the possession of such information. The offence is set out as follows:

- (1) A person commits an offence if
 - (a) he collects or makes a record of information of a kind likely to be useful to a person committing or preparing an act of terrorism, or
 - (b) he possesses a document or record containing information of that kind.
- (2) In this section “record” includes a photographic or electronic record.
- (3) It is a defence for a person charged with an offence under this section to prove that he had a reasonable excuse for his action or possession.
- (4) A person guilty of an offence under this section shall be liable
 - (a) on conviction on indictment, to imprisonment for a term not exceeding 10 years, to a fine or to both or
 - (b) on summary conviction, to imprisonment for a term not exceeding six months, to a fine not exceeding the statutory maximum, or to both.

6.2.2.1 *Actus Reus: Targeting Intrinsically Dangerous Information?*

The *actus reus* of this offence is made up of two alternative components. Either the accused must have collected or made a record of information likely to be of use to a person with a terrorist purpose, or the accused must have possessed a document or record containing information that is likely to be useful to such a person. In this way it differs from section 57, which has only one form of *actus reus*. Section 58 criminalises not only possession but also the collecting or making a record of certain information. The 'record' must be in a tangible form as a document or some other type of recorded information. Section 58(2) states that photographic and electronic records are included within the definition of 'record'. However, as the record must be recorded it cannot consist of unrecorded knowledge, mental notes or utterances.⁵⁹

Unlike section 57, section 58 does not refer to instigation of terrorism. The information must be likely to be useful to a person committing or preparing an act of terrorism; information that is likely to be useful to a person instigating acts of terrorism is not included. It is not clear why instigation is omitted from the offence. But perhaps this is to exclude the collection or possession of propaganda material from the ambit of the offence. Possession of information that praises or glorifies terrorism may be of use to someone who wishes to instigate acts of terrorism but is of less use to

⁵⁹ Walker, *Blackstone's Guide to the Anti-Terrorism Legislation*, 191

someone preparing or committing an act of terrorism.⁶⁰ Some support for this contention may come from the case of *R v K*,⁶¹ in which one leg of the defence's argument rested on the assertion that section 58 did not apply to the possession of theological or propagandist material. It was submitted by the defence that this offence had been in existence in Northern Ireland for many years (albeit in a different Act) and had never been applied nor was it intended to apply to the possession of theological or propagandist information. Furthermore, it was argued that if section 58 did cover the possession of propagandist or theological material, there would have been no need for Parliament to create the offence of dissemination of terrorist publications in section 2 of the Terrorism Act 2006.⁶² As mentioned above, section 2 of the Terrorism Act 2006 not only prohibits the dissemination of terrorist publications but also the possession of such publications. Section 2 applies to the encouragement and instigation of terrorism through the dissemination or possession of terrorist publications, which would include propagandist material.

In *R v K*, the Court of Appeal held that documents or records that simply encourage acts of terrorism do not fall within the scope of section 58.⁶³ Although not mentioned in the judgment, this finding accords with the idea that the reason why the offence does not refer to the instigation of an act of

⁶⁰ Note that glorification of terrorism was subsequently criminalised under section 1 of the Terrorism Act 2006 and the possession of material that glorifies terrorism was criminalised under section 2 of the same Act.

⁶¹ [2008] EWCA Crim 185

⁶² Para 7.

⁶³ Para 13

terrorism is that it was not the intention of Parliament at that time that the possession of propagandist material would be caught within the scope of the offence. However, why then is the word 'instigation' included in section 57? If it is this word that determines whether or not propagandist material is included, why should it be included in section 57 but not 58? In *R v Zafar*, the court reluctantly held that the possession of a document inciting acts of terrorism would fall within the scope of section 57 due to the fact that the word 'instigate' had to be given its ordinary meaning. The court expressed its reluctance in this regard due to concern that this would mean that the possession of propaganda could be covered by section 57. The court did not believe that this was the Parliamentary intention in drafting this offence.⁶⁴

It is debateable whether it was the intention of Parliament that either section 57 or 58 should cover propagandist material. If the distinction between sections 57 and 58 suggested by Lord Lloyd were maintained, namely that section 57 should apply to articles and section 58 to documents and information, this issue would be resolved. Section 57 would not apply to propaganda as it would not apply to written documents or records and section 58 would also not cover such material due to the absence of the word 'instigate' in the statement of the offence. There would be no disjuncture between the offences as to the exclusion of propagandist material, which would seem to more accurately reflect the Parliamentary intention. Furthermore, the offences in section 57 and 58 of the Terrorism Act of 2000

⁶⁴ *R v Zafar* para 31

and section 2 of the Terrorism Act of 2006 would operate distinctly. However, by virtue of the decision in *R v Rowe*, 'articles' includes written documents, resulting in overlap between sections 57 and 58 of the Terrorism Act and section 2 of the Terrorism Act 2006 and allowing for propaganda to come within the ambit of section 57. If the interpretation in *Rowe* were overturned so as to enable the offences to reflect what seems to have been the original intention of Lord Lloyd and Parliament - that articles would not include records and information - this would be one way in which the operation of offences could be clearer and overlap could be avoided.

Section 58 focuses on the nature of the information in question. It is not concerned with the circumstances in which the information is collected or possessed. In this way too it is distinguished from section 57, which is concerned with the particular circumstances in which an article is possessed: circumstances which give rise to a reasonable suspicion of a terrorist purpose. Section 58 does not even include this reference to a suspicion of a terrorist purpose. Rather, the offence focuses on the document or record itself and its potential use to a person committing or preparing an act of terrorism. The offender does not have to be connected to any act of terrorism at all, in even the remotest sense, nor need there be a suspicion of such a connection to terrorism on the part of the possessor. All that is needed is that the accused collects or possesses information that could be useful to an individual (or individuals) with a terrorist purpose, whether such individual is the accused or someone else. The information constitutes the danger and source of

potential harm due to the fact that it could be useful to a terrorist. This potential terrorist need not be identified or even exist. It is the content of the information itself that is in issue and provides the grounds for the offence. The information is assessed according to its intrinsic nature in order to determine whether it is likely to be useful in committing or preparing an act of terrorism, without any reference to the surrounding circumstances.

In determining the scope of the *actus reus*, the court needs to identify what constitutes information that is 'of a kind likely to be useful to a person committing or preparing an act of terrorism'. One could argue that almost anything could fall into this category: the A-Z of London is an often-used example;⁶⁵ flight schedules or train timetables; legal books and articles on counter-terrorism. Many of the documents and websites consulted for the purposes of drafting this thesis and saved on computer could arguably fall within the ambit of the offence. Due to the breadth of the offence and the fact that no limits are placed on the type of information that is included, even information that is not remotely connected to terrorism could be caught by the offence; things that are useful to ordinary people are generally useful to terrorists too. By failing to specify the parameters of what information is included in terms that are clear and precise, the *actus reus* is overly broad.

⁶⁵ This example was given in *R v K* [2008] EWCA Crim 185, para 9. See also Walker, 'Prosecuting Terrorism: The Old Bailey versus Belmarsh', 23; Hodgson and Tadros, 'How to Make a Terrorist Out of Nothing', 994.

This problem was addressed by the Court of Appeal in *R v K*.⁶⁶ In this case, it was argued by the defendant that section 58 was insufficiently certain to comply with the common law doctrine of legality or with Article 7 of the ECHR.⁶⁷ It was submitted that the term 'likely to be useful' is so broad that it fails to satisfy the requirements of legal certainty and effectively criminalises the possession of innumerable items of information.⁶⁸ The Court, in interpreting the phrase 'information of a kind likely to be useful to a person committing or preparing an act of terrorism', stated that a document or record would only fall within section 58 if it is of a kind that is likely to provide practical assistance to a person committing or preparing acts of terrorism. As mentioned above, a document that simply encourages the commission of acts of terrorism does not fall within section 58.⁶⁹ The Court distinguished the operation of this section from that of section 2 of the Terrorism Act 2006 in that the latter requires the jury to have regard to surrounding circumstances when deciding whether a publication is likely to be useful in the commission or preparation of an act of terrorism whereas section 58 does not include this requirement. Regarding section 58, the Court stated that:⁷⁰

The natural meaning of that section requires that a document or record that infringes it must contain information of such a nature as to raise a reasonable suspicion that it is intended to be used to assist in the preparation or commission of an act of terrorism. It must be information that

⁶⁶ *R v K* [2008] EWCA Crim 185.

⁶⁷ Para 4. As mentioned above, the other leg of the defence's argument related to the non-applicability of section 58 to the possession of religious or propagandist material.

⁶⁸ Para 6.

⁶⁹ Para 14.

⁷⁰ Para 14

calls for an explanation. Thus the section places on the person possessing it the obligation to provide a reasonable excuse. Extrinsic evidence may be adduced to explain the nature of the information. Thus had the defendant in *R v Rowe* [2007] EWCA Crim 635 been charged under section 58, evidence could have been admitted as to the nature of the substitution code possessed by the defendant. What is not legitimate under section 58 is to seek to demonstrate, by reference to extrinsic evidence, that a document, innocuous on its face, is intended to be used for the purpose of committing or preparing a terrorist act.

In this way, the Court of Appeal sought to remedy any imprecision in the offence, so as to render it compatible with the doctrine of legality.⁷¹ By interpreting the offence in this way, the Court limited the type of information that could be caught by the offence. To take the example of the A-Z map of London, while this may in certain circumstances be useful to a person with terrorist intentions, it is not intrinsically useful to terrorists and would not, on the face of it, raise a suspicion of connection with a terrorist purpose.⁷² Without recourse to the surrounding circumstances, the information itself is innocuous and therefore does not fall within the ambit of section 58. This interpretation of the offence goes some way to remedying the breadth and imprecision of the *actus reus* of the offence. The Court also referred to the raising of a reasonable suspicion of an intention that the record be used to prepare or commit an act of terrorism. This interpretation is not an obvious one and seems more akin to the wording in section 57 regarding a reasonable

⁷¹ Para 16.

⁷² Walker, *Blackstone's Guide to the Anti-Terrorism Legislation*, 191

suspicion of a terrorist purpose. While it does not introduce a true intention requirement (there is no requirement for the prosecution to show that the defendant intended the records to be used for a terrorist purpose), the court seems to suggest that there must at least be a suspicion that the information is intended to be useful in the preparation or commission of an act of terrorism. However, this suspicion of a terrorist intent must be raised by the nature of the information itself and not from any surrounding circumstances or evidence of terrorist intent. As the Court said, the document or record 'must contain information of such a nature as to raise a reasonable suspicion that it is intended to be used to assist preparation or commission of an act of terrorism'.⁷³ The use of the words 'intended to be used' in this context is somewhat misleading. What is required is that, on the face of it, the document or record is of such a nature as to be useful to a terrorist and due to this intrinsic practical utility it calls for an explanation as to the purpose of its use. What is at issue is the nature of the information, not the intention of the defendant. It is the document itself that must be of such a nature as to create an impression that whoever possesses it could reasonably be suspected of having such intention. The information calls for an explanation and it is then up to the defendant to provide such an explanation in the form of a 'reasonable excuse' for the collecting, recording or possessing of the offending information.⁷⁴

⁷³ Para 14

⁷⁴ The defence in section 58(3) will be examined in further detail in 6.2.2.3 of this chapter.

The judgment in *R v K* was followed in the case of *R v Malik*.⁷⁵ The defendant, referred to in the press by her pen-name, the 'Lyrical Terrorist', was acquitted on appeal of a conviction under section 58 on the grounds that the jury had not been properly directed as to the requirement for 'practical utility'. The judge's summing up had failed to distinguish those documents that could ground a conviction under section 58 by satisfying the test of 'practical utility' from those that could not and for this reason the decision was found to be unsafe.⁷⁶

The approach taken in *R v K* as to the interpretation of 'likely to be useful' was confirmed in the case of *R v G; R v J*.⁷⁷ The House of Lords acknowledged that there is the potential for section 58 to apply to a multitude of records of everyday information, which might be of use to a person who was preparing to carry out acts of terrorism. However, the court stated that it could not have been the intention of Parliament to criminalise the possession of such everyday information simply because it could also be useful to someone who was preparing an act of terrorism.⁷⁸ Therefore, it was held that in order to fall within section 58(1), 'the information must, of its very nature, be designed to provide practical assistance to a person committing or preparing an act of terrorism'.⁷⁹ Examples given by the House of Lords included training manuals on the manufacture or planting of explosives, information on how to gain unauthorised access to military or government

⁷⁵ [2008] All ER (D) 201 (Jun)

⁷⁶ Walker, *Blackstone's Guide to the Anti-Terrorism Legislation*, 191

⁷⁷ *R v G, R v J* [2009] UKHL 13; [2010] 1 A.C. 43

⁷⁸ Para 42.

⁷⁹ Para 43.

premises, as well as information on how to gain access to such information.⁸⁰ The House of Lords stated that the use of extrinsic evidence is limited in section 58. While it can be used to explain the significance of something in the document, it cannot be used with the aim of showing that an innocuous document should fall under section 58. This is because the document must contain information which, of its very nature, is likely to be useful to a potential terrorist,⁸¹ following the approach taken in *R v K*. This appears to be a sensible way of limiting the scope of the offence and the types of information to which it would apply. However, it is important to note that the court also said:⁸²

it is not necessary that the information should be useful only to a person committing, etc, an act of terrorism. For instance, information on where to obtain explosives is capable of falling within section 58(1), even though an ordinary crook planning a bank robbery might also find it useful.

This statement conflicts with the pronouncement in the same paragraph that 'the information must, of its very nature, be designed to provide practical assistance to a person committing or preparing an act of terrorism'. Taking the example given by the House of Lords, information on where to obtain explosives that has been produced by someone with the purpose of assisting another to commit a bank robbery is not designed to provide practical assistance to someone with a terrorist purpose. Rather, it is designed to

⁸⁰ Para 45

⁸¹ Para 44.

⁸² Para 43

provide practical assistance to a would-be bank robber. The words 'designed to provide practical assistance to a person committing or preparing an act of terrorism' give the impression that the information should have been produced specifically for a terrorist purpose. However, this does not accord with the examples of types of information that would satisfy this requirement given by the House of Lords. Nor with the statement that the information need not be of sole use to those with a terrorist purpose. It is therefore not clear exactly what the House of Lords means when it says that the information must be designed to provide practical assistance to a person committing or preparing an act of terrorism.⁸³ Perhaps the distinction that is being drawn is between information that is objectively innocent and innocuous and that which is inherently dangerous or risky in some way. A map is inherently innocent whereas a document with instructions for assembling a bomb is not. But what about information that lies on the spectrum between these two extremes? It becomes very difficult to pinpoint exactly what will be included in the scope of the offence and it seems that a great deal of discretion is still left with the prosecutors and courts to determine the parameters of this requirement.

The courts have provided some clarity as to the type of information that would fall within the ambit of section 58 of the Terrorism Act 2000. The information must be of practical use to someone committing or preparing an act of terrorism and this practical utility must be evident from the intrinsic

⁸³ Hodgson and Tadros, 'How to Make a Terrorist Out of Nothing', 988

nature of the information. The approach of the courts to the interpretation of the offence so as to limit the types of information that fall within its reach seems to be a sensible way of attempting to remedy the overly broad drafting of the *actus reus*. However, it is still not entirely clear what information should be included within the scope of the offence, due to the confusion as to whether it should be restricted to information designed specifically for a terrorist purpose or not. In determining whether something is of practical utility to a terrorist or not, the main consideration seems to be the perceived dangerousness of the information in question: utility and dangerousness are two very different concepts. Thus, while there is some improvement as to the breadth of the offence, there is, if anything, a corresponding increase in the vagueness or uncertainty of the definition of the offence.⁸⁴

6.2.2.2 Mens Rea: Nature of Information not Purpose of Offender

Section 58 does not contain a presumption akin to that in section 57(3) whereby possession can be presumed in certain circumstances. Therefore, the defendant is required to have both knowledge and control over the record that is collected or possessed. This was confirmed in the case of *R v G; R v J*, which held that the prosecution needed to prove beyond a reasonable doubt 'that the defendant knew that he had the document or record and that he had control of it'.⁸⁵ The Court went on to add another requirement, namely that

⁸⁴ See Macdonald on discretion and how narrowing offences can result in them becoming more vague.

⁸⁵ Para 46

the defendant must also have been aware of the nature of the information contained in the document or record.⁸⁶ Such knowledge need not have been comprehensive, but there must have been knowledge of the nature of the information. However, a person could not claim to be unaware of the nature of the information if he or she was in possession but wilfully chose to ignore the contents of the document or record.⁸⁷ Section 58 therefore has a very limited *mens rea* element in the sense that the defendant need only be shown to have knowledge and control over the document or record and knowledge of the kind of information that it contained, namely information that would be useful to someone committing or preparing an act of terrorism.

This limited *mens rea* requirement does not require very much. A person with no terrorist intent may knowingly be in possession and control of information and aware of the nature of the information contained. However, section 58 does not require proof of a terrorist purpose on the part of the defendant. Taking the example of the documents stored on a computer for the purposes of researching a thesis on terrorism legislation, the possessor knowingly controls these documents and recognises that they could have some use to a person preparing or committing an act of terrorism. The intrinsic nature of these documents could be of practical assistance to a terrorist and this may be apparent on the face of the documents. However, the intent in possessing and collecting this information is to undertake research and write a thesis. However, without a requirement for the

⁸⁶ Para 47

⁸⁷ Para 48

prosecution to show a terrorist purpose on the part of the defendant, it is possible that this possession and collecting of certain information for the purpose of writing a thesis could fall foul of section 58 were it not for the 'reasonable excuse' provision in section 58(3).

As mentioned above, in the case of *R v K* it was stated by the Court that the nature of the information must be such as to raise a reasonable suspicion that it is intended to be used for committing or preparing an act of terrorism.⁸⁸ However, it is not required that the defendant had such an intention, nor even that the collecting, recording or possessing of the information led to a reasonable suspicion of a terrorist purpose on the part of the defendant. The offence is based on the nature of the information itself and not on the defendant's mental state or purpose for having the information. Where the court speaks of intention, it is doing so in relation to the nature and practical utility of the information. The information must be of a type that it would naturally raise a suspicion that it is held or collected for a terrorist intention. This suspicion is based purely on the nature of the information itself, not on the surrounding circumstances (such as in section 57) nor on the mental state of the defendant.⁸⁹ There is therefore no requirement for an ulterior intention or *mens rea* requirement for an ultimate terrorist purpose on the part of the defendant. In *R v G*, *R v J*, the court speculates that Parliament must have 'proceeded on the view that, in fighting something as dangerous and insidious as acts of terrorism, the law was justified in intervening to prevent

⁸⁸ Para 14

⁸⁹ Para 14

these steps being taken, even if events were at an early stage or if the defendant's actual intention could not be established.⁹⁰ The court therefore recognises that this is an unusual (and potentially problematic) section but offers the precautionary justification for enacting such a provision. It goes on to say that the defence available in section 58(3) 'introduced the necessary element of balance'.⁹¹ However, as will be seen below, it is arguable whether this really does provide adequate protection against the lack of a culpability requirement in the offence.

6.2.2.3 A Defence to the Offence: A "Reasonable Excuse"

As in section 57, a defence is provided in section 58(3) that is designed to limit the breadth of the offence and its potential application to people who are not involved in terrorism. The defendant will only need to rely on the defence in section 58(3) once the prosecution has proved all the elements of the offence. If the jury accept the defence then the defendant is entitled to be acquitted.⁹² According to section 58(3), it is a defence for the defendant to prove that he or she had a 'reasonable excuse' for collecting, recording or possessing the offending information. This is different to the defence in section 57, which requires that the defendant show that he or she had no terrorist purpose. Section 58 does not require the defendant to show that he or she had no terrorist purpose but rather that he or she had a reasonable excuse. The

⁹⁰ Para 49

⁹¹ Para 49

⁹² *R v G; R v J*, paragraph 60.

meaning of the words 'reasonable excuse' has been the subject of much controversy. This controversy has centred on two main questions: whether resistance to a tyrannical regime can constitute a reasonable excuse, and what exactly is required for an excuse to be considered 'reasonable'.

In the case of *R v F*,⁹³ the defendant was a Libyan national who had been granted asylum in the UK. He was charged under section 58 for the possession of a CD which contained several files that had been downloaded from a Jihadist website as well as a handwritten document with information on how to set up a terrorist cell aimed at removing Colonel Gaddafi from power in Libya. The defence's argument rested on two propositions: first, that the definition of terrorism in section 1 should be constructed so as to exclude legitimate resistance to tyrannical regimes; and secondly, that even if such action was included within the definition of terrorism, legitimate resistance to a tyrannical regime would constitute a 'reasonable excuse' under section 58(3). It was asserted that the proposed action was targeted against Colonel Gaddafi, his secret police and army and that no civilians or foreigners would be harmed. The objective was to replace the Gaddafi regime with a popular Islamic movement. It was the defendant's assertion that he was a freedom fighter and not a terrorist. The Court of Appeal analysed the definition of terrorism in section 1 and highlighted the breadth of the definition, noting that it did not specify what types of countries or foreign governments were included within the ambit of its protection. The section

⁹³ *R v F* [2007] EWCA Crim 243

makes no exception or exclusion for 'terrorism in a just cause'.⁹⁴ There is therefore no distinction in the definition of terrorism between countries that enjoy legitimate governance and those under a tyrannical regime. The Court therefore held that the terrorism legislation applies equally to countries that are governed by dictators and tyrants and that no exception from criminal liability is provided by the justness or nobility of the cause under which terrorist action is taken.⁹⁵

As to the defence's second argument, that a reasonable excuse was provided by virtue of the fact that the defendant's possession of the material was to further his legitimate resistance to a tyrannical regime, this too was rejected by the Court. It was held that this argument was circular and incoherent. The excuse proposed by the defendant relied on something that was prohibited by the statute itself. This flowed from the Court's construction of section 1. The Court explained that the defence depended:⁹⁶

upon the proposition that a reasonable excuse for conduct which constituted a crime may be found in the very crime prohibited by the statute. If correct, this would introduce an impossible incoherence into the statutory provisions. And for such an excuse to be "reasonable", the carefully constructed definition of terrorism in section 1 of the Act would become inoperative.

⁹⁴ Para 27

⁹⁵ Paragraph 32

⁹⁶ Paragraph 38

The Court went on to state that if Parliament had intended that resistance to a tyrannical regime should provide a defence under section 58, this would have been expressly stated in the Act.⁹⁷

This case highlights the impact of the breadth of the definition of terrorism on the operation of specific terrorism offences. While it is correct that on a technical construction of section 1 there is no exception for resistance to tyrannical or undemocratic regimes, and no distinction is made between terrorists and those engaging in acts of terrorism for a just cause, it is significant to consider this case in light of the NATO led military intervention that was undertaken in Libya by a multi-state coalition, including the UK, a few years after this case was decided. Furthermore, the implication of this case is that those who supported resistance to regimes that are widely accepted to be unjust, for example Saddam Hussein's regime in Iraq, the Apartheid government in South Africa, Mugabe's regime in Zimbabwe etc., would not be afforded an excuse based on the fact that they were engaged in legitimate resistance against a tyrannical regime. Without the availability of the defence in section 58(3) to such cases, there is nothing that could excuse the possession or collection of information for the purpose of resisting an unjust and tyrannical regime.

The clear stance taken by the Court of Appeal regarding the non-availability of an excuse of resistance to a tyrannical regime in *R v F* has been

⁹⁷ Paragraph 38.

muddied somewhat by the more recent case of *R v AY*.⁹⁸ This was an interlocutory appeal against a ruling made by the trial judge at a preparatory hearing. The defendant submitted that he had downloaded material contravening section 58 at a time when the Somali people had been subject to unlawful and disproportionate force in Somalia and were in need of armed assistance for the purposes of self-defence. He believed that the information downloaded would be useful for the purpose of resisting unlawful invasion and occupation. At the preparatory hearing, the Crown asked the trial judge to rule that the defendant could not argue that the defence of the Somali people was a reasonable excuse for contravention of section 58. The trial judge refused to make such a ruling and the Crown appealed. In addressing this, the Court of Appeal considered the ambit of section 58(3) and stated that the principal issue to determine was whether 'an alleged intended use for the lawful defence of others, or to assist them to employ lawful self defence, is or is not capable of amounting to reasonable excuse within section 58(3)'.⁹⁹ The Court of Appeal distinguished this case from *R v F* by stating that in the earlier case the defendant's purpose was clearly offensive and was not concerned solely with lawful defence. However, in this case, it was held that it was open to the defendant to argue that the sole purpose for which he possessed the material was for the lawful self-defence of the Somali people and that this could constitute a reasonable excuse under section 58(3).

⁹⁸ *R v AY* [2010] EWCA Crim 762

⁹⁹ Para 7

The question of lawful self-defence has also come up in the context of section 57. Under section 57, the issue is not whether a reasonable excuse can be advanced but rather whether it can be shown that the defendant had no terrorist purpose. In the case of *R v Rowe*,¹⁰⁰ the defendant argued that he was not a terrorist but was engaged in the lawful defence of Muslims who were subject to atrocities in Bosnia and Chechnya.¹⁰¹ It was accepted by the parties and by the trial Court that where documents were possessed for the sole purpose of lawful defence of third parties, section 57 would not be infringed. However, the Court of Appeal did not have to decide this issue, it was simply accepted by all parties that had the sole purpose been the defence of Muslims in Bosnia and Chechnya, the offence could not be made out.

Whether or not resistance to a tyrannical regime or legitimate defence or self-defence could constitute a reasonable excuse under section 58(3) is not clear. It appears from *R v F* that the courts wish to distance themselves from difficult political decisions as to the legitimacy or not of governmental regimes. However, cases such as *R v Rowe* and *R v AY* indicate that there is room for the argument that in certain circumstances lawful self-defence or defence of third parties can provide an excuse for contravening counter-terrorism legislation. However, these cases provide no clear guidelines as to what constitutes legitimate defence, no distinction is made between private and public defence and it is not quite clear whether the defence would be made in terms of section 58(3) (or section 57(2)) or whether it would come

¹⁰⁰ *R v Rowe* [2007] EWCA Crim 635

¹⁰¹ Para 10

under an independent right to self defence.¹⁰² This uncertainty is a predictable consequence of the broad drafting of the offence and of the definition of terrorism in section 1.

The second issue regarding the interpretation of the defence in section 58(3) relates to the meaning of the word 'reasonable'. In *R v K*, the Court stated that a 'reasonable excuse' consists only of an explanation that the offending document or record is possessed for a purpose other than to assist in the commission or preparation of a terrorist act. It does not matter if a document is possessed for the purpose of engaging in some other form of prohibited conduct that would breach the criminal or civil law.¹⁰³ All that is relevant is that the possessor can show that possession was not for a terrorist purpose. However, unsurprisingly, this position has not been upheld. The court, in the case of *R v G*, *R v J*, overturned the approach taken in *R v K*. It stated that such an approach seeks to apply the same interpretation to section 58(3) as to section 57(2), which is neither appropriate nor possible since the two provisions are not the same. By focussing on the purpose for which the defendant possesses the document or record to form the basis of the reasonable excuse, there is a shift from the framing of the offence, which is concerned with only the nature of the document and not the purpose for which it is possessed. Such a construction of reasonable excuse makes sense in respect of section 57, where the offence is concerned with the circumstances

¹⁰² C Walker, *Terrorism and the Law* (OUP 2011), 219

¹⁰³ *R v K* para 15

in which the article is possessed, but not section 58.¹⁰⁴ The court went on to say that apart from this, the construction in *R v K*:¹⁰⁵

... robs the adjective 'reasonable' in section 58(3) of all substance. Neither the judge nor the jury is left with any room to consider whether the excuse tendered by the accused for, say, his possession of the document is actually reasonable. Provided only that he proves that his purpose was not connected with the commission, etc, of an act of terrorism, the Court of Appeal give him a defence under subsection (3).

It is interesting to examine the facts of the case against G and the 'reasonable excuse' that was offered in order to highlight just how narrow the defence now is. G was charged with the collection of information of a kind likely to be useful to a terrorist under section 58 of the Terrorism Act 2000, as well as one charge of preparation for terrorism under section 5 of the Terrorism Act 2006. The prosecution's case was that various documents of an extremist nature that could be useful to a terrorist had been collected by the accused and discovered after numerous searches of his cell. It was G's contention that he had collected this information as a means of winding up the prison officers, who he believed he had heard whispering about him, and not for any terrorist purpose. During a police interview, he stated that he knew that 'this terrorism stuff ... really gets on their nerves' and that he had left the documents in his cell for the prison officers to find. It was later determined that G had been suffering from severe and enduring mental illness and that

¹⁰⁴ Para 71-75.

¹⁰⁵ Para 77.

his collection and possession of the offending information was a direct result of this mental illness. This fact was accepted by the Crown. In the opinion of the consultant forensic psychiatrist, it was likely G's belief that he heard the guards whispering about him was actually the result of an auditory hallucination as a consequence of a psychotic experience.

The House of Lords had to determine the scope of the 'reasonable excuse' defence and whether the explanation provided by G satisfied this provision. As mentioned above, the House of Lords rejected the decision in *R v K* that the excuse provided simply had to show that there was no terrorist purpose on the part of the accused. The Court summed up its findings as follows:¹⁰⁶

Under section 58(1), the mere fact that the defendant's purpose was not to commit an act of terrorism is neutral. What he has to show is that he had an objectively reasonable excuse for possessing something which Parliament has made it, *prima facie*, a crime for him to possess because of its potential utility to a terrorist.

Giving the example of a would-be bank robber in possession of instructions for making explosives, the Court stated that while this may provide an explanation for the possession, it could not constitute a 'reasonable excuse' for such possession and thus the would-be bank robber would be guilty of an offence under section 58. Applying this reasoning to the facts of G's case, the

¹⁰⁶ Paragraph 79.

court held that G's explanation that he collected the information to wind up the prison officers could not constitute a reasonable excuse for collecting and recording the information.¹⁰⁷

The decision in *R v G, R v J* constitutes a significant extension of liability under section 58 compared to that which had been established in the earlier case of *R v K*. Their Lordships did not seem to find any problem with the fact that as a result of their interpretation of a 'reasonable excuse', the offence could catch people with 'ordinary' criminal motives or even practical jokers.¹⁰⁸ The result of this is that a person can be convicted of a terrorist offence, thus acquiring the label of 'terrorist', even where such a person may have no terrorist purpose or connection to terrorism at all.

'Reasonable excuse' under section 58(3) is a more onerous standard than that of showing a lack of terrorist purpose as required by section 57(2). In order to prove one has a reasonable excuse one would certainly need to show that the information was not collected, recorded or held for a terrorist purpose. But, in addition, one would need to show that whatever purpose one had was also objectively reasonable and legitimate. Just quite what is necessary for an excuse to be considered objectively reasonable is not clear. The House of Lords acknowledged in *R v G, R v J* that there are many circumstances that could give rise to a charge under section 58 and that it is

¹⁰⁷ Paragraph 87.

¹⁰⁸ A du Bois-Pedain, 'Terrorist Possession Offences: Curiosity Kills the Cat' (2009) 68 Cambridge Law Journal 261, p262

therefore impossible to think of all potential reasonable excuses that would suffice. It stated that 'whether or not an excuse is reasonable has to be determined in light of the particular facts and circumstances of the individual case'.¹⁰⁹ However, it appears that a consequence of this decision is that it will be very difficult to raise a successful defence under section 58(3). Absence of a terrorist purpose will not be sufficient to ground such a defence; rather, defendants will need to provide a far stronger excuse in order to satisfy the rather opaque standard set by the House of Lords.

One of the primary rationales for having a separate legislative regime governing terrorism relates to the argument of fair labelling and the expressive function of the criminal law. As discussed in chapter 3, if terrorism is regarded as representing a distinctive form of criminality with particular features that set it apart from ordinary criminality and which present a particularly grave form of harm, then this should be reflected in the criminal law by way of specific legislation. The offences under which those involved in terrorism are charged and convicted should accurately reflect their particular wrongdoing, namely the distinctive criminal wrong of engaging in terrorism-related activity. Due to the fact that those convicted under such specific legislation will be labelled as terrorists, it is vital that only those who could rightfully be labelled as having committed a terrorist wrong should be caught by such legislation. The offence in section 58 offends against this principle of fair labelling in that it may apply to a range of people

¹⁰⁹ Para 81

with no connection to terrorism and no intention to be involved in any terrorism-related activities. The offence could apply to 'ordinary criminals' with no terrorist intentions or involvement, practical jokers or attention seekers (even when done as a result of a mental illness, as in the case of *R v G*), or even to those who are merely curious. David Anderson QC, the Independent Reviewer of Terrorism Legislation, has reported that the CPS does not regard mere curiosity as always constituting a 'reasonable excuse' under section 58.¹¹⁰ He states that those who possess offending information as a result of curiosity 'must place their faith in the restrained exercise of prosecutorial discretion'.¹¹¹

The elements of the offence in section 58(1) are overly broad, resulting in potential application to those without any terrorist purpose or connection. The defence in section 58(3) is supposed to ameliorate this breadth by allowing a defence of a 'reasonable excuse'. However, as a result of the decision in *R v G, R v J*, the 'reasonable excuse' defence is rendered so narrow as to provide no adequate safeguard against the conviction of those who may have no terrorist purpose or involvement.

¹¹⁰ David Anderson QC, *Report on the Operation in 2010 of the Terrorism Act 2000 and of Part 1 of the Terrorism Act 2006* (July 2011), para 10.12. It is interesting to note that in the case of *R v Boutrab* [2005] NICC 36, [2007] NICA 23, curiosity was considered enough to satisfy the defence under section 57(2) and shift the burden of proof back to the prosecution.

¹¹¹ *Ibid*, para 10.12

6.3 Assessing the Criminalisation of Terrorist Possession

The previous section analysed the offences in sections 57 and 58 of the Terrorism Act 2000 in detail in order to determine their scope and effect. However, as is apparent, precisely defining the parameters of these offences is no easy task. Both offences suffer from broad drafting, evident in the overly broad scope of the *actus reus* of both sections 57 and 58. The courts have attempted to narrow the application of the offences through interpretation in various ways, for example, by requiring a direct connection between the article possessed and the act of terrorism in the case of section 57,¹¹² and by setting the requirement that an article must be of inherent practical utility to a terrorist in order to fall within the scope of section 58.¹¹³ However, such attempts have not successfully rendered these provisions sufficiently precise or narrow to overcome the defects in their drafting. The offences are still broad enough to catch conduct that cannot rightfully be described as being related to terrorism and the attempts to narrow the interpretation of the offences are themselves not entirely clear. Apart from the broad and vague *actus reus*, the offences are both effectively ones of strict liability, and no proof of a further or ulterior intention related to terrorism is required. Furthermore, the defences that are provided in order to ameliorate these fundamental issues could be said to reverse the burden of proof and offend against the presumption of innocence by placing the onus on the accused to provide an

¹¹² *R v Zafar*

¹¹³ *R v K; R v G, R v J*

explanation or excuse for his or her possession.¹¹⁴ Despite these significant problems, conviction under these offences results in substantial sentences of imprisonment: a maximum of 15 years under section 57 and 10 years under section 58.

The problems highlighted above are not unique to possession offences relating to terrorism. Possession offences generally are particularly difficult to accommodate within the standard criminal law doctrine and suffer from many of the same defects as those found in sections 57 and 58.¹¹⁵ Possession offences that are concerned with preventing the risk of future harm, such as the offences in sections 57 and 58, are particularly prone to these problems. In common with these offences, many risk-based possession offences lack a clear act requirement appearing to criminalise a state of affairs rather than a voluntary act. They are often defined as strict liability offences and incorporate reverse burdens of proof, thus eroding the presumption of innocence. Furthermore, they are remote from the causing of harm such that they hold the individual responsible for the future decisions of themselves or others. While these defects are not confined to the possession offences in

¹¹⁴ On reverse burdens and the presumption of innocence, see Andrew Ashworth, 'Four Threats to the Presumption of Innocence' (2006) 10 *The International Journal of Evidence and Proof* 241; D Hamer, 'The Presumption of Innocence and Reverse Burdens: A Balancing Act' (2007) 66 *Cambridge Law Journal* 142; Antony Duff, 'Presuming Innocence' in Lucia Zedner and Julian V. Roberts (eds), *Principles and Values in Criminal Law and Criminal Justice: Essays in Honour of Andrew Ashworth* (OUP 2012); Victor Tadros, 'Rethinking the presumption of innocence' 1 *Criminal Law and Philosophy* 193; Paul Roberts, 'Strict liability and the presumption of innocence: An exposé of functionalist assumptions' in Andrew Simester (ed), *Appraising Strict Liability* (OUP Oxford 2005); Victor Tadros and Stephen Tierney, 'The Presumption of Innocence and the Human Rights Act' [Blackwell Publishing] 67 *The Modern Law Review* 402.

¹¹⁵ See Ashworth, 'The Unfairness of Risk-Based Possession Offences' for a comprehensive analysis of the difficulties of accommodating risk-based possession offences within the criminal law paradigm.

counter-terrorism legislation, the implications of conviction under sections 57 and 58 are particularly severe, both in terms of the long prison sentences that can be imposed, as well as the stigma of being labelled a terrorist offender.

6.3.1 Possession as Conduct

As highlighted above, it is not clear from the *actus reus* of the offences in sections 57 and 58 exactly what conduct is prohibited. Furthermore, apart from the problem of defining the scope of the *actus reus*, it is not clear whether these offences truly have a conduct or behavioural component in the ordinary sense. Can possession of a document or article constitute 'conduct'? This question is not unique to these particular offences. Possession offences in general suffer from difficulties in identifying a clear conduct requirement in the form of a voluntary act. By their very nature, possession offences appear to criminalise a state of affairs rather than a voluntary act. However, the nature of the act requirement, and whether it is in fact a requirement at all, is controversial. While it is often asserted in criminal law textbooks that all crimes must involve a behavioural element in the form of a voluntary act,¹¹⁶ this is not in fact an accurate reflection of the criminal law in practice. There are several crimes where it is difficult to identify a voluntary act without stretching the meaning of this term quite substantially, and certain theorists

¹¹⁶ This certainty in the requirement for a voluntary act appears to be particularly prevalent amongst commentators in America, for example, M Moore, *Act and Crime* (Clarendon Press 1993); Paul Robinson, *Fundamentals of Criminal Law* (2 edn, Little, Brown 1995), p250; Wayne LaFave, *Criminal Law* (3 edn, West 2000), 195-202; Joshua Dressler, *Understanding Criminal Law* (4 edn, Lexis 2006), 93.

deny the existence of an act requirement completely.¹¹⁷ There are whole classes of crimes that instead criminalise a situation or state of affairs, based on the fact that it is the situation or the circumstances that present a particular harm and should thus be prohibited. In order to address this harm, the law must criminalise these specific circumstances or states of affairs, despite the fact that there may be no explicit behavioural element on the part of the offender indicated within the statement of the offence. So it is not just the offences in section 57 and 58 that struggle to satisfy the requirement for conduct in the form of an act; this is a feature of possession offences in general.

The requirement for a voluntary act or conduct on the part of the offender in order to justify responsibility is a matter of contention.¹¹⁸ It seems that the so-called act requirement in criminal law requires that criminal responsibility cannot be based upon a situation or state of affairs but must rather be grounded in a voluntary act, in order to prevent criminalisation of circumstances or states of affairs or even thoughts or involuntary actions.¹¹⁹ However, it is difficult to see how possession offences could be accommodated within such an understanding, not to mention crimes of

¹¹⁷ Husak argues that there is no act requirement in the criminal law. Douglas Husak, 'An alleged act requirement in the criminal law' in John Deigh and David Dolinko (eds), *The Oxford Handbook of the Philosophy of the Criminal Law* (Oxford University Press 2011). For further criticisms of the act requirement by English theorists, see A. P. Simester, 'On the So-Called Requirement for Voluntary Action' (1998) 1 *Buffalo Criminal Law Review* 403; Antony Duff, 'Action, the Act Requirement and Criminal Liability' in J Hyman and H C Stewart (eds), *Agency and Action* (Cambridge University Press 2004), 69.

¹¹⁸ See notes 114 and 115.

¹¹⁹ Ashworth, 'The Unfairness of Risk-Based Possession Offences', 240-1.

omission (which some argue are an exception to the act requirement),¹²⁰ vicarious liability offences and offences of 'situational liability'.¹²¹ The act requirement would require considerable stretching in order to encompass these forms of criminal liability. Can one say that possession constitutes an act on the part of the offender?¹²² While it is usually true that conduct or action was involved in acquiring the object that is then possessed, possession of the object itself cannot always truly be considered as constituting a voluntary action if voluntary action is to mean 'bodily-movement-caused-by-a-volition'.¹²³ Moore, a firm proponent of the act requirement, argues that possession offences do not constitute a counter-example to the act requirement and can in fact be accommodated within the boundaries of this requirement. He argues that either the act of acquiring possession or the failure to divest oneself of possession are prerequisites to liability for possession offences and, therefore, do not penalise a state of affairs. What is being punished is the acquisition of possession or the failure to rid oneself of

¹²⁰ Michael Moore, who provides a thorough defense of the act requirement, acknowledges that omissions are an important exception to the requirement. Moore, *Act and Crime*, 34. Section 2.01(1) of the Model Pen Code states: 'A person is not guilty of an offense unless his liability is based on conduct that includes a voluntary act or the omission to perform an act of which he is physically capable'. However, Husak argues that simply stating that omissions are an exception without providing the normative basis for this exception is not satisfactory. Rather, omissions liability is better explained by the control requirement, in terms of which 'criminal liability should sometimes be imposed for omissions because persons are able to exercise control over a state of affairs by not acting, and persons may be subject to moral and criminal condemnation for some of those untoward states of affairs over which they exercise control'. Douglas Husak, *The Philosophy of Criminal Law: Selected Essays* (OUP 2010), 42. On omissions, see further Andrew Ashworth, *Positive Obligations in Criminal Law* (Hart Publishing 2013), chapter 2.

¹²¹ Regarding situational liability, see P R Glazebrook, 'Situational Liability' in P R Glazebrook (ed), *Reshaping the Criminal Law* (1978); M D Cohen, 'The "Actus Reus" and Offences of "Situation"' (1972) 7 *Israel Law Review* 186.

¹²² This question was raised by the court in *R v Roddis*. in the context of section 5 TA2006, discussed in chapter 4.

¹²³ Moore, *Act and Crime*, chapter 1.

possession, thus fulfilling the requirement for an act (or omission) for criminal liability.¹²⁴

An alternative to the 'act requirement' is the 'control requirement', whereby offenders are only held responsible for that which is in their control.¹²⁵ This requirement may more easily accommodate possession offences than the 'act requirement'. This approach encompasses responsibility for states of affairs and circumstances or other examples that struggle to satisfy the act requirement, provided it can be said that the situation or state of affairs was within the offender's control. According to Husak, such an approach is preferable in order to reflect the fact that people 'may be morally responsible for a great many states of affairs other than their acts'.¹²⁶ This focus on control can be seen in the interpretation of possession by the courts as requiring knowledge and control over the possessed object.¹²⁷ Some explanation of what the word control means in this situation is provided in the Model Penal Code's definition of possession, which states that:

Possession is an act ... if the possessor knowingly procured or received the thing possessed or was aware of his control thereof for a sufficient period to have been able to terminate his possession.

¹²⁴ Moore, *Act and Crime*, 21.

¹²⁵ Husak, *The Philosophy of Criminal Law: Selected Essays*, ch 1 'Does Criminal Liability Require an Act?'

¹²⁶ *Ibid*, 36.

¹²⁷ *Warner v Metropolitan Police Commissioner*. In the context of section 57 and 58 - *R v G, R v J*.

Although Moore defends the act requirement, his argument that possession offences punish either the acquisition or failure to divest oneself of possession shares certain similarities with the definition of possession in the Model Penal Code. The first part of the Model Penal Code's definition echoes Moore's contention that possession offences punish the acquisition of possession, such that it is the acquisition that constitutes the voluntary act. The control element in the second part of the Model Penal Code's definition requires that control was such that the possessor could have divested himself or herself of possession, much like Moore's argument that possession punishes a failure to terminate possession. Both Moore and the Model Penal Code definition therefore focus on the beginning or the end of the possession – acquisition and termination – in order to ground the offence in a voluntary act of conduct. Control is determined by reference to a person's ability to terminate possession, thus also focusing on divestment as the potential to carry out a voluntary act.

The control requirement, as reflected in the Model Penal Code, places quite some emphasis on whether a person was able to terminate possession in order to show that he or she had control of possession. Whether or not this focus on termination of possession accurately reflects why someone is being punished under possession offences is debateable, and a question that is outside the scope of this thesis.¹²⁸ However, in the context of the offences of

¹²⁸ Moore acknowledges that some object to his accommodation of possession offences by arguing that 'we aren't really punishing acts of acquisition of, or omissions to dispose of,

possession of terrorist material, it appears as if the rationale for punishment is not related to the acquisition or failure to terminate possession, though this may have a bearing on liability. Rather, liability is based on the possession itself, due to the nature of the offending article or information that is possessed. According to the courts and on the face of the legislation, it is the potential harm that could be caused as a result of certain information or material being used by either the possessor or someone else that provides the rationale for criminalisation of possession.¹²⁹ Criminalisation is thus based on the inherent dangerousness of the article or information. For this reason, questions as to the blameworthiness of the possessor are less important. The failure or otherwise of the possessor to terminate possession is not the conduct that is being punished. It is the possession of the dangerous article that is targeted and it is for this possession that someone is punished. Control becomes the means by which a person assumes responsibility for this possession.

Husak provides a slightly different explanation of the control requirement, by reference to what it is reasonable to expect of persons. He argues that 'a person lacks control over a state of affairs and neither is nor ought to be criminally liable for it if it is unreasonable to expect him or her to have prevented that state of affairs from obtaining'.¹³⁰ Thus, in the case of

things like burglary tools, stolen goods, etc. Really, we are punishing the possession itself, however the crimes are formally construed. Moore, *Act and Crime*, 21.

¹²⁹ Ashworth, 'The Unfairness of Risk-Based Possession Offences'; Dubber, 'The Possession Paradigm: The Special Part and the Police Power Model of the Criminal Process'

¹³⁰ D Husak, 'Does Criminal Liability Require an Act?' in A Duff (ed), *Philosophy and the Criminal Law: Principle and Critique* (Cambridge University Press 1998), 78.

possession offences, liability would not be justified where it would be unreasonable to expect a person to have prevented the possession from occurring. It is clear that if a person had no knowledge or control over the possessed item, it would be unreasonable to expect him or her to prevent the possession. However, on such a construction, are there not other situations in which it would be unreasonable to expect a person to prevent the possession? For example, if the possessor had no intention of using a prohibited yet ostensibly harmless item to cause harm, or to further a terrorist purpose, or had no knowledge or intention that this item may be of use to a person engaging in terrorism-related activity, would it be reasonable to expect them to prevent the possession?

While possession offences in general, and terrorism possession offences in particular, struggle to satisfy the act requirement, it is arguable that they may be more easily accommodated within the control requirement. Sections 57 and 58 appear to have been applied in such a way as to reflect the control requirement; possession under these offences has been interpreted by the courts as requiring both knowledge and control.¹³¹ However, in the case of section 57, this requirement is negated by the operation of section 57(3), which allows possession to be assumed in certain broad and easily satisfied circumstances. It is therefore difficult to argue that section 57 satisfies the control requirement in any meaningful way. Due to the operation of the presumption in section 57(3), it is possible for someone to have fulfilled all of the elements of the offence in section 57, without having any knowledge or

¹³¹ R v G, R v J para 53

control of possession. In such a case, it would be up to the defendant to rebut the presumption of possession or prove a defence under section 57(2) in order to escape liability. Whether or not the control requirement provides a more convincing basis for liability in respect of possession offences than the act requirement has been thoroughly debated by criminal law theorists and is not something that can be addressed in this thesis.¹³² However, it seems that no matter which approach is preferred, both the act and control requirements would require considerable stretching in order to apply to the offences of possession of terrorist material, particularly in the case of section 57 which does not even require knowledge and control due to the operation of the presumption of possession. It would seem more logical and appropriate to accept that these offences criminalise a state of affairs and to then question whether responsibility for this state of affairs can be attributed to the offender based on an appraisal of wrongfulness and culpability.

6.3.2 *Identifying Wrongfulness*

As argued in chapter 2, the criminal law should only prohibit conduct (or, in some cases, circumstances or states of affairs) that is *prima facie* wrongful. This is so even if there are defences available to counter the charge.¹³³ While defences may help to protect against unjust convictions, the first step is to ensure that the law does not prohibit innocent, non-wrongful conduct. This

¹³² See, for example, Moore, *Act and Crime*; Husak, 'An alleged act requirement in the criminal law'; Duff, 'Action, the Act Requirement and Criminal Liability'; Simester, 'On the So-Called Requirement for Voluntary Action'.

¹³³ Tadros and Hodgson, *How to Make a Terrorist out of Nothing*, 987

section therefore assess whether the conduct prohibited by sections 57 and 58 (using 'conduct' in its loosest form as discussed above) is wrongful.

Looking first at section 57, what is the wrong that underlies the offence? The offence prohibits the possession of an article in circumstances that give rise to a reasonable suspicion that the possession is for a purpose connected with the commission, preparation or instigation of an act of terrorism. Having a purpose that is connected to terrorism in some way may well be wrongful. However, the offence does not require a purpose connected with terrorism. Rather, all that is required is that the possession is in circumstances that give rise to a reasonable suspicion of a terrorist purpose. Engaging in conduct which gives rise to a suspicion of wrongdoing is not equivalent to engaging in wrongful conduct. Nor can it be considered as proof of wrongdoing.¹³⁴

To make the argument that giving rise to a suspicion of wrongdoing is in itself wrongful, one would need to base this on the premise that people owe a duty not to arouse in others a suspicion of wrongdoing.¹³⁵ If this were the case, then people would be prohibited from possessing objectively innocent articles or documents (a car; rope; fertiliser) if such possession could result in feelings of insecurity in members of the public. Ramsay advances the contentious argument that the growing prevalence of 'pre-inchoate'

¹³⁴ du Bois-Pedain, 'Terrorist Possession Offences: Curiosity Kills the Cat', 263

¹³⁵ This would involve recourse to the idea that offences can be based on protecting subjective security. See Ramsay, *The Insecurity State: Vulnerable Autonomy and the Right to Security in the Criminal Law*, for argument that current criminal legislation is based on enhancing subjective security.

offences, which term would include the offences in sections 57 and 58, can only be explained by reference to the goal of increasing subjective security. He casts these criminal offences as targeting failures to reassure in order to advance subjective security.¹³⁶ While members of the public would be unlikely to know of instances of such possession contrary to section 57 or 58, the argument according to Ramsay is that knowing that there is no protection against such possession creates feelings of insecurity, even if each instance of possession is unknown: 'anyone who has reason to fear that ... [preparatory] acts are being carried out ... is going to be caused fear that the threatened atrocity may materialise'.¹³⁷ It is not within the scope of this thesis to analyse the merits or otherwise of the goal of subjective security in criminalisation.¹³⁸ However, the legislature and policy makers did not raise subjective security as a rationale for the preventive terrorism offences under consideration. Rather, the rationales provided are aimed at enhancing objective security and rely on the argument that these offences are necessary to prevent a terrorist atrocity from occurring by licensing earlier intervention by police and security services.¹³⁹

¹³⁶ Ibid, chapter 7

¹³⁷ Ibid, 145

¹³⁸ See Macdonald, 'Why We Should Abandon the Balance Metaphor: A New Approach to Counterterrorism Policy', 106-112 for convincing arguments against subjective security as a rationale for enacting counterterrorism laws. He argues (at p107) that while reducing public fear about terrorism may be desirable, this objective should not be pursued through the enactment of new criminal offences. He provides three reasons for this: 'first, cognitive evidence suggests that passing such legislation is unlikely to have this effect; second, the aim of reducing anxiety about terrorism is at odds with the politics of fear which characterizes contemporary society; and third, the enactment of new laws nurtures a vulnerability-led approach to terrorism which exacerbates public anxiety'.

¹³⁹ Andrew Cornford, 'Review: Peter Ramsay, *The Insecurity State: Vulnerable Autonomy and the Right to Security in Criminal Law*' (2014) 77 *Modern Law Review* 516, 518.

Placing a duty on citizens to reassure other citizens that they are not engaged in wrongdoing by prohibiting the possession of innocent objects seems an unjustifiably burdensome obligation. This can be distinguished from possession of inherently dangerous objects or an object that's primary purpose is linked to the commission of wrongful acts.¹⁴⁰ For example, the possession of a crowbar or a gun or knife would be far more suggestive of an intention to commit a wrongful act against the person or against property than is the possession of inherently innocent articles such as maps, cars, three band radios etc.¹⁴¹ The argument that creating a suspicion of wrongdoing is wrongful, in cases where what is prohibited is the possession of ordinary commonplace objects, without any proof of an ulterior intent, seems to stretch the limits of wrongfulness too far.¹⁴²

As explained above, section 57(2) provides a defence to the offence, whereby a defendant may escape liability if he or she proves that he or she did not have a purpose connected to terrorism. However, in refuting this defence, the prosecution does not have to prove that the defendant did in fact have a terrorist purpose. There is no need, even when rebutting the defence, for the prosecution to prove a substantive wrong on the part of the defendant. The effect of section 57 is to require the defendant to provide an account or explanation for his or her possession, based on the fact that this possession creates a suspicion that it is for a terrorist purpose. The defendant is required

¹⁴⁰ Ashworth, 'The Unfairness of Risk-Based Possession Offences', p251

¹⁴¹ Walker, *Blackstone's Guide to the Anti-Terrorism Legislation*, p190

¹⁴² Horder, *Crimes of Ulterior Intent*.

to provide an excuse for the possession, even though there has been no proof of wrongdoing, only a suspicion of wrongdoing. Yet, once such an explanation has been provided, there is no duty on the prosecution to prove the substantive wrong of conduct with a terrorist purpose in order to secure a conviction.

Section 58 presents similar problems with regard to satisfying the requirement for wrongfulness. The information that has been considered to fall within the scope of section 58 is often readily available to all. For example, an item that is often the subject of a charge and conviction under section 58 is *The Anarchist Cookbook*, which is available to purchase on Amazon.¹⁴³ Nineteen-year-old Nicky Davidson was convicted of three counts under section 58 for possession of documents likely to be useful to a person preparing or committing an act of terrorism. The documents included *The Anarchist Cookbook* and *The Poor Man's James Bond*, both freely available on Amazon.¹⁴⁴ While the courts have stated that the information must on the face of it be intrinsically useful to a terrorist, there is no requirement that such information must provide material assistance to a terrorist. Insisting on a material assistance requirement, which would only be satisfied if the information were difficult to obtain, could provide a more reasonable ground for establishing a link between the person who has collected or possesses the

¹⁴³ http://www.amazon.co.uk/The-Anarchist-Cookbook-William-Powell/dp/1607964813/ref=sr_1_1?ie=UTF8&qid=1400694239&sr=8-1&keywords=anarchist+cookbook

¹⁴⁴ http://www.cps.gov.uk/news/latest_news/118_10/

offending information and a terrorist purpose or activity.¹⁴⁵ A material assistance requirement may satisfy the requirement for sufficient normative involvement set out by Simester and von Hirsch.¹⁴⁶ A person who goes to the trouble of obtaining information that is intrinsically useful to a terrorist and is not easily acquired could be regarded as underwriting the future use to which such information will be put.¹⁴⁷ However, such normative involvement would depend upon the intention of the person who collects or possesses the information. Without the intention to further a terrorist purpose, it would be implausible to hold that a person was normatively involved in that terrorist purpose such that liability could be imputed.

As currently drafted, the offence has the potential to capture people who have no terrorist involvement at all. For example, in the case of *R v G*, where G allegedly collected the offending material to wind up the prison guards, it is difficult to identify the terrorist wrong that is targeted by his conduct. There is very little likelihood of the material reaching prospective terrorists and thus providing them any material assistance and much of the material was easily obtained. Furthermore, there was no evidence that G was intending to commit an act of terrorism or be involved in terrorism related activity himself. There was no normative involvement in any future terrorist

¹⁴⁵ von Hirsch, 'Extending the Harm Principle: Remote Harms and Fair Imputation'; Simester and von Hirsch, 'Remote Harms and Non-constitutive Crimes'; Simester and von Hirsch, *Crimes, Harms, and Wrongs: On the Principles of Criminalisation*. See chapter 2 on imputation of remote harms and the requirement of normative involvement as set out by Simester and von Hirsch.

¹⁴⁶ Simester and von Hirsch, 'Remote Harms and Non-constitutive Crimes'; Simester and von Hirsch, *Crimes, Harms, and Wrongs: On the Principles of Criminalisation*.

¹⁴⁷ See section 6.3.3 below and chapter 2 for a discussion of Simester and von Hirsch's requirement of sufficient normative involvement for imputation of remote harms.

act. Despite this, and the fact that the medical expert testified that G's conduct was linked to his mental illness, the House of Lords held that G did not have a 'reasonable excuse' for collecting and possessing the offending material.

What is the wrong that is targeted by an offence of collecting or possessing information that may be of use to a terrorist? If the offence is aimed at preventing information being used in furtherance of a terrorist plan, then should it not be assumed that the legislation is targeting the wrong of collecting or possessing material with the intention that the material will be useful in the commission or preparation of an act of terrorism (and this applies equally to the offence in section 57)? This seems a more convincing basis for establishing wrongfulness than the argument that the information is so intrinsically dangerous or presents such an inherent risk of harm itself that its possession should be criminalised irrespective of any terrorist purpose. There is a difference between the blanket criminalisation of possession of guns, explosives, drugs etc. – which offences are intentionally over-inclusive due to their inherent dangerousness and the aim of guiding all citizens away from possessing any of these items – and the possession of any information that could be of use to a terrorist. It would not be justifiable to require all members of society to refrain from possessing commonplace items or information that could be of use to a terrorist. Tadros argues that the legislature does not intend full compliance with offences that extend to non-

wrongful conduct.¹⁴⁸ Thus, there is a discrepancy between the wrong that is targeted and conduct that is criminalised, resulting in what Edwards refers to as an 'ouster' offence.¹⁴⁹ There is no requirement that the defendant have a terrorist purpose or intention for collecting or possessing the information. The information may have many potential uses, both innocent and criminal, and the offence definition does not distinguish between these types of uses. The offence therefore does not differentiate between those with a terrorist purpose and those who are not involved in terrorism in any way.¹⁵⁰

This is not to say that all instances of possession that could be caught by sections 57 and 58 would not be wrongful. There may be many incidences of such possession that would indeed be wrongful. However, due to the expansive *actus reus* and the lack of an ulterior intention relating to terrorism, the offences have the potential to apply to non-wrongful conduct or to conduct that may constitute a criminal wrong but should not be described as a terrorist wrong. By failing to describe the particular terrorist wrong that grounds the offences, both sections 57 and 58 fail to adequately explain why an offender should be condemned for breaching these offences. The result is that great power is then left in the hands of prosecutors to exercise discretion in applying these offences.¹⁵¹

¹⁴⁸ Tadros, 'Justice and Terrorism'

¹⁴⁹ Edwards, 'Justice Denied: The Criminal Law and the Ouster of the Courts' See discussion in chapter 2 on ouster offences.

¹⁵⁰ Tadros, Justice and Terrorism, 676.

¹⁵¹ Tadros and Hodgson, How to Make a Terrorist Out of Nothing, 995

6.3.2 *The Culpability Constraint and Strict Liability*

Possession offences present certain difficulties with regard to the *mens rea* doctrine. First, the definition of possession incorporates a very limited *mens rea* requirement, whereby all that is required is that the possessor had knowledge and control over the offending article.¹⁵² Secondly, this restricted mental element is incorporated into the *actus reus* of the offence, and does not constitute a separate, free-standing requirement. However, this is not particularly problematic, as the distinction between *mens rea* and *actus reus* is an analytical tool and does not require a rigorous separation or differentiation in order for an offence to be justified.¹⁵³ What is of greater concern is that even the restricted culpability requirement of knowledge and control can be circumvented due to the operation of presumptions of possession. The criminal law contains several examples of such possession offences, where possession is assumed unless rebutted by a defendant. The pervasiveness of presumptions in possession offences suggests that in this particular class of offences the legislature is concerned about the implications of retaining the ordinary culpability or fault requirement.¹⁵⁴ Such a requirement no doubt makes it harder to secure a conviction, and presumptions of possession reduce the scope for false defences and assist the prosecution in its task. However, it is difficult to see why these concerns should apply specifically to

¹⁵² Ashworth, *The Unfairness of Risk-Based Possession Offences*, 243

¹⁵³ Ashworth, *The Unfairness of Risk-Based Possession Offences*, 243-4

¹⁵⁴ *Ibid*, 244.

possession offences, so as to justify the sidestepping of a fundamental principle of criminal law doctrine.

The only fault requirement in section 57 is that the offender had knowledge and control of the possession. However, this is negated by the provision in section 57(3) that possession can be assumed in certain wide-ranging circumstances. There is also no requirement for the prosecution to show a terrorist purpose or ulterior intention on the part of the offender. While the offender has the benefit of a defence in section 57(2) to show that he or she had no terrorist purpose, the prosecution need not prove that the defendant did have a terrorist purpose in order to rebut the defence.

Section 58 also requires knowledge and control of possession and does not contain a presumption of possession akin to that in section 57. However, the terms of the defence in section 58(3) are narrower than those in section 57, in that the defendant has to show a 'reasonable excuse' in order to escape liability. A reasonable excuse is not restricted to showing a lack of terrorist purpose. There is no requirement in section 58 for an ulterior intention on the part of the offender that the information is used for a terrorist purpose. The courts have stressed that the purpose of the offence is to target information that could be useful to a terrorist. The intention or purpose of the offender is therefore immaterial, except, potentially, in the context of offering a defence under section 58(3).

The lack of a fault requirement in sections 57 and 58 renders it possible for a person to be convicted of having committed a terrorist offence where he or she had no terrorist intent or purpose. However, despite the fact that these are strict liability offences, conviction under these offences carries with it the stigma of being labelled a terrorist offender, as well as a maximum sentence of 15 years under section 57 and 10 years under section 58. Can strict liability be justified for serious offences such as this? Strict liability offences and their justifiability and place in the criminal law have been the subject of much academic debate.¹⁵⁵ Whilst academic textbooks generally stress the importance of *mens rea* or culpability as a moral and legal requirement for criminal liability, in practice the criminal law contains several thousand strict liability offences. One cannot ignore the central role that strict liability offences play within the criminal law. However, arguments as to their justifiability are usually made on the basis that the penalty for conviction of the offence is low, there is little stigma that attaches to an offender, and there are strong economic arguments for these crimes to be dealt with quickly, efficiently and effectively.¹⁵⁶ These strict liability offences are often referred to as quasi-crimes or public welfare offences. The offences in section 57 and 58 cannot be said to be quasi-crimes or public welfare offences, by virtue of the fact that they carry substantial sentences of imprisonment and significant stigma. Deprivation of liberty is the strongest form of punishment in the UK criminal justice system, and thus requires particularly strong justification. For

¹⁵⁵ Ashworth, 'Should Strict Criminal Liability be Removed from all Imprisonable Offences?'; A P Simester (ed) *Appraising Strict Liability* (2005).

¹⁵⁶ Ashworth, 'Should Strict Criminal Liability be Removed from all Imprisonable Offences?'

this reason, while strict liability may arguably be appropriate in certain instances, it is generally held to be far harder to justify for serious offences carrying sentences of imprisonment. Ashworth argues that deprivation of liberty for an offence which does not require proof of culpability is disproportionate 'since the seriousness of an offence is constituted partly by the defendant's culpability; no fair foundation for imprisonment has been laid if culpability is not required as to a significant element in the offence'.¹⁵⁷

While it is clear that the offences in section 57 and 58 of the Terrorism Act 2000, in common with many other possession offences, do not conform to the general requirement for the element of *mens rea*, it is important to note that in practice a substantial proportion of the criminal law is made up of such strict liability offences. However, the prevalence of strict liability offences does not render them justifiable. While it may be permissible to allow strict liability offences for certain minor or regulatory offences, these should be considered an exception to the foundational requirement of *mens rea*. For any more serious offences, and for offences that could impose a sentence of imprisonment, a *mens rea* requirement should be essential. Strict liability in such cases cannot be justifiable.¹⁵⁸

¹⁵⁷ Ibid

¹⁵⁸ Ashworth, Unfairness of Risk Based Possession Offences, 245; Simester, Appraising Strict Liability (2005); Ashworth, Should Strict Liability be Removed from Imprisonable Offences?.

6.4 Conclusion

The offences in sections 57 and 58 of the Terrorism Act 2000 encounter several problems in their justification. They provide for the criminalisation of non-wrongful conduct, by virtue of the overly broad *actus reus* of the offence together with the lack of a fault requirement in the form of a terrorist purpose or, indeed, in any form. Furthermore, the fact that the elements of the offences are easy to fulfil, leaving all the work to be done by the defendant in offering a defence, together with the operation of presumptions, results in a shift of the burden of proof onto the accused, thus potentially infringing the presumption of innocence. Despite these significant issues, sections 57 and 58 have together resulted in the greatest number of charges under terrorism legislation.¹⁵⁹ When it comes to conviction rates, section 5 of the Terrorism Act 2006 is the front-runner with 63 convictions.¹⁶⁰ However, there have been 61 convictions where the principal offence charged is either section 57 or 58, representing an almost equal number of convictions to those under section 5.¹⁶¹ It is important to bear in mind that the Home Office only records the principal offence that is charged (that is the offence that carries the most severe sentence) in charge and conviction figures. Section 5 of the Terrorism Act 2006 would therefore be the principal charge in cases where several charges were brought. If one had to count all charges and convictions for

¹⁵⁹ There have been 137 charges under sections 57 and 58 together. Home Office, *Operation of police powers under the Terrorism Act 2000 and subsequent legislation: Arrests, outcomes, and stop and search, Great Britain, financial year ending 31 March 2015*

¹⁶⁰ Ibid

¹⁶¹ Ibid

offences under sections 57 and 58, the numbers would undoubtedly be higher.

These offences are clearly being used, and used effectively so as to result in successful prosecutions. This is perhaps unsurprising. Where an offence is easy to prove, and the defences provided are difficult to sustain, it follows that securing a conviction will not be particularly onerous. It is also clear that these offences are used to charge suspects as a means of investigating the suspicion of terrorist involvement. This is reflected in the high number of charges under these offences. Such offences are sometimes openly defended as creating an operational space for police and security services. As mentioned, Anderson talks of the need to 'defend further up the field' in commenting on offences such as these.¹⁶² This investigative function is particularly worrying in respect of section 58, due to the fact that no suspicion of terrorist involvement need be present. Rather, the information that grounds the charge must be useful to a terrorist. As has been demonstrated above, this could apply to information that could be useful to ordinary people or to criminals with no terrorist link. There is therefore the potential for this offence to be misused to target people who have no actual terrorist link and who could even have no suspected link to terrorism. Based on the above analysis, it is argued that these offences are not justifiable instances of criminalisation.

¹⁶² Anderson, 'Shielding the Compass: How to Fight Terrorism without Defeating the Law'.

7. Association with Terrorism

Various offences contained in the current counter-terrorism legislation extend liability laterally to people who may be associated with or in some way connected to a terrorist group or person involved in terrorist activity. Unlike the offences discussed in earlier chapters that extend inchoate liability temporally and causally, these participatory or associative offences extend liability laterally by criminalising assorted facilitative, associative or participatory acts. These offences display similar characteristics and suffer many of the same problems as the offences discussed in earlier chapters. They are overly broad and present particular difficulties in respect of the imputation of responsibility, as they often fail to specify sufficiently precisely the wrong that is targeted. As with the other preventive terrorism offences, these associative offences impose liability for conduct that is very remote from the causing of harm.

Criminalisation in this context occurs by virtue of a person's links or associations to those involved with terrorism. Such a link or association can be constituted in one of the following ways. First, a person can be linked to a terrorist organisation through membership or support of a terrorist organisation or by wearing or displaying an article or item of clothing of a

proscribed organisation.¹ These so called proscription offences rely for their operation on the proscription of an organisation for being concerned in terrorism and criminalisation occurs as a result of a person's links to this proscribed organisation. There are also various offences relating to funding and financial support to terrorist organisations, some of which can be triggered by proscription of an organisation.² Secondly, a person can be linked to terrorism or a terrorist group through one of the training offences in section 54 of the Terrorism Act 2000 and sections 6 and 8 of the Terrorism Act 2006. While those liable to conviction under these training offences may not be involved in the perpetration or preparation of a terrorist act, their association with a terrorist organisation by virtue of their receiving training or attending a place where training takes place brings them within the scope of the legislation. Finally, a person may be linked to a terrorist group as a result of their personal relationship with someone suspected of terrorist involvement. The legislation imposes positive reporting duties that could apply to family members, friends, acquaintances or community members of a person suspected of terrorist involvement.³ Failure to comply with these reporting duties constitutes a criminal offence. All of the people targeted by these associative offences are therefore presumed to present a risk of harm from a future potential terrorist attack as a result of their association or link in with terrorist groups or people suspected of terrorist involvement. The prosecution does not need to prove a terrorist act, or even an intention to

¹ Sections 11, 12 and 13 Terrorism Act 2000

² Section 15 and 16 Terrorism Act 2000

³ Section 38B Terrorism Act 2000

commit such an act, on their behalf. Rather, all that must be proved is their linkage to an organisation that is proscribed as a terrorist organisation or a person who is suspected of terrorist activity, through the use of these associative offences, which may be very remote from the commission of an act of terrorism. This chapter analyses the first category of offences outlined above – the proscription offences – in order to assess the justifiability of these lateral extensions of liability.⁴

7.1 Defining the Offences

7.1.1 Proscription of Terrorist Organisations

The proscription of terrorist organisations is not new, and proscription is not restricted to the counter-terrorism arena.⁵ The UK has a long history of banning or proscribing various types of associations. One such historical

⁴ It is not possible in this thesis to address all of the numerous associative offences in detail. The proscription offences are analysed as representative of this class of offences. For an overview and comment on the training offences, see Walker, *Terrorism and the Law*, ch 5. For discussion of terrorist financing offences see Peter A. Sproat, 'Counter-Terrorist Finance in the UK: A Quantitative and Qualitative Commentary Based on Open-Source Materials' (2010) 13 *Journal of Money Laundering Control* 315; Walker, *Terrorism and the Law*, ch 9; Jude McCulloch and Bree Carlton, 'Preempting Justice: Suppression of Financing of Terrorism and the 'War on Terror'' (2006) 17 *Current Issues in Criminal Justice* 397; J McCulloch and S Pickering, 'Suppressing the Financing of Terrorism: Proliferating State Crime, Eroding Censure and Extending Neo-colonialism' (2005) 45 *British Journal of Criminology* 470. For analysis of the duty to report see Walker, *Terrorism and the Law*, ch 3; Ashworth and Zedner, *Preventive Justice*, 101-102; Ashworth, *Positive Obligations in Criminal Law*, 58-65; S Wallerstein, 'On the Legitimacy of Imposing Direct and Indirect Obligations to Disclose Information on Non-Suspects' in G R Sullivan and I. H. Dennis (eds), *Seeking Security* (Hart Publishing 2012).

⁵ See A Loughnan, 'The Legislation We Had to Have?: The Crimes (Criminal Organisations Control) Act 2009 (NSW)' (2009) 20 *Current Issues in Criminal Justice* 457 for a discussion of the proscription of criminal organisations in New South Wales, under The Crimes (Criminal Organisations Control) Act 2009 (NSW). For a discussion of the legal response to organised crime in the UK and Ireland, see L Campbell, *Organised Crime and the Law: A Comparative Analysis* (Hart Publishing 2013)

example was the 1799 Act, 'An Act for the More Effectual Suppression of Societies established for Seditious and Treasonable Purposes; and for Better Preventing Treasonable and Seditious Practices'.⁶ The purpose of the Act is apparent from its title, and it is interesting to note that prevention is specifically mentioned within the title.⁷ The Act outlawed specific named organisations that were suspected of aiming at revolution and overturning the government, laws or other civil or ecclesiastical establishments.⁸ It also imposed restrictions on membership of certain types of groups that displayed characteristics considered to have seditious purposes. Furthermore, restrictions were placed on the giving of lectures or addresses and expansive constraints were imposed on printing presses.⁹ The Act aimed to prevent the threat of revolution by suppressing association with perceived radical groups and by restricting the expressions of such groups either by word or in print. This Act remained in force until 1967, when it was repealed by the Criminal Justice Act. It has been reported that as late as 1939, a Home Office official stated that this Act could be useful in dealing with the IRA and Fascist organisations.¹⁰

⁶ 39 Geo.III, ch 79

⁷ See Ashworth and Zedner, *Preventive Justice*, chapter 2 on the 'Historical Origins of the Preventive State' for an examination of the historical precursors to the current preventive focus in criminal justice, and highlighting the centrality of prevention to the criminal justice system in the eighteenth- and nineteenth centuries.

⁸ L Levanon, 'Criminal Prohibitions on Membership in Terrorist Organizations' (2012) 15 *New Criminal Law Review* 224, fn 47.

⁹ A Prescott, 'Masonic Papers: The Unlawful Societies Act of 1799' in M D J Scanlan (ed), *The Social Impact of Freemasonry in the Modern Western World The Canonbury Papers I* (Canonbury Masonic Research Centre 2002), p 116-134. See also R F Gould, *The History of Freemasonry* (Thomas C Jack 1885), 4, 486-7, for a summary of the provisions of the Act.

¹⁰ Prescott

More recently, and in the specific context of counter-terrorism legislation, the Prevention of Terrorism (Temporary Provisions) Act 1974 introduced the scheme of proscription offences that form the basis of the current proscription offences in the Terrorism Act 2000. The 1974 Act listed the IRA as a proscribed organisation.¹¹ By section 1, it created offences of belonging or professing to belong to a proscribed organisation;¹² soliciting or inviting financial or other support for a proscribed organisation;¹³ and arranging, assisting or addressing meetings to support a proscribed organisation¹⁴ in largely the same form as the current offences set out in the Terrorism Act 2000.¹⁵

The current proscription regime is set out in Part II of the Terrorism Act 2000 and the proscribed organisations are listed in Schedule 2. According to section 3 of the Act, the Secretary of State can proscribe any organisation that she believes is 'concerned in terrorism'.¹⁶ The Act sets out that an organisation can be considered to be concerned in terrorism if it 'commits or participates in acts of terrorism';¹⁷ 'prepares for terrorism';¹⁸ 'promotes or encourages terrorism';¹⁹ or 'is otherwise concerned in terrorism'.²⁰ This leaves a wide discretion to the Secretary of State, specifically by virtue of the rather

¹¹ Schedule 2

¹² Section 1(1)(a)

¹³ Section 1(1)(b)

¹⁴ Section 1(1)(c)

¹⁵ See chapter 1 for a discussion of the historical contingencies that required this legislation.

¹⁶ Section 3(4) Terrorism Act 2000

¹⁷ Section 3(5)(a)

¹⁸ Section 3(5)(b)

¹⁹ Section 3(5)(c)

²⁰ Section 3(5)(d)

circular drafting whereby, according to section 3, an organisation is 'concerned in terrorism' if it is 'otherwise concerned in terrorism'. The phrase 'concerned in terrorism' was examined by the Court of Appeal in the case of *Secretary of State for the Home Department v Lord Alton of Liverpool*.²¹ In analysing the provision, the court distinguished between the criteria in subsections 3(5)(a) to (c) and subsection 3(5)(d). With regard to sub-sections 3(5)(a)- (c), it held:²²

In our view the criteria set out in sub-sections 3(5)(a) to (c) are focussed on current, active steps being taken by the organisation. There could be reasonable grounds for a belief that the organisation is concerned in terrorism based on the organisation's past activities, but that material would have to be such that it gave reasonable grounds for believing that the organisation was currently engaged in any activities specified in those three subsections.

With regard to sub-section 3(5)(d), the Court of Appeal clarified the meaning of 'otherwise concerned in terrorism' by holding that this could refer to an organisation that is currently inactive but that 'retains its military capacity for the purpose of carrying out terrorist activities'.²³ The Court of Appeal did not state that this is the only type of organisation that could fall within subsection 3(5)(d). Thus, while this decision provides some much needed clarity as to what the criteria could encompass, it does not provide a definitive limitation on the breadth of this sub-section. However, it does check the

²¹ *Secretary of State for the Home Department v Lord Alton of Liverpool* [2008] EWCA Civ 443

²² *Ibid*, para 31 citing POAC decision para [124]

²³ *Ibid*, para 36

operation of the section by stating what would not be considered to fall within the criteria:²⁴

... an organisation that has no capacity to carry on terrorist activities and is taking no steps to acquire such capacity or otherwise to promote or encourage terrorist activities cannot be said to be 'concerned in terrorism' simply because its leaders have the contingent intention to resort to terrorism in the future. The nexus between such an organisation and the commission of terrorist activities is too remote to fall within the description 'concerned in terrorism'.

In doing so, the Court of Appeal highlighted the importance of the principle of remoteness in determining the reach of the provision. This is an interesting statement, as the Court appears to place greater value on the ability of an organisation to engage in acts of terrorism rather than simply focus on its terrorist intent. This is at odds with the interpretation of other preventive terrorism offences, whereby conviction has been upheld on the grounds of very remote acts of preparation or possession, where there is often minimal likelihood or possibility of an actual terrorist act materialising.²⁵

If the statutory threshold for proscription is met such that the Secretary of State believes that the organisation is 'concerned in terrorism', she must

²⁴ Ibid, para 37

²⁵ See, for example, the case of *R v G* discussed in chapter 6.

then take certain factors into account when deciding whether or not to exercise her discretion to proscribe. The factors to be considered are:²⁶

- (a) the nature and scale of the organisation's activities;
- (b) the specific threat that it poses to the UK;
- (c) the specific threat that it poses to British nationals overseas;
- (d) the extent of the organisation's presence in the UK; and
- (e) the need to support other members of the international community in the global fight against terrorism.

The process affords a very broad discretion to the Secretary of State. All that is required is that the Secretary of State believes that an organisation is concerned in terrorism. There is no requirement for her to satisfy a court that the organisation actually is concerned in terrorism. The only limit on this power is that she must consider the five discretionary factors set out above and must obtain Parliamentary assent to the proscription.²⁷

Proscription of an organisation for being 'concerned in terrorism' is an executive measure, whereby the government may indirectly restrict the freedoms of individuals without the substantive issue being adjudicated by a court. In contrast to TPIMs, which are also executive measures, there is no automatic legal scrutiny of proscription, and challenges to proscription cases

²⁶ Home Office, *Proscribed Terrorist Organisations* (20 August 2014), p 2 https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/354891/ProscribedOrganisationsAug14.pdf ; Hansard HL vol. 613 col. 252 (16 May 2000), Lord Bassam.

²⁷ D Anderson, *The Terrorism Acts in 2011, Report of the Independent Reviewer on the Operation of the Terrorism Act 2000 and Part 1 of the Terrorism Act 2006* (June 2012), para 4.15

are almost unheard of.²⁸ Also in contrast to TPIMs, proscription is not time limited and there is no requirement to renew them periodically. Once an organisation is proscribed, the proscription remains in force until such time as it is deproscribed by the Secretary of State. In theory, deproscription could occur on the initiative of the government following an annual review of the proscribed organisations. However, to date no organisation has been deproscribed in this way.²⁹ The legislation does provide that the organisation concerned, or a 'person affected by the organisation's proscription' may apply to the Secretary of State for deproscription.³⁰ If refused, this decision could be referred to the Proscribed Organisations Appeal Committee (POAC) for appeal, at which point there would be full judicial scrutiny of the case.³¹ The POAC is a superior court of record charged with determining the appeal according to the principles of judicial review.³² Should this prove unsuccessful, it is possible to appeal questions of law to the Court of Appeal or Court of Session if permission is granted.

There have only been 12 applications to the Secretary of State for deproscription since 2001, all of which have been refused. However, one of these decisions was successfully appealed in the POAC in the case of *Secretary of State for the Home Department v Lord Alton of Liverpool*.³³ This case concerned

²⁸ Anderson QC, *The Terrorism Acts in 2011*, Report of the Independent Reviewer on the Operation of the Terrorism Act 2000 and Part 1 of the Terrorism Act 2006, June 2012, Para 4.2.

²⁹ Anderson, *Report on Terrorism Acts in 2011*, paras 4.23 and 4.25.

³⁰ Section 4, Terrorism Act 2000

³¹ Section 5 TA 2000

³² Anderson, *Report of Terrorism Acts in 2011*, para 4.14.

³³ *Lord Alton of Liverpool v Secretary of State for the Home Department*, Proscribed Organisations Appeal Committee (POAC), Nov 30 2007. The decision of the POAC was later upheld by the

the application for deproscription by the People's Mojahadeen Organisation of Iran (PMOI). Lord Alton and 34 other Parliamentarians wished to arrange meetings at which support for the PMOI could be encouraged. However, arranging such meetings could contravene section 12 of the Terrorism Act 2000 by providing support to a proscribed organisation. Following the Secretary of State's refusal to deproscribe the organisation, the Parliamentarians sought judicial review of this decision by appealing to the POAC. It was their contention that the PMOI was no longer involved in terrorist activity but was now a peaceful organisation advocating for regime change in Iran. The POAC held that there was no evidence that the PMOI possessed 'a structure that was capable of carrying out or supporting terrorist acts'.³⁴ Nor could it find 'evidence of any attempt to "prepare" for terrorism' or 'any encouragement to others to commit acts of terrorism'.³⁵ It therefore held that the PMOI was no longer concerned in terrorism and thus could not lawfully be proscribed. The Court of Appeal upheld this finding.³⁶

It therefore appears as though deproscriptions are unlikely to occur unless they reach the stage of an appeal to the POAC, suggesting that the executive are reluctant to entertain the idea of deproscription. Recently there has been an attempt to reconsider the stance taken by the executive with regard to deproscription, in response to the recommendations of Anderson in

Court of Appeal in *Secretary of State for the Home Department v Lord Alton of Liverpool* [2008] EWCA Civ 443, discussed above.

³⁴ para 348

³⁵ para 348

³⁶ As discussed above, the Court of Appeal provided some clarity on the meaning of the phrase 'concerned in terrorism'.

his review of the terrorism legislation in 2011. The Home Secretary agreed to implement a review process whereby organisations that no longer meet the statutory threshold for proscription would be deproscribed.³⁷ This was supposed to be implemented by the beginning of 2014. However, this process has now stalled indefinitely and there are no longer any plans to undertake periodic reviews of proscribed organisations to ensure that they continue to meet the statutory threshold. Consideration of deproscription will now occur only on application to the Home Secretary.³⁸ This decision is clearly a political one, sparing the executive from having to deproscribe organisations which may not meet the statutory threshold but which are still considered by the government, or by foreign governments, to be of concern. However, the consequence of this is that several groups that appear on the list of proscribed organisations may be there unjustifiably, and consequently, people associated with such groups would be unjustifiably criminalised. Furthermore, the fact that no application for deproscription has been successful makes the very wide discretion afforded to the executive by this procedure even more concerning. It is clear that the only realistic way of obtaining deproscription would be through recourse to the judiciary via the POAC, and this highlights the importance of having an independent judicial body involved in this essentially executive process. However, while there has been one such case of deproscription following an appeal to the POAC, it is difficult to know

³⁷ Anderson, *The Terrorism Acts in 2012: Report of the Independent Reviewer on the Operation of the Terrorism Act 2000 and Part 1 of the Terrorism Act 2006*, (July 2013) para 5.36

³⁸ D Anderson, *The Terrorism Acts in 2013, Report of the Independent Reviewer on the Operation of the Terrorism Act 2000 and the Terrorism Act 2006* (July 2014), para 5.6 – 5.9

whether it is realistic to think that judges would gainsay government proscriptions.

All proscribed organisations are listed in Schedule 2 of the Terrorism Act 2000. As of 27 March 2015, there are a total of 81 proscribed organisations listed in Schedule 2. This is made up of 14 organisations in Northern Ireland that were previously proscribed under earlier legislation and 67 international organisations (up from 21 when the legislation was introduced in 2001, and with 7 new groups being added since the previous report was published in August 2014).³⁹ These international organisations are predominantly jihadi groups, but there are also a few nationalist separatist movements and one Marxist movement.⁴⁰ It is interesting to note that no domestic extremist groups are listed. While Welsh and Scottish nationalist groups and animal rights and environmental activists were considered for proscription during the parliamentary debates, it was decided that they did not possess the sophistication or present a sufficiently grave threat to be proscribed.⁴¹ However, there is a concern that this legislation may be seen as being discriminatorily applied to Islamist terrorist organisations. There is also the more profound risk that the legislation actually is discriminatory. To allay this concern, the executive should ensure that where other domestic extremist organisations meet the statutory threshold for proscription, they are seriously

³⁹ Home Office, *Proscribed Terrorist Organisations* (27 March 2015); Walker, *Terrorism and the Law*, 8.13.

⁴⁰ Walker, *Terrorism and the Law*, 8.13.

⁴¹ *Ibid*, para 8.09.

considered for proscription so as to ensure that the law is applied, and seen to be applied, fairly.⁴²

The proscription of an organisation triggers three criminal offences, which are set out in Part II of the Terrorism Act 2000. The three offences prohibit membership of a proscribed organisation, support to a proscribed organisation and wearing the uniform of a proscribed organisation. The offences rely on an association or link with a proscribed organisation. Thus, an individual is prohibited from associating with an organisation by virtue of an executive decision to proscribe the organisation. While the proscription may be an executive measure, the offences that follow from association with a proscribed organisation are criminal prohibitions which, if contravened, carry substantial sentences.⁴³ Proscription of an organisation or group provides the basis for the prosecution of individuals, based only on their links to the proscribed group. In this way, it could be argued that such offences are essentially crimes of guilt by association.⁴⁴

⁴² Anderson, Report of Terrorism Acts in 2011, para 4.16(c). However, there is a danger here, which must be avoided, of too ready resort to proscription of domestic extremist groups in order to 'be seen to be fair'.

⁴³ The maximum sentence of imprisonment for contravention of the membership and support offences is ten years, s11(3) and s12(6) Terrorism Act 2000.

⁴⁴ David Cole argues in the American context that 'the US "material support" principle is "guilt by association" in 21st century garb'. David Cole, 'Terror Financing, Guilt by Association and the Paradigm of Prevention in the 'War on Terror'' in Andrea Bianchi and Alexis Keller (eds), *Counterterrorism: Democracy's Challenge* (Hart Publishing 2008), 235. The US federal crime of knowingly providing 'material support or resources to a foreign terrorist organisation', 18 U.S.C.A s 2339B(1)(1) shares similarities with the support provisions in the Terrorism Act 2000. See, also, S Bronitt, 'Australia's Legal Response to Terrorism: Neither Novel nor Extraordinary' (Castan Centre for Human Rights Law Conference "Human Rights 2003: The Year in Review", Melbourne), S Harris Rimmer, 'Dangerous Intersection: Migration and Counter-Terrorism Laws in the Case of Dr Mohamed Haneef' in F Jenkins, M Nolan and K Rubenstein (eds), *Allegiance and Identity in a Globalised World* (Cambridge University Press 2014), T Rashid, 'Australia's War on Terrorism: Impact on Australian Muslim Communities' in A Babacan and H Tahiri (eds), *Counter Terrorism and Social Cohesion* (Cambridge Scholars

7.1.1.2 Membership Offence

The first proscription offence appearing in Part II of the Terrorism Act 2000 concerns membership of a proscribed organisation. Section 11(1) sets out that 'a person commits an offence if he belongs or professes to belong to a proscribed organisation'. There are two ways in which one might therefore commit the offence – either by being a member of a proscribed organisation or by professing to be a member. The meaning of the word 'profess' is somewhat uncertain. Lord Bingham expressed this uncertainty in *Attorney General's Reference* [No 4 of 2002]:⁴⁵

It is far from clear, in my opinion, whether it should be understood to denote an open affirmation of belonging to an organisation or an acknowledgement of such belonging, and whether (in either case) such affirmation or acknowledgement, to fall within section 11(1), would have to be true.

This point is illustrated by the facts of the case against A, which formed the basis for the Reference.⁴⁶ A had been indicted on two counts under section 11(1) of the Terrorism Act 2000, being a member of a Hamas-Izz al-Din al

Publishing 2011) for a discussion of proscription offences in Australia being essentially crimes of guilt by association.

⁴⁵ *Sheldrake v Director of Public Prosecutions; Attorney General's Reference* (No 4 of 2002) [2004] UKHL 43, para [48]

⁴⁶ It is this case that forms the basis for the Attorney General's Reference No 4 of 2002. The decision in the case against A prompted the Attorney General to refer two questions to the Court of Appeal for their opinion. The questions were then referred to the House of Lords on application by counsel for A.

Qassem Brigades (Hamas IDQ) and professing to be a member of Hamas IDQ. A arrived in the UK in April 2001, approximately three weeks after Hamas IDQ had been proscribed. He had been heard to say on more than one occasion ' I am Hamas ', which may have been a reference to Hamas IDQ, the proscribed organisation, rather than the charitable organisation known as Hamas, which was not proscribed. Those who heard him make these statements were not sure whether he was speaking seriously or joking and the trial judge concluded that ' a jury could reasonably conclude that [A] was perhaps some latter day Walter Mitty or Billy Liar '.⁴⁷ The trial judge ruled that there was no case to answer and found the defendant not guilty on both counts.⁴⁸ The finding of the trial judge indicates that it may be possible for an individual to escape liability for professing to belong to a proscribed organisation where the profession is untrue or the character of the offender is such that the profession could not be taken seriously. However, as indicated by Lord Bingham, it is by no means clear that this will always be the case.

Apart from the vagueness of the language in section 11(1), the offence is also overly broad. This ' extraordinary breadth ' was highlighted by the House of Lords in Attorney General's Reference. In its judgment, it set out

⁴⁷ Para 48

⁴⁸ Prompted by the decision of the trial judge in the case against A, the Attorney General referred two questions to the Court of Appeal. The Court of Appeal was asked to give an opinion as to what constitutes the ingredients of an offence under section 11(1) and whether the defence in section 11(2) places a legal rather than evidential burden on the accused, and if so, whether the legal burden is compatible with the European Convention, particularly articles 6(2) and 10 of the Convention. The Court of Appeal found that the ingredients of the offence were set out fully in section 11(1) and that the defence in section 11(2) placed a legal burden on the accused but that this did not infringe the rights under Article 10 of the Convention. The questions were then referred to the House of Lords on application by counsel for A.

various scenarios that would be caught by the offence and thus subject to punishment:⁴⁹

It would cover a person who joined an organisation when it was not a terrorist organisation or when, if it was, he did not know that it was. It would cover a person who joined an organisation when it was not proscribed or, if it was, he did not know that it was. It would cover a person who joined such an organisation as an immature juvenile. It would cover someone who joined such an organisation abroad in a country where it was not proscribed and came to this country ignorant that it was proscribed here (as illustrated by *R v Hundal and Dhaliwal* [2004] EWCA Crim 389). It would cover a person who wished to dissociate himself from an organisation he had earlier joined, perhaps in good faith, but had no means of doing so, or no means of doing so which did not expose him to the risk of serious injury or assassination. If section 11(1) is read on its own, some of those liable to be convicted and punished for belonging to a proscribed organisation may be guilty of no conduct which could reasonably be regarded as blameworthy or such as should properly attract criminal sanctions.

The imprecision and extent of the offence is apparent when one tries to distinguish the elements of the offence. First, it is difficult to identify an *actus reus*. The offence can be committed in one of two ways: membership or professing membership. Membership of an organisation cannot be considered to be conduct in the ordinary sense of the meaning. This part of the offence does not criminalise an act, but rather a person's status as a

⁴⁹ Para 46

member of a proscribed organisation.⁵⁰ One might argue that it is the act of becoming a member that constitutes the relevant conduct, but this is not what is reflected in the drafting of the offence. Even if such a formulation were employed, the act of joining a proscribed organisation is so remote from the perpetration of an act of terrorism, or indeed even preparing to commit such an act, that it is hard to see how one could regard the act of joining, without some further requirement as to intention or proximate conduct, as blameworthy conduct suitable for sanction by the criminal law.

Looking at the second way in which the offence can be committed, by professing to be a member of a proscribed organisation, it is easier to identify the *actus reus*. The act of professing would constitute the conduct required to fall within the scope of the offence. However, as highlighted above, the meaning of the word 'profess' is uncertain. And again, the act may be extremely remote from the commission of a terrorist act. It is possible that a person who acknowledges membership of a proscribed organisation even where this is not true could be caught by the offence. To argue that this act, which may present no objective danger in even the remotest sense, is wrongful would require considerable stretching of the understanding of wrongfulness. Turning to the question of *mens rea*, section 11(1) makes no reference to any *mens rea* requirement. These are offences of strict liability. The lack of an act requirement or any *mens rea* requirement means that the

⁵⁰ See discussion in chapter 6 on the so-called act requirement and status offences.

offence in section 11(1) does not conform to the paradigm requirements of criminal law offence definitions.

Section 11(2) provides for a defence, which could potentially mitigate the breadth of section 11(1). According to section 11(2),

It is a defence for a person charged with an offence under subsection (1) to prove –

- (a) that the organisation was not proscribed on the last (or only) occasion on which he became a member or began to profess to be a member, and
- (b) that he has not taken part in the activities of the organisation at any time while it was proscribed.

The scope of the defence in section 11(2) was addressed by the House of Lords in *Attorney General's Reference* [No 4 of 2002]. The question to which the House's opinion was sought was whether the defence in section 11(2) places a legal rather than evidential burden on the accused, and if so, whether the legal burden is compatible with the European Convention or if it would undermine the presumption of innocence. Lord Bingham stated that it was clear that Parliament intended section 11(2) to impose a legal burden on the accused. This was due to the fact that section 118 of the Act, which lists those sections that are to be understood as imposing only an evidential burden, does not apply to section 11. The question therefore was whether it is

proportionate and justifiable to impose a legal burden in order to address the legitimate aim of the offence.⁵¹

As shown in paragraphs [47] and [48] above, a person who is innocent of any blameworthy or properly criminal conduct may fall within section 11(1). There would be a clear breach of the presumption of innocence, and a real risk of unfair conviction, if such persons could exonerate themselves only by establishing the defence provided on the balance of probabilities. It is the clear duty of the courts, entrusted to them by Parliament, to protect defendants against such a risk. It is relevant to note that a defendant who tried and failed to establish a defence under section 11(2) might in effect be convicted on the basis of conduct which was not criminal at the date of commission.⁵²

In order to satisfy section 11(2)(b), the accused would need to produce evidence that he or she had not taken part in the activities of the organisation at any time when it was proscribed. It would be very difficult, or likely impossible, for an accused to produce such evidence. Beyond the assertion of the accused that he or she was not involved in any activities while the organisation was proscribed, there would be little other evidence that could be produced in support of this claim. The assertion itself may be discounted on the basis that the accused's evidence is regarded as unreliable.⁵³ Therefore,

⁵¹ Para 50.

⁵² Para 51(1)

⁵³ Para 51(2). Lord Bingham refers to the facts of A's case as evidence of this point: 'He arrived as a stowaway. He described himself on different occasions as Palestinian and also as Jordanian. An immigration adjudicator concluded that he was Moroccan. The judge, as already noted, thought he might well be a fantasist. He was not a person whose

it could prove difficult or impossible for the accused to exercise the right of defence provided by section 11(2). Lord Bingham acknowledged that failure to establish a defence under section 11(2) would result in potentially severe consequences, as the maximum sentence for the offence is imprisonment for ten years.⁵⁴ He accepted that an evidential burden would make it harder for the prosecution to disprove the facts offered by the defendant and, in some cases, there would be no other offences under which the defendant could be charged. However, he stated that this outcome was due to the fact that the prosecution could not prove any conduct of the defendant that contributed to the furtherance of terrorism. 'It is not offensive that a defendant should be acquitted in such circumstances.'⁵⁵ This is a welcome limitation on the operation of the offence in an attempt to preserve the presumption of innocence. It is interesting and encouraging to note that Lord Bingham accepted that this finding might make the task of the prosecution more difficult, but that this should not overrule considerations of fairness.

The House of Lords held that section 11(2) should be read down under section 3 of the Human Rights Act 1998 so as to impose an evidential rather than a legal burden. The subsection should be treated as if section 118(2) applied to it. It held further that while section 11(1) does interfere with the

uncorroborated testimony would carry weight. Thus, although section 11(2) preserves the rights of the defence, those rights would be very hard to exercise effectively.'

⁵⁴ Para 51(4). According to section 11(3), A person guilty of an offence under this section shall be liable (a) on conviction on indictment, to imprisonment for a term not exceeding ten years, to a fine or to both, or (b) on summary conviction, to imprisonment for a term not exceeding six months, to a fine not exceeding the statutory maximum or to both.

⁵⁵ Para 52

exercise of the right of free expression guaranteed by article 10 of the Convention, this interference is justified in the circumstances. Lord Bingham stated that section 11(1) is directed to a legitimate end in the interests of national security, public safety and the prevention of disorder or crime; the offence is prescribed by law despite the uncertainty as to the meaning of 'profess'; the necessity of attacking terrorist organisations is clear and section 11(1) is a proportionate response.⁵⁶ The House emphasised the necessity of attacking terrorist organisations and the fact that this offence is a proportionate and effective means of doing so. However, whether or not this is true is hard to say in the absence of empirical evidence. Whether membership offences act as a deterrent or hamper the ability of a terrorist organisation to operate effectively is not something that can be proven without further empirical research.

The effect of the House of Lords' judgment is to somewhat limit the scope of the section 11 offence. However, although this is an improvement, it does not adequately address the many defects in the offence – the broad *actus reus*; the lack of a *mens rea* requirement; the reverse burden of proof incorporated by the defence; and the potential to criminalise non-wrongful conduct.

⁵⁶ Para 54

7.1.1.3 *Support Offence*

Section 12 Terrorism Act 2000 criminalises support for a proscribed organisation in various forms. First, an offence is committed if a person 'invites support for a proscribed organisation'.⁵⁷ Support in this context is not limited to financial support, which is covered by section 15 of the same Act.⁵⁸ Secondly, an offence is committed if a person 'arranges, manages or assists in arranging or managing a meeting which he knows is (a) to support a proscribed organisation, (b) to further the activities of a proscribed organisation, or (c) to be addressed by a person who belongs or professes to belong to a proscribed organisation'.⁵⁹ Finally, it is an offence where a person 'addresses a meeting and the purpose of his address is to encourage support for a proscribed organisation or to further its activities'.⁶⁰ A 'meeting' is defined as a gathering of three or more people, whether or not the public are admitted.⁶¹ A meeting is defined as 'private' if members of the public are not admitted.⁶²

A defence is available in section 12(4), but only in respect of the form of offence set out in section 12(2)(c), which prohibits the arranging, managing or assistance of a meeting which the offender knows is to be addressed by a person who is a member or professes to be a member of a proscribed organisation. In such a case, the defendant may escape liability by proving

⁵⁷ Section 12(1)(a)

⁵⁸ Section 12(1)(b)

⁵⁹ Section 12(2)

⁶⁰ Section 12(3)

⁶¹ Section 12(5)(a)

⁶² Section 12(5)(b)

that he had no reasonable cause to believe that the address mentioned in subsection (2)(c) would support a proscribed organisation or further its activities.⁶³ However, no defence is available for any of the other forms of offence under section 12. The reason for the defence was to protect the arrangement of 'genuinely benign meetings'.⁶⁴ An example of such a meeting that the government would want to protect would be those between government representatives and members of a proscribed organisation aimed at achieving an end to violence.⁶⁵ However, the defence is expressly limited to private meetings. As stated by Charles Clarke during the House of Commons debate:⁶⁶

We accept that there could be a genuinely benign private meeting to be addressed by a member of a proscribed organisation ... However, we cannot accept the arranging of public meetings to be addressed by members of proscribed organisations, even when the person arranging the meeting does not think that the address will support the organisation.

It is clear, therefore, that the government intends to prohibit any public expressions of support to a proscribed organisation, whether or not the person arranging the meeting had any intention that the address would be in support of the proscribed organisation. While it is the meeting and the expression that the government aims to prevent, together with any support that could enhance the ability of the organisation to operate, this is not what is

⁶³ Section 12(4)

⁶⁴ Hansard HL vol 614 col 1453 (4 July 2000) Lord Bassam.

⁶⁵ Walker, *Terrorism and the Law*, 8.45

⁶⁶ Hansard HC vol 353 col 655 (10 July 2000) Charles Clarke

targeted by the offence. Rather, it is the person who arranges the meeting who is guilty of the offence, despite the fact that he or she may have had no intention to support the organisation. In this way, the arranger or organiser could be criminalised as a proxy for the true mischief that the offence aims to prevent. The penalties for committing these offences are severe, despite the remoteness of the offence from the ultimate harm. A person found guilty of an offence under section 12 is liable to a sentence of 10 years imprisonment.⁶⁷

The section 12 offences are similar to the material support provisions in U.S. legislation. But unlike the U.S. counterpart, there has been no direct challenge to section 12 as there was in the US case of *Holder v Humanitarian Law Project*.⁶⁸ In fact, there is almost no case law on this section. In *Secretary of State for the Home Department v Lord Alton of Liverpool*,⁶⁹ the Parliamentarians who brought the application for deproscription did so because they wanted to arrange a meeting which would contravene section 12 as the PMOI was a proscribed organisation. However, while section 12 provided the background to the case, it was not the subject of the judgment and was not mentioned at any time.

⁶⁷ Section 12(6)

⁶⁸ *Holder v Humanitarian Law Project*, 130 S. Ct. 2705 (2010). In this case, the U.S. Supreme Court upheld the constitutionality of the offence of knowingly providing 'material support or resources to a foreign terrorist organization' under 18 U.S.C.A. §2339B(a)(1) (West 2010). See Adam Tomkins, 'Criminalizing Support for Terrorism: A Comparative Perspective' (2010) 6 Duke Journal of Constitutional Law and Public Policy Special Issue 81 for a discussion of the implications of this case from a comparative perspective in light of developments in UK counter-terrorism legislation.

⁶⁹ [2008] EWCA Civ 443

7.1.1.4 Uniform Offence

The final proscription offence is set out in section 13 of Terrorism Act 2000. According to this section, it is an offence for a person to wear an item of clothing or wear, carry or display an article 'in such a way or in such circumstances as to arouse reasonable suspicion that he is a member or supporter of a proscribed organisation'.⁷⁰ The offence can only be committed if the conduct occurs in public. Therefore, it does not prohibit the wearing, carrying or displaying of such clothing or articles in private. The penalties under this section are considerably lighter than under the other proscription offences: contravention of the offence carries a sentence of imprisonment up to six months. While this sentence is significantly shorter than those that can be imposed for other preventive terrorism offences, this still entails a deprivation of liberty on the basis of a strict liability offence, which, as discussed in chapters 2 and 6, is arguably unjust.

As with the other proscription offences, section 13 is clearly aimed at denouncing any form of visible support for a terrorist organisation. More than any other, this offence is primarily a symbolic one. It is hard to see how the wearing of an item of clothing that could arouse a reasonable suspicion of membership or support for a proscribed organisation presents a danger of harm, which should be prevented by the criminal law. It is possible that an argument could be made that the wearing of a uniform could inspire fear in

⁷⁰ Section 13(1)

the public – for example, it is possible that a gang wearing Gestapo uniforms could instil terror. However, as drafted the offence does not only apply to those instances where it could reasonably be expected that the wearing of uniforms would engender fear. Whether this expression presents any threat of future harm is by no means certain. Wearing such an item of clothing is so far removed from the preparation or commission of a terrorist act that it would be disingenuous to state that the provision is aimed at anything more than condemnation of support for a proscribed organisation. Framing this as a measure aimed at preventing harm would involve stretching the idea of prevention of harm to its absolute outer limits.

7.2 Assessing the Criminalisation of Association with Terrorism

Security Council Resolution 1456 of 2003 requires states to ‘take urgent action to prevent and suppress all active and passive support to terrorism’.⁷¹ This provides the necessary international legal basis for the proscription offences, which target support for proscribed organisations. However, the proscription offences predate SCR 1456. Even ignoring this fact, the wording of the Resolution is too general to ground a clear justification for the proscription offences enacted in the UK. Several other existing and subsequently enacted offences could be used to address this Security Council directive: for example, the encouragement offences in the Terrorism Act 2006, the various financial

⁷¹ United Nations Security Council Resolution 1456, Combatting Terrorism (2003)

offences in the Terrorism Act 2000 and other related legislation, and previously existing public order offences that would be far less contentious. It is therefore necessary to look for further justifications for these offences.

7.2.1 Rationales for the Associative Offences

In debating the proscription offences that were to be enacted in the Terrorism Act 2000, the government stated that the purpose of the offences was threefold – to deter, to target low-level support, and to signal condemnation:⁷²

First, it has been, and remains, a powerful deterrent to people to engage in terrorist activity. Secondly, related offences are a way of tackling some of the lower-level support for terrorist organisations. ... Thirdly, proscription acts as a powerful signal of the rejection by the Government—and indeed by society as a whole—of organisations' claim to legitimacy. ... The legislation is a powerful symbol of that censure and is important.

As with all of the preventive terrorism offences examined so far, the associative offences are based on the rationale of prevention and the aim of enhancing security and protecting the public from the dangers of terrorism. According to this rationale, people who are associated with terrorism through their links to terrorist organisations increase the risk of harm from a terrorist attack. Therefore, offences must be enacted to deter any such association, giving effect to the first purpose stated above. However, establishing how

⁷² Hansard HC Standing Committee D, col 56 (18 January 2000), Charles Clarke

these associations increase the risk of a terrorist attack is not straightforward. Does, for example, the wearing of a ring with the letters of a proscribed group engraved on it increase the risk of a terrorist attack?⁷³ It seems unlikely, although one would need empirical evidence in order to ascertain. It may be that the wearing of terrorist uniforms or accessories inspires young people to become jihadis, which could increase the risk of a future terrorist attack. However, without empirical evidence to support this claim, one is left with an offence that is very remote from the causing of harm. To take another example, it is not clear that providing assistance in arranging a meeting in order to assist the *non-terrorist* or *non-violent* activities of a proscribed organisation increases the danger of an attack. It could be argued that while the specific behaviour targeted by the act may not be directly linked to the risk of a terrorist attack, the provision of any support at all allows the organisation to function more easily. Prohibiting even innocent or harmless support therefore makes it harder for terrorist organisations to commit future acts of terrorism.⁷⁴ However, such an argument effectively imputes responsibility for the wrongful acts of an organisation to individuals who associate with them, yet may not pose any risk of harm themselves. While it is acknowledged that the conduct prohibited by the proscription offences could facilitate terrorism, there is no requirement that they in fact do.

⁷³ See *Rankin v Murray* [2004] SCCR 422, where the defendant was convicted for wearing such a ring.

⁷⁴ David Cole, 'Terror Financing, Guilt by Association and the Paradigm of Prevention in the 'War on Terror'', 248-9

Further to the question of whether these offences are necessary to prevent future terrorist acts, it is interesting to note that a recent study of individuals convicted for Islamism-related terrorist offences in the UK between 1999 and 2010 showed that 66% of those convicted had no links to a proscribed organisation.⁷⁵ While this, of course, leaves 34% who are linked to proscribed organisations, the figures reflect the reality that many terrorist cells and lone wolves operate without any association with or membership of a proscribed terrorist organisation.⁷⁶

The proscription offences can be used as an investigative tool to obtain information about a proscribed organisation from those arrested as members or supporters of the organisation, possibly as a part of the plea bargaining process.⁷⁷ It could therefore be argued that these offences are operationally necessary for intelligence gathering purposes to allow for early intervention. As discussed earlier, the use of criminal offences as a method of enhancing investigative powers can lead to abusive and invasive police practices. Even if this were a legitimate and sufficient basis for criminalisation, it is not clear that the offences would be effective in enhancing the police's investigative resources. Members or supporters of proscribed organisations, and to an even greater extent those who wear or display articles or clothes of a proscribed organisation, are not required to have knowledge of any particular terrorist plots for liability under these offences. Thus, liability could attach to

⁷⁵ R Simcox, H Stuart and H Ahmed, *Islamist Terrorism - The British Connections* (2nd edn, 2011)

⁷⁶ Anderson, *The Terrorism Acts in 2011, Report of the Independent Reviewer on the Operation of the Terrorism Act 2000 and Part 1 of the Terrorism Act 2006*, para 4.10

⁷⁷ Levanon, 265

people whose link to the association may be very peripheral. However, even if those arrested under this legislation did have knowledge of planned terrorist activity, this would not provide a persuasive justification for these offences. The offences are not aimed at uncovering this information; the subject of the offence is not the obtaining of information or knowledge regarding terrorist activity. Attempting to justify the offences on this basis would result in co-opting them for a purpose for which they are not intended and which is not reflected in the drafting of the offence.⁷⁸

A further rationale that has been advanced in support of proscription offences relates to their focus on collective or group relationships.⁷⁹ The offences prohibit the relationship between an individual and a proscribed organisation, which one assumes must display certain settled structural and organisational characteristics in order to be considered for proscription. An existing terrorist group with a sophisticated organisational structure that has as its aim the commission of grave terrorist acts arguably presents a greater danger to public safety than a single actor or random group of two or more people. However, this argument is not entirely convincing, as individuals and groups who are not affiliated with a proscribed organisation can commit the gravest of terrorist crimes. This is supported by the figures mentioned above, which indicate that a large proportion of terrorist offenders have no associative links to proscribed organisation.

⁷⁸ Levanon, 265

⁷⁹ Manuel Cancio Melia, 'The Wrongfulness of Crimes of Unlawful Association' (2008) 11 *New Criminal Law Review* 563, 577

Finally, it could be said that proscription offences are necessary to perform a symbolic function. As mentioned above, the government specified this symbolic function as one of the reasons for the offences. Walker argues that 'proscription has often been of marginal utility in combating political violence'.⁸⁰ He argues that these offences are primarily symbolic, pointing to the low number of convictions for proscription offences to support his claim.⁸¹ The offences, he explains, 'express society's revulsion at violence as a political strategy as well as its determination to stop it'.⁸² By criminalising any association with proscribed terrorist organisations, the offences signal public condemnation of the aims and methods of terrorist organisations.

7.2.2 *Guilt by Association - Criminalising the Non-Wrongful*

Having examined some of the reasons for prohibiting association with prohibited terrorist groups, it is necessary to determine whether these rationales suffice to ground criminal liability by assessing the offences against the relevant limiting principles and constraints. It is difficult to identify the wrongful conduct that is criminalised by these offences, due to the fact that they prohibit equivocal acts and in some cases have no act requirement at all,

⁸⁰ Walker, *Blackstone's Guide to the Anti-Terrorism Legislation*, 53

⁸¹ Walker, *Terrorism and the Law*, 8.49. However, it is worth noting that there may be other reasons to account for the low number of prosecutions for proscription offences. It could, for example, be due to the difficulties of admitting intelligence as evidence in an open criminal trial. Or it could be that the offences act as a powerful deterrent against joining a proscribed group. Without empirical research, one cannot know which inference is right.

⁸² *Ibid*, 8.49

and do not require an ulterior intention in respect of an ultimate terrorist harm. Furthermore, the distance between the prohibited conduct and the ultimate terrorist harm is so great that it would be impossible to claim that these offences are capable of satisfying any kind of proximity constraint.

If one subscribes to the idea that the offences are aimed at preventing a terrorist act by targeting those who, through their associative links, present a risk of harm, then wrongfulness is based on the anticipatory wrongdoing of the offender. One would need to explain how responsibility could be imputed to the offender on this basis. In order to attempt to justify the offence as criminalising conduct that is wrongful, one would have to argue that by joining or supporting or wearing the uniform of a proscribed organisation, the offender displays its allegiance to that organisation and its aims and methods. This, in turn, indicates that the offender could be willing to commit or assist in the commission of an act of terrorism. In this way, the offender poses a risk of harm, albeit a risk that depends only on the implications of association with a proscribed organisation. Imputing responsibility to the offender for this potential future risk would be difficult due to the remoteness of the harm from the act of membership, support or the wearing of a uniform.

There is another possible way to conceive of these offences other than as preventive offences targeting future acts of wrongdoing on the part of the individual offender. As mentioned above, the offences are most convincingly

conceived of as symbolic offences, which signify condemnation of a proscribed organisation and their methods. If the offences are regarded as based on the condemnation of an autonomous terrorist organisation, it may be possible to argue that those who associate with such organisations underwrite the activities of the organisations.⁸³ The key step here is that it is necessary to view the proscribed organisation itself as the wrongdoer. The organisation is regarded as an autonomous moral agent, capable of committing criminal wrongs. Where such an organisation has as its main aim the commission of acts of terrorist violence and its operations are geared to furthering this aim, evidenced perhaps by past conduct and stated intentions, then it is the organisation as a separate moral entity, which is engaged in wrongdoing.⁸⁴ The proscription offences attribute the wrongs of the organisation to the individuals associated with the organisation. By joining or supporting a group which is aimed at the perpetration of acts of terrorism, a person could be seen to be aligning themselves with this purpose and underwriting the wrongful conduct of the organisation. In this way, responsibility for the wrongful acts of the organisation could be imputed to the individuals associated with the organisation. Responsibility would not depend on the future actions or intentions of the individual offender or on the danger they pose to public safety. Such a conception would allow for the criminalisation of people associated with a proscribed organisation who were not themselves going to be involved in any part of the commission of a

⁸³ Cancio Melia, 578-9, 584

⁸⁴ Interestingly, unlike in the case of corporate liability, there is little pressure in the UK to conceive of the acts of terrorist groups as corporate or collective wrongs.

specific act of terrorism. Rather, any wrongs committed by the group are committed by each individual member or associate, irrespective of their individual role, thus providing a basis for establishing wrongfulness in the associative offences. Such a conception of wrongfulness results in effectively punishing guilt by association, as liability depends entirely on the wrongfulness of the group with which the offender associates.

By conceptualising terrorist organisations as autonomous moral agents and grounding the associative offences in the wrongful conduct of the organisation, it may be possible to justify some of the proscription offences. However, this could certainly not apply to all cases covered by the offences as currently drafted. In order to hold someone liable for the wrongdoing of the organisation with which they associate, certain conditions would need to be met. First, in order to be considered to have displayed sufficient normative involvement in the wrongdoing of the organisation, membership and support would need to be explicit and active. There would need to be a high culpability requirement in terms of an ulterior intention to further the terrorist aims and methods of the organisation. The offender would therefore have to take active steps to align with the terrorist organisation. Secondly, if the organisation is to be regarded as an autonomous moral agent, it would need to display certain features that render it a real threat to public safety. Organisations would need to have a discernible internal structure and a demonstrable degree of strength. Furthermore, it would not be legitimate to include organisations that include non-violent, or humanitarian sections

within the organisation. Rather, the terrorist organisation must be wholly committed to perpetrating serious and violent acts of terrorism. In order to legitimately impute the wrong of the organisation to a person who underwrites that organisation's wrongful conduct by some form of association, at the very least these conditions would need to be met to ensure that offences do not capture people associated with the organisation but with no terrorist designs.⁸⁵

Although it may be possible to justify a narrowly defined set of associative offences by imputing the wrongfulness of a terrorist organisation to those who are associated with it, this would not serve to justify the current proscription regime. All of the proscription offences criminalise very remote conduct, extending to capture those who have no intention to subscribe to the wrongdoing of a proscribed organisation.

7.3 Conclusion

Proscription offences criminalise conduct (or a situation or state of affairs) that does not result in harm. Rather, the offences aim to prevent harm by criminalising associative links that are believed to lead to the commission of further conduct that may cause harm. What is criminalised is the risk of harm, and generally a very remote risk at that, in order to forestall commission of a future act of terror. It is very difficult to identify the

⁸⁵ Cancio Melia, 589.

particular future offence or dangerous act that is to be prevented. With membership, support and uniform offences, there is no requirement for a future harmful act of terrorism to be planned or even contemplated. The membership offence in section 11 is a status or situational offence with no conduct requirement. All that is required is that an offender has the status of a member, which continues until something is done to terminate that membership. The support offences in section 12 have as their object the acts of inviting support for an organisation or addressing, or arranging or assisting to arrange meetings in support of such organisations. The conduct element in the uniform offence in section 13 is satisfied by the wearing or displaying of certain articles or clothes, which again does not present a clearly identifiable danger or risk of harm. It is therefore difficult to rely on dangerousness or harmful consequences of the conduct prohibited by the proscription offences when aiming to justify these offences. The membership offence is one of strict liability, with no intention requirement at all; the support offences require knowledge but do not require any intention or even recklessness as to the commission of a future terrorist offence; and the uniform offence is again one of strict liability. Individual liability for a proscription offence is therefore not attributed on the basis of the offender's culpability.

8. Prevent and Prosecute? Situating the Offences within the Broader Counter-Terrorism Strategy

This chapter examines the relationship between the prosecution of terrorism offences and the implementation of various 'soft' counter-terrorism strategies, which are intended to be reintegrative. It highlights the problematic relationship between the government's *Prevent* strategy, which is based on winning hearts and minds and preventing radicalisation, and criminal prosecution, which could be counter-productive to this pursuit. Furthermore, the overlap between criminal offences that seek to prevent radicalisation and the 'soft' measures implemented to achieve the same aim is scrutinised in order to determine whether these different approaches can be reconciled. The very broad scope of the terrorism offences is problematic for 'soft' strategies because those who are identified as being 'at risk of radicalisation' are nearly always liable to prosecution of terrorism-related offences. This chapter raises questions as to the purpose behind enacting terrorism offences that extend inchoate liability and their place within the context of a larger counter-terrorism strategy. It is argued that the very breadth of the offences means that they occupy the same operational space as 'soft' measures under the *Prevent* strategy, which negatively affects the ability of *Prevent* to operate successfully.

8.1 Counter-Terrorism Strategy: CONTEST

8.1.1 Background

The UK's counter-terrorism strategy is set out in CONTEST, which has been in existence since 2003¹ but was first published by the Blair government in 2006 (CONTEST 1).² Since 2006, this strategy has undergone two revisions and was republished in March 2009 by the Brown government (CONTEST 2),³ and then again in July 2011 by the Coalition government (CONTEST 3).⁴ The strategy is made up of four strands – *Pursue*, *Prevent*, *Protect* and *Prepare* – which set out different responses to the threat of terrorism with the aim of providing a comprehensive strategy to tackle the problem. The strategy includes not only criminal legal measures to prosecute terrorist offenders (*Pursue*); but also aims to counter terrorist ideology and prevent radicalisation (*Prevent*); protect national infrastructure and the population against a terrorist attack (*Protect*); and establish emergency response procedures in the event of an attack (*Prepare*).⁵ Since CONTEST 1 was launched in 2006, two revised

¹ Hansard HC Deb 10 July 2006 vol 448 col 1115 (John Reid)

² Office, *Countering International Terrorism (Cmnd. 6888)* (CONTEST 1). Published under the Blair government.

³ Home Office, *Pursue Prevent Protect Prepare: The United Kingdom's Strategy for Countering Terrorism* (TSO, Cm 7547, March 2009) (“CONTEST 2”).

⁴ Home Office, *CONTEST: The United Kingdom's Strategy for Countering Terrorism* (TSO, Cm 8123, July 2011) (“CONTEST 3”).

⁵ For the purposes of this thesis, it is the *Prevent* and *Pursue* strands that are of particular relevance and therefore the focus of this chapter. However, for completeness, the ‘purpose of *Protect* is to strengthen our protection against a terrorist attack in the UK or against our interests overseas and so reduce our vulnerability’ and the ‘purpose of our *Prepare* work is to mitigate the impact of a terrorist attack where that attack cannot be stopped. This includes work to bring a terrorist attack to an end and to increase our resilience so we can recover from its aftermath. An effective and efficient response will save lives, reduce harm and aid recovery’ CONTEST 3 paras 1.33 and 1.40.

versions of the *Prevent* leg of the strategy have been published, in 2008 and 2011, and incorporated in the subsequent versions of CONTEST.

CONTEST 1 was introduced in the aftermath of the London bombings of July 2005. Prior to this, and following the events of 9/11, the government's counter-terrorism response had been focused on coercive measures. The government expressed the aim of pursuing and prosecuting terrorists, emphasising that they should be brought to justice. This is reflected in then-Prime Minister Tony Blair's speech to Parliament following 9/11:⁶

They are terrorists, and history will judge them as such ... Before the history books are written, however, we will continue to hunt them down, and we continue to do so for as long as it takes to bring them to the justice they deserve. They are guilty and they will face justice, and today, thankfully, they have far fewer places to hide and far fewer people who wish to protect them.

Furthermore, apart from pursuing and prosecuting terrorists of criminal offences under existing legislation, other coercive counter-terrorism methods such as control orders, stop and search powers, proscription, port and border controls and the use of immigration laws were used in the fight against terrorism. We now also know that the UK government was complicit in

⁶ Parliament of United Kingdom, *Hansard*, House of Commons, 14 November 2001, vol 374, col 863 (Tony Blair)

much extra-legal activity too - extraordinary rendition being the most infamous.⁷

While the emphasis after 9/11 was on countering international terrorism, and much attention was placed on the threat of a terrorist attack emanating from outside the UK, it was also known that there were those in the UK intent on planning terrorist attacks. With the London bombings in 2005, this threat from so called 'home-grown' or 'neighbour' terrorists came to the fore.⁸ The bombings in London on 7 July 2005 were perpetrated by British citizens who had been brought up in Yorkshire. While they did have some access to foreign links and support, and three were the British-born offspring of Pakistani immigrants and one was born in Jamaica, their action was planned and executed locally.⁹ This led to a perceived need to focus attention on local communities as the locus for the terrorist threat. This shift in focus is embodied in CONTEST 1, which represented a move from the primacy of coercive criminal legal measures to combat terrorism to a broader, more holistic approach that incorporated the aim of tackling the social and political causes of terrorism. The strategy incorporates both 'hard' measures in the form of criminal offences and a focus on prosecution and investigation in

⁷ *The Report of the Detainee Inquiry* (December 2013), http://www.detaineeinquiry.org.uk/wp-content/uploads/2013/12/35100_Trafalgar-Text-accessible.pdf (last accessed 27 September 2015); Ian Cobain, Richard Norton-Taylor and Nick Hopkins, 'MI5 and MI6 face questions over torture of terrorism suspects' *The Guardian* (19 December 2013).

⁸ C Walker, "'Know Thine Enemy as Thyself': Discerning Friend from Foe Under Anti-Terrorism Laws' (2008) 32 *Melbourne University Law Review* 275; C Walker, 'Neighbour Terrorism and the All-Risks Policing of Terrorism' (2009) 3 *Journal of National Security Law and Policy* 121.

⁹ C Walker and J Rehman, "'Prevent' Responses to Jihadi Extremism' in V Ramraj and others (eds), *Global Anti-Terrorism Law and Policy* (Cambridge University Press 2005), 242-268, 246.

order to convict and punish terrorists, as well as 'soft' measures aimed to combat the root causes of terrorism.

This pairing of criminal legal measures, or 'hard' coercive measures, alongside 'soft' measures that are officially intended to be reintegrative so as to 'win hearts and minds' is not a new idea. The UK itself has long recognised the idea of the need to 'win the battle of hearts and minds' in the fight against terrorism, dating back to the conflict in Malaya in 1948-1960.¹⁰ In 1952, General Templer stated that: 'The answer lies not in pouring more troops into the jungle, but in the hearts and minds of the Malayan People'.¹¹ However, this is in marked contrast to the counter-terrorism policy adopted by the UK relating to Irish terrorism, whereby the political motivations of terrorists were initially officially ignored and offenders were cast as criminals, with the focus firmly on a criminal justice approach aimed at prosecuting

¹⁰ The Malayan Emergency was a period of unrest from 1948-1960 following the establishment of a colonial government and the creation of the Federation of Malaya. The armed wing of the Malayan Communist Party began a guerrilla insurgency and a state of emergency was declared. Initially the British government enacted emergency legislation in an attempt to stifle the revolt. These harsh measures were unpopular with the local population. However, in 1951, the British began a campaign to 'win the hearts and minds' of the people of Malaya, winning the support of many nationals and involving the local population in the fight against the insurgents. The Federation of Malaya was granted independence in 1957 and the emergency was declared over in 1960.

¹¹ See R Sunderland, *Winning the Hearts and Minds of the People: Malaya 1948-1960* (Santa Monica, CA: Rand, 1964); F. Kitson, *Low-Intensity Operations* (London: Faber & Faber, 1971); R Stubbs, *Hearts and Minds in Guerilla Warfare* (Singapore: Oxford University Press, 1989); P Dixon, "'Hearts and minds'? British counter-insurgency from Malaya to Iraq' (2009) 32 *Journal of Strategic Studies* 353; Walker and Rehman, "'Prevent" responses to jihadi extremism', 243; Richard Stubbs, 'From Search and Destroy to Hearts and Minds: The Evolution of British Strategy in Malaya 1948-60' in Daniel Marston and Carter Malkasian (eds), *Counterinsurgency in Modern Warfare* (Osprey, 2008) 101, 101, 109; Keiran Hardy, *Ruthlessness and Sympathy: Smart Power Thinking in Counter-Terrorism and Counter-Insurgency* UNSW PhD Thesis, November 2014, ch 1 & 4.

perpetrators of criminal acts.¹² Furthermore, as mentioned above, during the period after 9/11 up until the London bombings, the focus was on pursuing a security agenda aimed at prosecuting terrorists and disrupting attacks through coercive means, rather than any focus on community engagement or integration. CONTEST 1, with its focus on *Prevent* and community orientated projects that aimed to be reintegrative so as to prevent people becoming radicalised, professed to be a turning point in official UK counter-terrorism policy. However, the 'hard' coercive criminal measures have always existed alongside the supposedly 'soft' measures under *Prevent*, and as shall be explained below, several critics have argued that *Prevent* is as much about covert surveillance as it is about community engagement.

8.1.2 *The Prevent Strategy*

CONTEST 1 sets out *Prevent* as the first strand of the government's response to the threat of terrorism. It explains that *Prevent* aims to tackle the

¹² Margaret Thatcher stated in 1981 that: 'There is no such thing as political murder, political bombing or political violence. There is only criminal murder, criminal bombing and criminal violence.' <http://www.margaretthatcher.org/document/104589> (last accessed 5 October 2015). While certain measures adopted in the context of countering Irish terrorism may resemble those that are commonly seen as falling within the *Prevent* leg of the current counter-terrorism strategy, the motivations underlying these measures differed so that in fact in the Irish context they were used as coercive measures and were not aimed at integration or community involvement. C Heath-Kelly, 'Reinventing Prevention or Exposing the Gap? False Positives in UK Terrorism Governance and the Quest for Pre-Emption' (2012) 5 *Critical Studies on Terrorism* 69. However, following the declaration of a ceasefire by the IRA in 1994, the approach shifted towards power-sharing with groups like Sinn Fein (the political wing of the IRA) and the eventual rehabilitation of former terrorists.

radicalisation of individuals and sets out three methods by which it seeks to achieve this aim:¹³

- Tackling disadvantage and supporting reform – addressing structural problems in the UK and overseas that may contribute to radicalisation, such as inequalities and discrimination;
- Deterring those who facilitate terrorism and those who encourage others to become terrorists – changing the environment in which the extremists and those radicalising others can operate; and
- Engaging in the battle of ideas – challenging the ideologies that extremists believe can justify the use of violence, primarily by helping Muslims who wish to dispute these ideas to do so.

Work under the *Prevent* leg of the strategy was seen to be a necessary accompaniment to the more traditional ‘hard’ measures that were provided for in the *Pursue* leg. The *Pursue* strand was stated to be ‘concerned with reducing the terrorist threat to the UK and to UK interests overseas by disrupting terrorists and their operations’.¹⁴ The strategy set out that this leg comprised various aspects, namely: intelligence gathering, disrupting terrorist activity so as to frustrate attacks and ‘bring terrorists to justice through prosecution and other means, including strengthening the legal framework against terrorism’; and working with international allies to strengthen intelligence and disrupt terrorist activity outside the UK.¹⁵ When introducing the strategy to Parliament, days after the first anniversary of the

¹³ CONTEST 1 para 6

¹⁴ CONTEST 1 para 7

¹⁵ CONTEST 1 para 7

7/7 London bombings, John Reid emphasised this view that both 'hard' and 'soft' measures in the form of *Pursue* and *Prevent* were crucial in combatting terrorism:¹⁶

Effective security measures, intelligence and policing are essential. But ultimately, modern terrorism will be defeated only by addressing the political and social issues by a debate about values, by democracy and by public solidarity. That is why we are working with all communities to tackle the social factors underlying radicalisation, to block the ways radicalisation takes place, and to counter the radicals' arguments.

With the introduction of CONTEST 1, the policy focus shifted to emphasising the importance of *Prevent* work to the counter-terrorism strategy, alongside the coercive criminal law measures that were necessary to disrupt and prosecute terrorist offenders. This idea is reflected in one of the early policy documents issued by the Department for Communities and Local Government (DCLG), shortly after the publication of CONTEST 1:¹⁷

..... it is also recognised that while a security response is vital it will not, on its own, be enough. Winning hearts and minds and preventing individuals being attracted to violent extremism in the first place is also crucial.

The *Prevent* strand was expanded and further explained in 2008, when it was published as a separate policy document. Again, the idea of *Prevent* work

¹⁶ Hansard HC Deb vol 448, col 1116 (10 July 2006) (John Reid)

¹⁷ Department for Communities and Local Government, *Preventing Violent Extremism: Winning Hearts and Minds* (Communities and Local Government, April 2007) 7

being a vital accompaniment to the more traditional 'hard' legal measures was emphasised:¹⁸

The Government is taking tough security measures to keep people safe, but this is not enough. We also need a much broader and longer-term programme of work, notably around Prevent.

The 2008 *Prevent* strategy described a variety of interlocking factors believed to lead a person to violent extremism. It then set out 5 key ways in which the *Prevent* strategy aimed to tackle these underlying causes of extremism so as to prevent people 'becoming or supporting terrorists or violent extremists'. These 5 methods are described as follows:¹⁹

- challenging the violent extremist ideology and supporting mainstream voices;
- disrupting those who promote violent extremism and supporting the institutions where they are active;
- supporting individuals who are being targeted and recruited to the cause of violent extremism;
- increasing the resilience of communities to violent extremism; and
- addressing the grievances that ideologues are exploiting.

¹⁸ Home office and Department for Communities and Local Government, *The Prevent Strategy: A Guide for Local Partners in England – Stopping People Becoming or Supporting Terrorists and Violent Extremists* (Home Office and Department for Communities and Local Government, May 2008), p5

¹⁹ 2008 Prevent part B

The 2008 *Prevent* strategy was followed in 2009 by a revised version of CONTEST (CONTEST 2).²⁰ Again, the importance of combining *Prevent* and *Pursue* to achieve an effective and comprehensive counter-terrorism strategy was stressed. It was stated that ‘work on *Pursue* and *Prevent* reduces the threat from terrorism’.²¹ The measures set out in the 2008 *Prevent* strategy were incorporated into CONTEST 2, but the scope of the strategy was expanded so as to cover both violent and non-violent extremism. Prior to this, the strategy covered only ‘violent extremism’. Under CONTEST 2, *Prevent* work would continue to focus on ‘those who defend terrorism and violent extremism’.²² But it would also be used to ‘challenge views which fall short of supporting violence and are within the law, but which reject and undermine our shared values and jeopardise community cohesion.’²³ The reason given for including non-violent, lawful extremism was that ‘some of these views can create a climate in which people may be drawn into violent activity.’²⁴ However, it was claimed that there was no intention to criminalise such non-violent extremist views. Rather, the aim was to intervene by means of ‘soft’ measures so as to prevent this lawful, non-violent extremism providing an environment that may lead to violent extremism.²⁵ Just how ‘soft’ these measures were in practice is something that will be explored further below.

²⁰ CONTEST 2

²¹ CONTEST 2, para 0.21

²² CONTEST 2 para 0.38

²³ CONTEST 2 para 0.38.

²⁴ CONTEST 2 para 0.38

²⁵ CONTEST 2 para 0.38

Despite this assurance that there was no intention to criminalise non-violent extremism under *Prevent*, the expression of such views can fall within the ambit of the criminal law by virtue of the offences already examined in this thesis, coupled with the expansive definition of terrorism. For example, it is conceivable that the expression of a non-violent extremist view could fall within the encouragement offences under section 1 of the TA 2006, and sections 57 and 58 of the TA 2000 have been applied so as to criminalise the possession of extremist literature, whether violent or not.²⁶ Proscription offences could also target non-violent extremism in cases where, for example, a person attends a talk by a member of a proscribed organisation, whether or not violent extremist views are expounded and irrespective of the intention or views of the person attending the talk.²⁷ Therefore, while it may not be the intention to criminalise non-violent extremism under *Prevent*, the reality is that the expression of such views may already constitute criminal offences or open one up to liability under the criminal law. By including non-violent extremism within the remit of *Prevent*, the bounds of what constitutes 'acceptable' views is further restricted, signalling that any type of radical or extremist position is dangerous and worthy of official attention.

The 2008 *Prevent* strategy and CONTEST 2 were heavily criticised for focusing solely on Muslim communities, creating a climate whereby all members of the Muslim community could be viewed with suspicion as potential terrorists. A further criticism resulting from the expansion of the

²⁶ See chapters 5 and 6 of this thesis.

²⁷ See chapter 7

strategy was that it was far too broad in attempting to cover both community cohesion and crime prevention. It was argued that this overlap between integrative work and conventional policing work was counter-productive in that it created mistrust in the community.²⁸

As a response to the criticisms levelled against the 2008 *Prevent* strategy and CONTEST 2, the Coalition government published a revised *Prevent* strategy in 2011, followed shortly thereafter by CONTEST 3. Again, the importance of *Prevent* to the counter-terrorist strategy was highlighted, on the grounds that it is not 'possible to resolve the threats we face simply by arresting and prosecuting more people'.²⁹ The aims of the 2011 *Prevent* strategy are now to:³⁰

- respond to the ideological challenge of terrorism and the threat we face from those who promote it;
- prevent people from being drawn into terrorism and ensure that they are given appropriate advice and support; and
- work with sectors and institutions where there are risks of radicalisation which we need to address.

²⁸ House of Commons Communities and Local Government Committee, Parliament of United Kingdom, *Preventing Violent Extremism: Sixth Report of Session 2009-10* (HC 65, 30 March 2010); Communities and Local Government Committee: Press Notice, *Prevent Programme Backfiring in Local Communities*, Session 2009-10, 30 March 2010 <http://www.parliament.uk/business/committees/committees-archive/clg/clgpn100330/> (last accessed 5 October 2015). Criticisms of *Prevent* and the overlap between *Prevent* and *Pursue* will be examined in the following section.

²⁹ CONTEST 3 para 5.2

³⁰ *Prevent* 2011, para 3.21

These aims are incorporated into CONTEST 3 as the three objectives for the *Prevent* leg of the strategy. Due to concern regarding the overlap between community integration work and counter-terrorism work under *Prevent* 2008 and CONTEST 2, the earlier objectives of increasing community resilience and addressing grievances were dropped. This change aimed to draw a clearer line between integration work and counter-terrorism. While the strategy recognises the importance of integration work and that ‘a stronger sense of belonging and citizenship makes communities more resilient to terrorist ideology’,³¹ it stresses that ‘work on integration and *Prevent* should not be merged together’.³² However, despite the attempt to delineate counter-terrorism work and community integration, there remains a large role for the police to perform under the auspices of *Prevent*. The overlap of *Prevent* and *Pursue* persists, resulting in the securitisation of integration work and the use of security measures to bolster policing and prevention.

The *Prevent* objectives set out in CONTEST 3 were to be implemented through a variety of means. Terrorist ideology was to be challenged through projects in education, communities and the criminal justice system and through the development of a counter-narrative by the Research and Information Communications Unit (RICU).³³ Institutions identified as being potential places where radicalisation takes place (eg. schools, universities and colleges, prisons, faith institutions) and sectors where those at risk of

³¹ CONTEST 3 para 5.17

³² CONTEST 3 para 5.18

³³ CONTEST 3 paras 5.35 and 5.39.

radicalisation may be encountered (eg. health care (particularly mental health), probation, youth justice, charity sectors) were to be engaged so as to 'ensure that there is an awareness of the risks of radicalisation and of how radicalisers work and to develop an effective response'.³⁴

One of the key objectives of *Prevent* – supporting vulnerable people – is based on identifying and supporting those who are being 'drawn into radicalisation and recruitment' and then dissuading them 'from engaging in and supporting terrorist related activity'.³⁵ The majority of these programmes are coordinated and delivered through Channel.³⁶ Channel is a multi-agency approach, based on collaboration between local authorities, the police, statutory partners and local communities and coordinated by the Association of Chief Police Officers. Under this process, a person is identified and referred to Channel as being 'at risk of radicalisation'. This referral can come from police or members of the community. A 'support package' is then developed by the multi-agency panel, which is designed to divert the individual from radicalisation.³⁷ Various support services can be recommended and the level of support that is provided will depend on the level of vulnerability or risk that the individual presents. The support package must connect the individual with the relevant support providers. Examples of support services that may be recommended are: one-to-one mentoring; cognitive behavioural therapy and other counselling services;

³⁴ CONTEST 3 para 5.56

³⁵ CONTEST 3 para 5.43

³⁶ CONTEST 3 para 5.44. See Home Office, *Channel: Protecting Vulnerable People from Being Drawn into Terrorism – A Guide for Local Partnerships* (Home Office, 2012) ('Channel')

³⁷ Channel paras 4.19 and 4.20)

education; health support; drug and alcohol awareness; housing support; careers advice and support; or supervised or managed constructive leisure pursuits.³⁸ Cases are reviewed every three months until the panel deems the risk to have been successfully managed or reduced, at which point the case will exit the process.³⁹ However, the cases will be reviewed again 6 months and 12 months later.⁴⁰ As will be seen, Channel presents particular difficulties when attempting to reconcile the *Prevent* approach with criminal prosecution for terrorist offences.

In 2013, as a response to the murder of Lee Rigby in Woolwich, the Prime Minister set up the Task Force for Tackling Radical Extremism. The Task Force was charged with identifying areas in which CONTEST was lacking and to agree practical steps to improve the strategy so as to 'fight against all forms of extremism'.⁴¹ Reflecting the shift that had already taken place in CONTEST 2, it was stressed that all forms of extremism should be targeted, that the strategy should not be limited to focusing only on violent extremism. As explained in the Task Force's report:⁴²

This response is broader than dealing only with those who espouse violence
- we must confront the poisonous extremist ideology that can lead people to
violence; which divides communities and which extremists use to recruit

³⁸ Channel paras 5.3 and 5.4. For an evaluation of a mentoring scheme implemented in the West Midlands, see B Spalek and L Davies, 'Mentoring in Relation to Violent Extremism: A Study of Role, Purpose, and Outcomes' (2012) 35 *Studies in Conflict and Terrorism* 354

³⁹ Channel paras 6.1 and 6.2

⁴⁰ Channel para 6.4

⁴¹ HM Government, *Tackling extremism in the UK - Report from the Prime Minister's Task Force on Tackling Radicalisation and Extremism*, December 2013

⁴² Task Force Report, p1

individuals to their cause; which runs counter to fundamental British values such as freedom of speech, democracy and equal rights; which says that 'the West' is at war with Islam and that it is not possible to be a true Muslim and to live an integrated life in the UK.

While this is presented as a new response, it is in fact no different to what had already been set out in CONTEST 2 and 3. The strategy already focused on non-violent extremism and radicalisation, in an attempt to target the environment in which terrorism could take root. However, the Task Force focuses on Islamist extremism in particular, stating that while there has been a definition of 'extremism' since the 2011 *Prevent* strategy, there is now a need to define the ideology of 'Islamist extremism'.⁴³ The Report explains that the Government's prior reluctance to challenge extreme Islamist ideology for fear that this equates to attacking Islam itself has resulted in an environment which is conducive to the spread of radicalisation in various institutions.⁴⁴ However, whether this is in fact true is difficult to establish without empirical evidence. Furthermore, this assumption has been criticised for its potential to fuel anti-Muslim sentiment and drive radical extremists underground.⁴⁵

The Task Force made several recommendations in its Report in December 2013, which are referred to in the Government's Annual Report on

⁴³ Task Force report, p1

⁴⁴ Task Force report, p2. See discussion on Muslims as a 'suspect community' below.

⁴⁵ O Wright and N Morris, 'Government Crackdown on Radicals 'Will Lead to Attacks on Muslims'' *Independent* (4 December 2013).

CONTEST.⁴⁶ It was recommended that more be done to tackle extremist propaganda, which is available online, and that there should be further restrictions on UK internet users' access to terrorist material, which is illegal under UK law but hosted overseas.⁴⁷ The recommendation that further legislation be enacted 'to deal with groups and individuals who promote extremist views but who deliberately and carefully stay within the existing hate speech and terrorist legislation' is under consideration.⁴⁸ This suggests that there may be an expansion of the already overly broad encouragement offences under TA 2006. The Task Force concluded that Channel should be made a legal requirement in the UK and that there should be further interventions in prisons and schools and universities to prevent radicalisation.⁴⁹ This recommendation was given effect in the Counter-Terrorism and Security Act 2015, which places a general duty on specified authorities to have due regard to the need to prevent people from being drawn into terrorism.⁵⁰

Two measures that were suggested by the Task Force, but not referred to in the Government's report on CONTEST, were to consider the possibility of a new type of order 'to ban groups which seek to undermine democracy or

⁴⁶ HM Government, CONTEST The United Kingdom's Strategy for Countering Terrorism Annual Report, Cm 8848, April 2014

⁴⁷ Contest Annual Report, para 2.19

⁴⁸ Contest Annual Report, para 2.20

⁴⁹ Contest Annual Report, para's 2.22, 2.23 and 2.24.

⁵⁰ Counter-Terrorism and Security Act 2015, s26. This has been fiercely criticised by universities, who argue that the legislation requires university lecturers to act as spies, as well as by a former director of public prosecutions, a cabinet secretary and MI5's former chief, Eliza Manningham-Buller. HL Deb, (28 January 2015), col 313; D Casciani, 'Is it Extreme to Make Universities Combat Extremists?' *BBC News* (1 February 2015), <http://www.bbc.co.uk/news/uk-31086694> (last accessed 5 October 2015).

use hate speech, when necessary to protect the public or prevent crime and disorder'; and to consider 'if there is a case for new civil powers, akin to the new anti-social behaviour powers, to target the behaviours extremists use to radicalise others'.⁵¹ These suggest the worrying possibility of an expansion of proscription type offences and using civil measures outside of the criminal law to restrict those deemed to be extremists. While all of these recommendations are made under the rubric of *Prevent*, they appear to be coercive in nature and it is difficult to distinguish them clearly from measures that could more easily be seen to fall within the *Pursue* policy strand.

It is clear that from the period following the July bombings in London, the UK's counter-terrorism strategy has been based around a two-pronged approach, combining both 'hard' and 'soft' measures under the *Pursue* and *Prevent* strands of CONTEST. The official position is that both approaches are essential in order to tackle terrorism effectively. This attitude is predicated on the assumption that *Pursue* and *Prevent* are distinct, yet complementary, concepts with specific methods under each strand. However, in practice this delineation is not so clear. While the 'hard' methods such as prosecution, TPIMs,⁵² stop and search powers and immigration controls would fall within the ambit of *Pursue* and 'soft' community focused, reintegrative measures such as education, counter-narratives and counselling are encompassed by

⁵¹ HM Government, *Tackling Extremism in the UK: Report from the Prime Minister's Task Force on Tackling Radicalisation and Extremism* (December 2013), para 2.3

⁵² TPIMs have been expanded under the Counter-Terrorism and Security Act 2015, not least through the reintroduction of forcible relocation to 'other premises situated in an agreed locality or in some other locality in the United Kingdom that the Secretary of State considers to be appropriate'. Counter-Terrorism and Security Act 2015, s16.

Prevent, when one explores these methods more closely this supposed distinction between the two tactics collapses.

8.2 Prevent is Pursue, Pursue is Prevent?

8.2.1 *Overlap Between the Two Policy Strands*

The purpose of *Pursue* is described in CONTEST 3 as being:⁵³

to stop terrorist attacks in this country and against our interests overseas. This means detecting and investigating threats at the earliest possible stage, disrupting terrorist activity before it can endanger the public and, wherever possible, prosecuting those responsible.

As could be expected, reference is made to the prosecution of those responsible for terrorist activity. This accords with the view of *Pursue* as being concerned with coercive 'hard' legal measures and prosecution for criminal offences. However, the *Pursue* objective contains a heavy emphasis on prevention. Both the rationale and operation of this objective are based primarily on a preventive agenda, aimed at early intervention in order to prevent terrorist harm. Prosecution is then tied to this preventive objective, whereby offenders are prosecuted for being responsible for terrorist threats or activity that is disrupted before the public is endangered. Prosecution is therefore not based on the harmful wrongdoing of the offender, but rather on

⁵³ CONTEST 3 para 1.16

the threat of such harmful wrongdoing that the offender presents. So while there are certain features that identify this strand as being concerned with the pursuit of terrorist offenders, the rationale and operation of *Pursue* closely resembles something that could be conceived of as falling within a *Prevent* agenda.

While *Pursue* resembles *Prevent*, the converse is also true. In many ways, the *Prevent* strategy contains several features that could more accurately be conceived of as falling within *Pursue*. The *Prevent* strategy itself stresses the importance of certain measures that one would expect more naturally to fall within the purview of the *Pursue* strand. This is in evidence in all three versions of CONTEST. In CONTEST 1, the second objective of the *Prevent* strand is to deter 'those who facilitate terrorism and those who encourage others to become terrorists'.⁵⁴ As has been discussed in the previous chapters, the facilitation and encouragement of terrorism would already constitute an offence under terrorism legislation (either under sections 1 or 2 of Terrorism Act 2006 or under the support provision in section 12 of Terrorism Act 2000) and is thus liable to prosecution and punishment through the courts. However, the aim of *Prevent* is to deter such encouragement and facilitation. Yet the only means suggested in the strategy to achieve this objective of deterring encouragement and facilitation of terrorism is by reference to coercive measures that would seem more naturally to fall within the ambit of *Pursue*. After setting out the objective, the

⁵⁴ CONTEST 1 p 12

strategy suggests various coercive measures as potential ways in which to achieve the objective. These are the encouragement and dissemination offences under the Terrorism Act 2006, the proscription offences under the Terrorism Act 2000 and immigration procedures such as exclusion or deportation from the UK for 'unacceptable behaviour', provision for which is expanded and strengthened in the Counter-Terrorism and Security Act 2015.⁵⁵ It is difficult to see how this can be distinguished in any way from the 'hard' legal powers that are regarded as falling within the domain of *Pursue*.⁵⁶

This confusion regarding the distinction between *Prevent* and *Pursue* continues in CONTEST 2. Under objective 2 of *Prevent* in CONTEST 2 – 'disrupting those who promote violent extremism and supporting the institutions where they may be active' – the strategy stresses the importance of prosecution as a part of *Prevent*. It states that action by the 'police and Crown Prosecution Service through the courts is a vital part of *Prevent*', in order to disrupt violent extremists.⁵⁷ It appears as if *Prevent* can encompass coercive legal measures enforced through the courts to achieve its objective. The strategy goes on to say that there are other preventive steps that can be taken to disrupt violent extremists, such as identifying such individuals and considering what action may be required 'in advance of or in addition to

⁵⁵ CONTEST 1, p 12

⁵⁶ House of Commons Communities and Local Government Committee, *Preventing Violent Extremism: Sixth Report of Session 2009-10* (HC 65, 30 March 2010), 52-55; A Kundnani, *Spooked! How Not to Prevent Violent Extremism* (Institute of Race Relations 2009); S Lakhani, 'Preventing Violent Extremism: Perceptions of Policy from Grassroots and Communities' (2012) 51 *The Howard Journal* 190; Keiran Hardy, *Ruthlessness and Sympathy: Smart Power Thinking in Counter-Terrorism and Counter-Insurgency* UNSW PhD Thesis, November 2014, ch 2.

⁵⁷ CONTEST 2 p 23

police action'. Examples of such action are to disrupt or remove funding streams or to restrict access to particular locations for those groups or individuals identified as promoting violent extremism.⁵⁸ However, again these measures all seem to fall on the coercive side of the spectrum and resemble the 'hard' legal measures that would more naturally fall under *Pursue*.

The definition of *Prevent* in CONTEST 3 is 'to stop people becoming terrorists or supporting terrorism'. This aim is to be achieved by pursuing three objectives, namely responding to the ideological challenge of terrorism, preventing people being drawn into terrorism and working with sectors and institutions where there are risks of radicalisation. Stopping people from supporting terrorism is already covered in various ways in the counter-terrorist offences, for example in proscription offences and offences relating to financial and other forms of support. The aim of stopping people from becoming terrorists is also the aim of the encouragement offences. Thus, the aims of *Prevent* are also addressed to some extent by the criminal offences, highlighting the overlap between the policy strands of *Prevent* and *Pursue*. While there is, in practice, a difference between trying to intervene early to prevent people becoming involved in terrorism and criminalising them, there is an overlap in the scope of the measures pursued under each strand. This overlap is significant in that it is difficult to de-radicalise and reintegrate an individual who knows they are liable to prosecution. The 'risk factors' of

⁵⁸ CONTEST 2 p 23

Prevent are co-terminus with criminal offences, so those who are 'vulnerable' are also potentially criminal offenders.

The clearest example of the overlap between the criminal offences under *Pursue* and the *Prevent* strategy is the encouragement offences in sections 1 and 2 of the TA 2006. As explained in chapter 5, these offences criminalise the direct or indirect encouragement of terrorism or the dissemination of such publications or their possession with a view to dissemination. While the ultimate intention of such offences is to prevent acts of terrorism, the more immediate goal, as explained by the government during the enactment of the offences, is to prevent radicalisation. These offences were specifically enacted in order to prevent vulnerable people being drawn to extremism and radicalised for fear that they may then proceed to commit an act of terrorism. The focus of the offences is on those who supposedly do the radicalising, but the aim is to prevent those who are vulnerable to radicalisation from being drawn into terrorism. This aim is indistinguishable from the aims of *Prevent*.

The Channel programme, which falls under the *Prevent* strategy, aims at intervening and supporting those who are vulnerable to radicalisation. A list of indicators is used to assess whether a person is vulnerable to radicalisation and should be supported by the programme. The list of behaviours that indicate this vulnerability include the following:

- Changing their style of dress or personal appearance to accord with the group;
- Possession of material or symbols associated with an extremist cause;
- Attempts to recruit others to the group/ cause/ ideology;
- Communications with others that suggest identification with a group/ cause/ ideology;
- Speaking about the imminence of harm from the other group and the importance of action now;
- Expressing attitudes that justify offending on behalf of the group, cause or ideology;
- Condoning or supporting violence or harm towards others; and
- Plotting or conspiring with others.

Having examined the offences extending inchoate liability in previous chapters, it is clear that these indicators could all form the basis of criminal liability under the counter-terrorism legislation. There are clear overlaps between these indicators and offences such as support for terrorism (section 11 and 12 of the Terrorism Act 2000), wearing the uniform of a proscribed group (section 13 of the Terrorism Act 2000), possession of terrorist materials (sections 57 and 58 of the Terrorism Act 2000), encouragement of terrorism (section 1 of the Terrorism Act 2006), dissemination of publications encouraging terrorism or possession with a view to dissemination (section 2 of the Terrorism Act 2006) and even preparation for terrorism (section 5 of the

Terrorism Act 2006). All of these offences carry heavy sentences of imprisonment, including a potential life sentence for an offence under section 5 of the Terrorism Act 2006. Therefore, such behaviour could either form the grounds of an offence whereby a person could be prosecuted and liable to conviction and imprisonment, or be used as a means of assessing whether someone should be the recipient of support under a programme of intervention. This overlap can, justifiably, result in a fear that measures under *Prevent* could be used as a means of investigation so as to form the grounds for a charge under *Pursue*. Due to the remote and broad nature of the criminal offences, those at risk of radicalisation could almost always find themselves falling foul of the criminal law and subject to prosecution.

This overlap has been acknowledged by the government, which has stated the following:⁵⁹

It is also important to emphasise that the following activities may involve illegality. It is not the purpose of Channel to provide an alternative to the criminal justice system for those who have been engaged in illegal activity. Channel is about early intervention to protect and divert people away from the risk they may face before illegality relating to terrorism occurs. Therefore, in line with other safeguarding processes, being referred to Channel will not lead to an individual receiving a criminal record as a consequence of the referral, nor as a result of any support they may receive through Channel.

⁵⁹ Home Office, *Channel: Protecting Vulnerable People from Being Drawn Into Terrorism – A Guide for Local Partnerships* (Home Office, 2012) para 3.3

However, this does not adequately address the fact that due to the breadth of the criminal offences, discretion is left to police and prosecutors as to whether a person should be liable to criminal prosecution or a diversionary programme through Channel. Furthermore, the recent Task Force report recommending greater legal force for *Prevent* measures only serves to increase this uncertainty regarding the division between *Prevent* and *Pursue*.

Another issue that further blurs the distinction between *Prevent* and *Pursue* relates to the imprecise and broad use of the word 'terrorist' in the *Prevent* strategy. If *Prevent* is concerned with preventing people becoming terrorists, it follows that it is targeting people who have not yet committed any offences under the terrorist legislation that would result in them being labelled terrorist offenders. The offences that have been analysed in this thesis all target conduct which precedes the commission of a terrorist attack. In order to avoid overlap with the offences, *Prevent* would need to reach so far back due to the breadth of the offences and the remoteness of conduct which they target, that it becomes an unrealistic endeavour. Rather, the inevitable consequence is an overlap between *Prevent* work and the remote harm criminal offences falling under *Pursue*. The result is that much of the behaviour targeted under *Prevent* could form the basis of a response under *Pursue*.

A rather troubling sentence in CONTEST 3 that highlights the clear overlap between *Pursue* and *Prevent*, suggests that *Prevent* measures serve as a backup response when prosecution is not possible. According to the strategy:⁶⁰

Where it is not possible to prosecute individuals or proscribe groups of concern, we will seek to tackle the problem through the Government's work on integration.

This is a stark indication that these are not two distinct policy approaches aimed at holistically countering terrorism. Rather, the two approaches are seen as alternatives, where one is used when the other is not available. The intention appears to be coercive rather than integrative, but with the coercion focused on prevention rather than on liability for culpable wrongdoing.

8.2.2 Crime Prevention or Community Engagement? Police Delivery of Prevent

Apart from the fact that several measures under the *Prevent* strategy resemble coercive 'hard' legal measures similar to those already in the terrorism legislation, this overlap is further reinforced by the delivery of *Prevent* services by the police. The embedding of counter-terrorism police in the delivery of local services under *Prevent* has led to mistrust within

⁶⁰ CONTEST 3 pg 50

communities and the fear that the police are using these measures to gather intelligence in order to take steps under *Pursue*.⁶¹

The policing of counter-terrorism is characterised by secretive, covert practices that attract allegations of unaccountability. Community engagement has not been a priority, with agencies refusing to inform or account to local communities due to operational concerns.⁶² However, these features of counter-terrorist policing under a traditional *Pursue* type agenda do not fit with the change of focus to tackling the root causes of terrorism under *Prevent*. The focus on 'home-grown' or 'neighbour' terrorists, and the concomitant need to engage the community for support in the counter-terrorism effort, has resulted in the perceived need for organisational changes in the policing of counter-terrorism. This shift in policy has resulted in the net-widening of policing, whereby counter-terrorist police are rooted within local communities in order to engage in what could be seen to be a neighbourhood policing approach to counter-terrorism.⁶³ This net-widening, where police are tasked with community engagement services as well as intelligence gathering, results in a blurring of the lines between *Pursue* and *Prevent* and a lack of trust in the strategy.⁶⁴

⁶¹ G Mythen, S Walklate and F Khan, 'Why Should We Have to Prove We're Alright?: Counter-Terrorism, Risk and Partial Securities' (2012) 47 *Sociology* 393, p393. For a case study on how the police in the West Midlands are implementing *Prevent*, see J Bahadur Lamb, 'Preventing Violent Extremism; A Policing Case Study of the West Midlands' (2012) 7 *Policing* 88.

⁶² Walker and Rehman, 'Prevent' Responses to Jihadi Extremism' p 261

⁶³ For a case study on the implementation of the *Prevent* strategy by the West Midlands police see Bahadur Lamb

⁶⁴ Walker and Rehman, p 261 and 265

There has been ample evidence of community concern as to the purpose of the police in the delivery of *Prevent* services and fears that this is simply a system that is used to spy on Muslims. This was highlighted in the House of Commons Select Committee on Communities and Local Government report on the 2008 *Prevent* strategy.⁶⁵ The Institute of Race Relations, in its evidence to the Select Committee, expressed the view that the delivery of *Prevent* services was a major source of concern for Muslim communities. It stated that:⁶⁶

There is strong evidence that Prevent-funded services are being used for information gathering by the police [...] In practice, a major part of the Prevent programme is the embedding of counter-terrorism police officers within the delivery of other local services. [...] The extent to which counter-terrorism police officers are now embedded in local government is illustrated by the fact that a West Midlands Police counter-terrorism officer has been permanently seconded to the equalities department of Birmingham City Council to manage its Prevent work [...] Muslims may want to avoid participating in the government's Prevent programme for a number of reasons which have nothing to do with support for extremism – for example, concerns about surveillance, transparency, accountability or local democracy.

⁶⁵ House of Commons Communities and Local Government Committee, Parliament of United Kingdom, *Preventing Violent Extremism: Sixth Report of Session 2009-10* (HC 65, 30 March 2010), p3.

⁶⁶ House of Commons 6th Report, p 12

This fear of *Prevent* being used to spy on Muslims was reflected in the media, in an article published by the Guardian, reporting that:⁶⁷

The government programme aimed at preventing Muslims from being lured into violent extremism is being used to gather intelligence about innocent people who are not suspected of involvement in terrorism. [...] The information the authorities are trying to find out includes political and religious views, information on mental health, sexual activity and associates, and other sensitive information, according to documents seen by the Guardian. [...] Shami Chakrabarti, director of Liberty, branded it the biggest spying programme in Britain in modern times and an affront to civil liberties.

This overlap between *Prevent* and *Pursue* in terms of delivery of services and the role of counter-terrorism police in the *Prevent* strategy has been heavily criticised. In a report by Kundnani, published by the Institute of Race Relations, it is stated that there is evidence to suggest that the *Prevent* measures are being used to gather intelligence on Muslim communities and that this blurring of roles is counter-productive. It is said that one of the main objectives of *Prevent* is to encourage closer relationships between the police and local services with the aim of enabling the transfer of information to the police on people in the community who are identified as holding extremist views, but also on the general Muslim population. This information provides an elaborate picture of the community that is used to investigate criminal activity as well as identifying people or places that are vulnerable to

⁶⁷ Government anti-terrorism strategy 'spies' on innocent, The Guardian, 16 October 2009.

radicalisation and extremism.⁶⁸ An example given to support this assertion related to the approval of *Prevent* funding to a youth centre that was aimed at young Muslims, to provide sports and recreational facilities, careers advice and religious guidance as a means of countering the extremist ideology. However, the proposal included provision for free IT facilities in the centre. One of the rationales for this was to 'monitor which websites people were visiting' and for 'intelligence gathering'.⁶⁹ This proposal did not go ahead, but highlights that fears of spying within the Muslim community are not unfounded. A further worrying example of the dangers of overlap is the allegation that MI5 used the threat of harassment and detention in an attempt to recruit five Muslim community workers as informers. Three of the men were detained at airports and apparently threatened with travel restrictions, and some of them claim to have received threatening and intimidating phone calls from members of the security services. They were allegedly told that if they did not cooperate they would be considered terrorist suspects.⁷⁰ This raises concern that the threat of terrorist offences can be used as a threat and a back-up to the so-called 'soft' measures.

In response to the Guardian article and to the report by Kundnani alleging that the *Prevent* programme was used as a way of spying on members of the community, the Office for Security and Counter Terrorism was tasked with investigating the substance of these allegations. It found that

⁶⁸ Kundnani, *Spooked*, p28

⁶⁹ Kundnani, 29

⁷⁰ R Verkaik, 'How MI5 Blackmails British Muslims' *Independent* (21 May 2009). <http://www.independent.co.uk/news/uk/home-news/exclusive-how-mi5-blackmails-british-muslims-1688618.html> (last accessed 5 October 2015)

there was no evidence for these claims and refuted the conclusions in the Kundnani report, criticising the methodology of the report, particularly that the sample group of witnesses was very small.⁷¹ Charles Farr, director of the Office for Security and Counter Terrorism, strenuously denied allegations of spying and stated that the flow of information relating to *Prevent* is in fact from the police to the local authorities and not the other way round.⁷² However, despite these reassurances and refutations, it appears as though the suspicion that *Prevent* is being used to further *Pursue* objectives by spying on Muslim communities and gathering intelligence on individuals remains.⁷³

Apart from turning individuals against the *Prevent* strategy, this blurring of roles has also resulted in some community organisations distancing themselves from involvement with *Prevent* endeavours. This lack of involvement is not due to any extremist sympathies, but rather to avoid being seen to be linked to intelligence gathering and used as 'police spies'.⁷⁴ There is a danger that the mistrust for *Prevent* and the fears that it is being used as a spying tool could be used by extremists to recruit followers.⁷⁵ This merging of the crime prevention and community engagement roles of the police is therefore potentially counter-productive to the counter-terrorism effort.⁷⁶

⁷¹ House of Commons 6th Report, p14

⁷² House of Commons 6th Report, p13

⁷³ Lakhani; Kundnani; House of Commons 6th Report

⁷⁴ House of Commons 6th Report, p17 and p52

⁷⁵ Paul Thomas, *Failed and Friendless*, p449-50

⁷⁶ For further research and discussion on the impact of CONTEST and the *Prevent* strategy on Muslims, see T Choudhury and H Fenwick, *The Impact of Counter-Terrorism Measures on Muslim Communities* (Equality and Human Rights Commission, 2011) Rashid B Spalek,

8.2.3 *Criticisms of Prevent Resemble Criticisms of Pursue*

A criticism of both the 'hard' and 'soft' counter-terrorism measures is that they focus disproportionately on the Muslim community, constructing the community as 'suspect'.⁷⁷ The term 'suspect community' was coined by Paddy Hillyard in 1993 in the context of counter-terrorism measures in Northern Ireland and their effects on the Irish population. In explaining the effects of the Prevention of Terrorism Act, he stated that:⁷⁸

a person who is drawn into the criminal justice system under the Prevention of Terrorism Act is not a suspect in the normal sense of the word. In other words, they are not believed to be involved in or guilty of some illegal act [...] people are suspect primarily because they are Irish and once they are in the police station they are often labelled an Irish suspect, presumably as part of some classification system. In practice, they are being held because they belong to a suspect community.

While the focus in Hillyard's exposition of the 'suspect community' related to the ways in which a person became a formal criminal suspect, this applied

'Community Policing, Trust, and Muslim Communities in Relation to "New Terrorism"' (2010) 38 *Politics & Policy* 789 B Spalek, S El-Awa and L Z McDonald, *Police-Muslim Engagement and Partnerships for the Purposes of Counter-Terrorism: An Examination* (University of Birmingham 2009) B Spalek and A Imtoul, 'Hard' Approaches to Community Engagement in the UK and Australia: Muslim Communities and Counter-Terror Responses' (2007) 27 *Journal of Muslim Minority Affairs* 185 B Spalek and R Lambert, 'Muslim Communities, Counter-Terrorism and De-Radicalisation: A Reflective Approach to Engagement' (2008) 36 *International Journal of Law, Crime and Justice* 257 B Spalek and R Lambert, 'Policing within a Counter-Terrorism Context Post 7/7: The Importance of Partnership, Dialogue and Support when Engaging with Muslim Communities' in M J Goodwin and R Eatwell (eds), *The "New" Extremism in 21st Century Britain* (Taylor & Francis 2010)

⁷⁷ See, for example, Choudhury and Fenwick

⁷⁸ P Hillyard, *Suspect Community: People's Experience of the Prevention of Terrorism Acts in Britain* (Pluto Press in association with Liberty 1993), 7

equally to a looser construction of the term suspect, where people were viewed with suspicion by virtue of belonging to a certain group. It has been argued that under the current counter-terrorism strategy, the Muslim community has become the new suspect community. Pantazis and Pemberton, who argue that the effect of the current counter-terrorism legislation identifies the Muslim community as the source of the terrorist threat, have provided an updated definition of the term 'suspect community' as:⁷⁹

... a sub-group of the population that is singled out for state attention as being 'problematic'. Specifically in terms of policing, individuals may be targeted, not necessarily as a result of suspected wrong doing, but simply because their presumed membership to that sub-group. Race, ethnicity, religion, class, gender, language, accent, dress, political ideology or any combination of these factors may serve to delineate the subgroup.

Pantazis and Pemberton argue that the legislative framework that developed as a response to the threat of terrorism identifies the Muslim community as worthy of suspicion and state attention.⁸⁰ As evidence of the ways in which the Muslim community are targeted, they highlight the fact that since 9/11, the percentage of Asians who have been stopped and searched under counter-terrorist legislation has risen dramatically in comparison to searches

⁷⁹ Pantazis and Pemberton, *From the 'Old' to the 'New' Suspect Community: Examining the Impacts of Recent UK Counter-terrorist Legislation*, p649. However, see Steven Greer, 'Anti-Terrorist Laws and the United Kingdom's "Suspect Muslim Community"' (2010) 50 *British Journal of Criminology* 1171, for a critique of Pantazis and Pemberton, claiming that there is no evidence that Muslims are disproportionately legally targeted as criminal suspects.

⁸⁰ Pantazis and Pemberton, 649-50

of other population groups in the UK.⁸¹ They argue that the political discourse and accompanying legislation has served to construct the Muslim community as suspect.⁸² The preventive terrorism offences carry with them the danger that they will be applied disproportionately to those who are seen to present the greatest risk or danger to society. Where a particular community is seen to be the source of a terrorist threat, it becomes very easy to apply these overly broad laws to members of that community.

There are various ways in which the offences examined in this thesis serve to reinforce the idea of a suspect Muslim community. The proscription of groups by the Home Secretary triggers the membership, support and uniform offences in sections 11, 12 and 13 of the Terrorism Act 2000, which criminalise various forms of association with the proscribed group, as discussed in chapter 7. Many of the activities that are criminalised are non-violent and do not require culpable wrongdoing. Criminalisation is based on the associative link to a proscribed organisation. The majority of the groups that have been proscribed are located within minority ethnic or refugee communities in the UK and a great number are associated with Islamist extremism. By virtue of the far-reaching proscription offences, any association with these groups serves to incriminate the entire community from which the group originates.⁸³ This is similar to the reporting offences,

⁸¹ Pantazis and Pemberton, 656

⁸² However, it is important to note that this research was published in 2009, when suspicionless searches under section 44 of the Terrorism Act 2000 were still lawful. It would be interesting to explore how the policing of Muslim communities has changed since the requirement of reasonable suspicion was reinstated.

⁸³ Pantazis and Pemberton, p652-653

which require people essentially to police their own community, due to the fact that the community is viewed as suspect.⁸⁴ The breadth of the encouragement offences and possession offences allow for the targeting of unpalatable views and also serve to bolster the idea of a suspect community by legislating that certain views or beliefs will not be tolerated.⁸⁵

The effect of these offences and the perception that they are disproportionately targeting Muslims is evidenced in interviews with members of the Muslim community, who report feeling unfairly targeted, insecure, and unsure of what views it is safe to express, resulting in a chilling effect on speech and expression as well as feelings of alienation.⁸⁶ The following exchange of interview participants highlights the fear of being unfairly targeted by the encouragement offences and the resulting withdrawal from debate or expression of any views that may be construed as radical:⁸⁷

Taj: There are radical elements in all religions, so why persecute us all?
Most - nearly all - Muslims stand against the use of violence, but that's not to say we don't understand the reasons why. They've succeeded in shutting us up; people are too scared of the consequences that might happen. All it takes is saying the wrong thing in front of the wrong person, where it's taken as encouraging terrorism, then who knows what might happen and

⁸⁴ See chapter 7

⁸⁵ See chapters 5 and 6

⁸⁶ Mythen, G, Walklate, S, Khan F, 'Why should we have to prove we're alright?', 393

⁸⁷ Ibid, 393

that's the thing that scares me, not just what might happen to me but those I care about.

Yasmin: You're right; you have to be so careful now ... anything can be understood as glorifying terrorism. Remember what happened to the guy demonstrating against the blasphemous cartoon, he said the wrong thing and then he's in prison for supposedly encouraging other people to commit violence. So now there is two types of free speech, one for Muslims and one for everyone else.

Rabiya: I think we are restricted when it comes to saying what we think. If you're Muslim people don't let you get away with challenging what this country is doing anymore. If you do, you're seen as a fanatic.

.....

Rehana: It makes me feel like I have to watch what I say and work harder to show that I'm not like that. I resent that.

Shams: But why should we have to prove we're alright.

This notion of having to 'prove we're alright' sums up the effect of the creation of a suspect community. The onus rests on members of the community to prove that they do not present a danger or threat in order to avoid falling within the gaze of the state in its counter-terrorism efforts.

The construction of Muslims as a 'suspect community' under 'hard' counter-terrorism legislation is reinforced by the *Prevent* strategy. It has been argued that measures under *Prevent* also result in the creation of a suspect Muslim community, whereby suspicion falls on Muslims due to the fact that they are labelled as being particularly at risk of radicalisation.⁸⁸ There is a belief, reflected in counter-terrorism policy, that extremists and radicalisers exist within the Muslim community, such that the community is both the originator of the terrorist threat and particularly vulnerable to these radicalising and extremist influences. The Muslim community is 'the pool in which terrorists will swim'.⁸⁹ Counter-terrorism policy and political discourse fosters this idea of a suspect community by portraying Muslims as either being allies in the fight against terrorism and extremism or as harbouring or supporting potential extremists.⁹⁰ Muslims are thus seen to fall into two categories: legitimate or illegitimate; good or bad; terrorist/extremist or ally.⁹¹ Failure to engage with the government's attempts at preventing extremism renders members of the Muslim community suspect, thus moving them into the illegitimate category. Simply failing to participate as an ally in the state's

⁸⁸ See: Basia Spalek , Alia Imtoul , 'Muslim Communities and Counter-Terror responses: "Hard" Approaches to Community Engagement in the UK and Australia', *Journal of Muslim Minority Affairs*, 2007, vol 27, Iss 2; Tufyal Choudhury and Helen Fenwick, *The Impact of Counter-Terrorism Measures on Muslim Communities, Equality and Human Rights Commission, Research Report 72*, 2011;

⁸⁹ Of course twenty years ago it was the Irish community alone that formed this 'pool' and in another 20 years it will no doubt be a different ethnic or religious group.

⁹⁰ M J Hickman, L Thomas, S Silvestri, H Nickels, London Metropolitan University, *A Report for Policy Makers and the General Public - July 2011, Report of a Research Project: A Comparative Study of the Representations of 'Suspect' Communities in Multi-Ethnic Britain and of their Impact of Muslim and Irish Communities 1974-2007*, p3

⁹¹ J Mohammed and A Siddiqui, *Good Muslim, Bad Muslim: A Response to the Revised Prevent Strategy* (Cageprisoners, 2011); J Mohammed and A Siddiqui, *The Prevent Strategy: A Cradle to Grave Police-State* (Cage Ltd, 2013).

counter-terrorist effort serves to label a person as a potential extremist and worthy of state suspicion.

As mentioned above, the 2008 *Prevent* strategy and CONTEST 2 were criticised for focussing disproportionately on Muslim communities. Under CONTEST 2, funds and resources were allocated almost exclusively to areas with large Muslim populations. Ninety-two per cent of community projects under the Pathfinder Fund identified Muslim communities as their beneficiaries and funding for community projects was allocated to communities based on the number of Muslims residing in the area.⁹² Such practices served to reinforce the perception of Muslims as suspect. Despite attempts to respond to such criticism under CONTEST 3 and the 2011 *Prevent* strategy, the focus on Muslim communities and Islamist extremism remains. CONTEST 3 states that Al-Qaeda and its associated terrorist groups present the greatest threat to the UK and therefore the focus of the strategy is on responding to this form of terrorism.⁹³ This now seems rather dated in light of the fact that IS appears to have taken over from Al-Qaeda as the chief threat.⁹⁴ Furthermore, the Task Force on Tackling Radical Extremism, in their 2013 Annual Report, specifically stated that the focus should be on 'Islamist extremism'.⁹⁵ Thus, much of the work under *Prevent* remains centred on the Muslim community and radical Islam, bolstering the perception of Muslims as suspect. The perception that whole communities are being singled out as

⁹² Pathfinder Mapping, 33

⁹³ CONTEST 3, p40

⁹⁴ Anderson, *The Terrorist Acts in 2014: Report of the Independent Reviewer on the Operation of the Terrorism Act 2000 and Part 1 of the Terrorism Act 2006*, 6.

⁹⁵ Task Force Report, p1

suspect or criminalised as potential terrorists may serve to alienate communities even further, potentially resulting in individuals becoming more 'vulnerable to radicalisation', such that the measures are counter-productive to the counter-terrorism strategy.⁹⁶

Both 'hard' and 'soft' measures target conduct that is only remotely connected to terrorism. This focus on the prevention of terrorist harm by early intervention that informs the preventive terrorism offences is mirrored in the *Prevent* strategy. The aim of *Prevent* is to stop people from becoming or supporting terrorism by focusing on the root causes of terrorism. Thus, by definition the focus is on activity that is remote from the causing of a terrorist attack, but which is regarded as potentially presenting the risk of some future harm. As an example, Sir Norman Bettison of ACPO spoke of the early warning signs that should be acted upon so as to prevent a catastrophe such as the July 2005 London bombings:⁹⁷

Hasib Hussain was a young man, third generation Leeds-born individual. [...] He was a model student at Matthew Murray School in East Leeds. He went on at the age of 18 to strap a rucksack to his back and blew up the number 30 bus that we have all seen in the scenes that followed the 07/07 bombings. We started to unpick what was known about Hasib Hussain. He had never come to the notice of the police at any stage in his young life and therefore in terms of opportunities for the police to intervene to prevent what went on to occur, there were just no hooks there. However, what we

⁹⁶ Lakhani, p202

⁹⁷ CLG Committee 6th report, p17

did discover is that as a model student whilst at Matthew Murray School his exercise books were littered with references to al-Qaeda, and the comments could not have been taken as other than supportive comments about al-Qaeda. To write in one's exercise book is not criminal and would not come on the radar of the police, but the whole ethos, the heart of *Prevent* is the question for me of whether someone in society might have thought it appropriate to intervene. What do I mean by intervention? I do not mean kicking his door down at 6 o'clock in the morning and hauling him before the magistrates. I mean should someone have challenged that? They are the sorts of cases that get referred through the Channel scheme.

The warning signs in this case appear to be the writing of references to al-Qaeda in school exercise books and the argument seems to be that this is something that should be acted upon so as to prevent a person from ultimately engaging in a terrorist attack. The present government has been very explicit in its determination to render universities, schools and even nursery schools responsible for monitoring and preventing extremism under the Counter-Terrorism and Security Act 2015.⁹⁸ However, this behaviour is extremely remote from the ultimate terrorist attack. It is questionable whether writing references to a terrorist group in an exercise book is a reliable predictor of a pathway to terrorism. Such an approach gives the impression that radical expressions, no matter how rudimentary, necessarily lead to

⁹⁸ Section 26(1) provides: 'A specified authority must, in the exercise of its functions, have due regard to the need to prevent people from being drawn into terrorism'. This has been very controversial and attracted much debate. See, for example, in respect of nursery schools <http://www.independent.co.uk/news/uk/politics/nursery-staff-to-be-forced-to-report-toddlers-at-risk-of-becoming-terrorists-9956414.html>; in respect of universities see <http://www.theguardian.com/education/2015/feb/02/counter-terrorism-security-bill-threat-freedom-of-speech-universities>

extremism and then on to terrorism. The assumption is that there is a linear progression from radicalism and political extremism to the perpetration of violent terrorist acts. This is reflected in a speech by David Cameron in the aftermath of the murder of Lee Rigby in Woolwich in 2013:⁹⁹

When young men born and bred in this country are radicalised and turned into killers, we have to ask some tough questions about what is happening in our country. It is as if that for some young people there is a conveyor belt to radicalisation that has poisoned their minds with sick and perverted ideas. We need to dismantle this process at every stage – in schools, colleges, universities, on the internet, in our prisons, wherever it is taking place.

This idea of a sliding scale from radical to extremist (potentially non-violent to violent) and then on to terrorist killer informs the approach of the *Prevent* strategy and attempts at early intervention to prevent radicalisation.¹⁰⁰ However, there is no clear empirical evidence to support this position. In fact, according to the 2011 *Prevent* strategy, only 15% of those who have been convicted of terrorist offences were previously linked to extremist groups.¹⁰¹ Furthermore, MI5 has concluded that there is no single pathway to extremism and terrorism and there is thus no simple way to identify those who may be drawn into terrorism and go on to commit terrorist acts.¹⁰² There is very little evidence of how to accurately identify people who are genuinely at risk of

⁹⁹ "Woolwich killing a betrayal of Islam, says Cameron". BBC News. 3 June 2013.

¹⁰⁰ See A Richards, 'The Problem with 'Radicalization': The Remit of 'Prevent' and the Need to Refocus on Terrorism in the UK' (2011) 87 *International Affairs* 143 for a criticism of the focus on radicalisation.

¹⁰¹ Para 5.37

¹⁰² Alan Travis, *The Guardian*, 20 August 2008, <http://www.theguardian.com/uk/2008/aug/20/uksecurity.terrorism1>

radicalisation, with the result that programmes such as Channel and other diversionary measures under *Prevent* are of questionable effect.¹⁰³

One of the effects of this view of radicalisation leading to terrorism is to limit freedom of expression. By associating radical views with terrorism, the *Prevent* strategy effectively marks all those who criticise sanctioned official views as suspect, as potential terrorists who should be targeted by the state. This has a negative effect on freedom of expression, similar to that which was highlighted in chapter 6 when analysing the encouragement offences. Due to the breadth of the encouragement offences, it is not clear what will constitute unlawful expression and what would be considered to rather be addressed under *Prevent*. As seen in the quotes in the above section regarding the construction of a 'suspect community', the result of this uncertainty is that people are hesitant to speak at all and retreat from engaging in a process of debate. This can be counter-productive to the aims of *Prevent*, in that such views are forced underground and prevent a person from engaging in the very debate of ideas that the government sees as a means of countering extremist ideology, which is just the argument used by universities in recent debates.¹⁰⁴

¹⁰³ P Thomas, 'Failed and Friendless: The UK's 'Preventing Violent Extremism' Programme' (2010) 12 *The British Journal of Politics and International Relations* 442, 450

¹⁰⁴ Baroness Manningham-Buller said plans to make the *Prevent* counter-terrorism strategy a statutory obligation risked banning "non-violent extremists" from speaking at universities. <http://www.bbc.co.uk/news/uk-31032926>

8.3 Conclusion

Prevent is what it says. About preventing violent extremism. It is a crime prevention programme – aiming to ensure that our fellow citizens do not commit acts of violence against Britain or British people overseas and that people abide by British law. And that is all.¹⁰⁵

This statement, by the then Secretary of State in 2009, highlights the crime prevention aspect of *Prevent*. This aim of preventing acts of terrorism is one that is shared by the offences extending inchoate liability. The focus of both *Prevent* and the offences under consideration is prevention. This shared aim leads to difficulties in distinguishing the different government responses under the broad counter-terrorism strategy. As has been demonstrated, there is a large overlap between *Prevent* and *Pursue*, evidenced in the aims of each strand and the measures taken in fulfilment of these aims. This overlap has resulted in both policy strands suffering from similar difficulties and attracting much of the same criticism. It is difficult to reconcile these different policy strands, reinforcing the conclusion that the offences extending inchoate liability are an adjunct to the wider counter-terrorism policy based primarily on prevention, rather than on the punishment of wrongful conduct.

¹⁰⁵ The Rt Hon John Denham MP, Speech and the National Prevent Conference, Birmingham, 8 December 2009.

9. Concluding Remarks

This thesis set out to assess the justifications for various extensions of the criminal law introduced to combat terrorism, in particular those extensions that go beyond the existing remit of inchoate offences and extend liability to earlier acts and intentions. The method for assessing these extensions was to critically analyse four classes of offences in counter-terrorism legislation, referred to as preventive terrorism offences, which extend the criminal law beyond its legitimate boundaries.

The extensions to inchoate liability displayed in the preventive terrorism offences have been justified by recourse to the state's duty to prevent harm and enhance public safety, which is a legitimate objective of the criminal law. However, recognising the legitimacy of prevention as an animating principle does not licence unlimited power to harness the criminal law in the pursuit of this goal. Allowing prevention to be the sole justifying principle for criminalisation would have serious negative implications for individual liberty, autonomy and fundamental human rights. In order to counter this concern, a framework of limiting principles and constraints was offered, based on the state's duty to respect individual autonomy and to abide by rule of law standards. It was argued that it is necessary to assess the preventive terrorism offences against these limiting principles and constraints in order to determine whether the preventive reach of the criminal law has been extended unjustifiably.

Having set out the theoretical framework for the project, the thesis moved onto an analysis of the definition of terrorism. It was established that this expansive definition could extend to conduct that would not ordinarily equate to any commonly held understanding of terrorism. Furthermore, due to the breadth of the definition, the reach of the preventive offences is further increased as all of the offences rely on the definition for their operation. The thesis then moved onto an analysis of the preventive terrorism offences. The offences were split into four groups: preparatory, encouragement, possession and associative offences. While each class of offence has its own particular features, the analysis revealed several problematic characteristics common to all. All of the preventive terrorism offences are drafted in unclear and expansive terms, offending rule of law standards such as maximum certainty of definition and fair labelling, thus failing to provide a sufficient guide to conduct. Many of them fail to specify an intention requirement, allowing for them to be committed recklessly. Several of the offences shift the burden of proof onto the accused, violating due process protections that are usually provided as a reason to favour prosecution. Due to the remoteness of the offences from an ultimate terrorist harm, it is difficult to identify the particular wrong that is targeted. The result of these deficiencies is that the preventive terrorism offences have the capacity to criminalise non-wrongful conduct. If the criminal law is to be valued as a censoring institution that condemns and punishes wrongful conduct, offences that can extend to non-

wrongful conduct diminish the moral legitimacy of the law by distorting its boundaries.

The thesis concluded by examining the relationship between the prosecution of preventive terrorism offences and the implementation of various 'soft' counter-terrorism strategies under the government's *Prevent* strategy, which is based on winning hearts and minds and preventing radicalisation. It was argued that the breadth of the preventive terrorism offences means that they occupy the same operational space as measures under the *Prevent* strategy. This creates a real tension between the so-called 'hard' and 'soft' strategies, and negatively affects the ability of *Prevent* to operate. It was argued that this overlap in approaches could be counter-productive to the goal of preventing terrorism.

The preventive terrorism offences have been defended as creating the necessary operational space to prevent a terrorist atrocity – what David Anderson, the Independent Reviewer of Terrorism Legislation, has called 'defending further up the field'. However, the result is that these broad offences occupy the same operational space as work done under *Prevent*. The result of this overlap and overextension of the criminal law is counter-productive to alternative softer and possibly more effective means of countering terrorism. Taking into account the overlap in operation and the similar problems raised under both the *Prevent* and *Pursue* limbs of CONTEST, it is difficult to sustain the argument that these are distinct

counter-terrorism approaches. *Prevent* becomes *Pursue*, *Pursue* becomes *Prevent*, and again one is left with the conclusion that the preventive terrorism offences are about pursuing a preventive agenda focused on enhanced policing and investigation rather than the condemnation and punishment of harmful and culpable wrongdoing.

It is often argued that prosecution is the preferred way of dealing with terrorists as it avoids the problems associated with other preventive measures that have been introduced – the so-called ‘priority of prosecution’ approach. The merits of prosecution are clear – defendants have the benefit of due process rights and guarantees, guilt must be proved beyond a reasonable doubt, punishment must (at least in principle) be proportionate to the offence. Where prosecutions are based on legitimately enacted offences that do not extend the reach of the law unjustifiably, they should be considered preferable to executive or administrative procedures due to the procedural protections and requirements of proportionality. However, as has been demonstrated, priority of prosecution in the context of the preventive terrorism offences comes at a cost. In order to give a veneer of moral legitimacy to counter-terrorism measures by bringing them within the criminal law, various principles, values and standards have been stretched or sacrificed, resulting in an unpalatable distortion of the criminal law. The persuasiveness of the priority of prosecution argument diminishes when it is necessary to sacrifice the very safeguards that are advanced as reasons for favouring prosecution.

Based on a critical analysis of the offences extending inchoate liability, this thesis has established that these are not justifiable instances of criminalisation. It has been demonstrated that without substantial revision, the preventive terrorism offences cannot be conceived of as punishing culpable wrongdoing based on an offender's desert. Rather, they appear to be an adjunct to a wider counter-terrorism strategy based on an unwarranted extension of the powers of policing and prosecutorial and judicial discretion, leaving the limits and contours of the offences, and thus this area of the criminal law, to be defined by the courts.

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