THE 2005 TERRORISM CONVENTION: A FLEXIBLE STEP TOO FAR?

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"And what do the people say"? asked Syme.
"It's quite simple what they say", answered his guide.
"They say we are a lot of jolly gentlemen
who pretend they are terrorists".
*"It seems to me a very clever idea", said Syme.***

INTRODUCTION

On 16 May 2005, the Council of Europe opened a new Convention on the Prevention of Terrorism[1] for signature by Council of Europe member states, the European Community, and other participating states.[2] The intent behind this recent initiative was to up-date existing Council of Europe instruments for the prevention of international terrorism in the post-9/11 legal environment.[3]

The 2005 Terrorism Convention does not define any new terrorist offences beyond those contained in the conventions listed in its Appendix.[4] Instead, the Convention seeks to fill what had been identified by the Council of Europe's Committee of Experts on Terrorism (CODEXTER) as a gap in coverage,[5] and thus seeks to criminalise certain behaviour that holds the potential to lead to the commission of acts of terrorism. Three new offences deemed "predicate" to the existing treaty offences incorporated by the Appendix are created: public provocation to commit a terrorist offence (article 5), recruitment for terrorism (article 6), and training for terrorism (article 9). Accessory (ancillary) offences (article 9) criminalise "complicity" (such as aiding and abetting) under articles 5–7, and "attempt to commit an offence" under articles 6 and 7. Article 8 provides that no "terrorist" offence, as such, need actually to occur.

The Explanatory Report highlights concern in the Council of Europe to concentrate on closer co-ordination between member and other participating states in their shared domestic policies and laws.[6] Indeed, given "the special climate of mutual confidence

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** Apologies to GK Chesterton, *The Man Who Was Thursday* (Penguin Books, 1986 with Introduction by K Amis; first published 1908), at 54.

[1] CETS No 196. The Convention was adopted by the Committee of Ministers of the Council of Europe at its 925th meeting. See generally the Explanatory Report to the Terrorism Convention (hereinafter "Explanatory Report"), accessed at http://conventions.coe.int/Treaty/EN/Report/Html/196 htm.

[2] Entry into force 1 June 2007, which required six ratifications, including four Council of Europe member states, art 23(3). Article 24 of the Convention provides for accession by states other than those participating in its elaboration. Article 31 provides for denunciation. Of five non-member participating states (Canada, the Holy See, Japan, Mexico, and the United States), none, as of 21 May 2007, has signed the Convention.

[3] *Eg*, the 1977 European Convention on the Suppression of Terrorism, ETS No 90, and its Amending Protocol, ETS No 190.

[4] Ten UN and international conventions are listed, ranging from the 1970 Hague Convention on the Unlawful Seizure of Aircraft, to the 1999 New York Convention for the Suppression of the Financing of Terrorism. Article 28 of the Convention provides for modification of this list.

[5] The Committee of Ministers had tasked CODEXTER to "elaborate proposals for one or more instruments (. . .) with specific scope dealing with existing *lacunae* in international law or action on the fight against terrorism". Explanatory Report, para 13.

[6] Greater co-operation on prevention and judicial matters is also contemplated: Explanatory Report, paras 26 and 27.

among like-minded states"[7] deemed already to exist, it was hoped the criminalisation of certain kinds of speech or behaviour would be reasonably straight-forward. Nevertheless, a measure of substantive difficulty remains – even among "like-minded states" – due to an obvious potential for conflict: the criminalisation of recruitment or training might appear straight-forward enough, but new offences relating to speech or behaviour which could be construed as "glorifying" terrorism could encroach on existing human rights standards. In particular, the new article 5 offence of "public provocation to commit a terrorist offence" raises concern in that it seeks to criminalise, *inter alia*, the "distribution, or otherwise making available, of a message to the public", and thus directly targets public rights of access to information and freedom of expression.

In that the post-9/11 legal environment has been characterised by what has been termed "an increasingly 'militant democracy'",[8] it is the purpose of this discussion to explore some implications of article 5. The text of and commentary to article 5 of the 2005 Terrorism Convention are first outlined, and its prohibitory parameters identified. Of particular interest, an in-built differentiation in status between those individuals who may be charged with the relevant offences raises immediate concerns regarding any neutrality in approach to the problem of provocation to terrorist violence. The requirement of intent is similarly circumscribed by flexibly applied contexts of identity, so enforcement of these new offences could well import the seeds of minority discrimination for purposes of a fair trial, as is highlighted. Finally, after a brief look at the British implementation of article 5, it is concluded that the initiative, while no doubt well-intentioned, may well provide another worrying opportunity for Europe to seek to impose its standards on a wider basis.

EXEMPTIONS AND INTENT

History is replete with the battle lines carved between sought-for freedoms and prohibited behaviour. The potential for the new predicate offences to clash with rights associated with speech is recognised in the Explanatory Report to the Convention, as follows:

> This is a crucial aspect of the Convention, given that it deals with issues which are on the border between the legitimate exercise of freedoms, such as freedom of expression, association or religion, and criminal behaviour.[9]

Developments in individual human rights can come at the cost of arbitrarily-held power, yet the domestic responsibility for human rights implementation remains with state governments, and thus provides an extra dimension to frameworks of state legitimacy. Assuming for the sake of argument that the essence of human rights is their equal application to all, it remains the case that the content, import, and desirability of individual rights can only be grasped through access to information, *eg*, by means of education, association, religion, *etc.* In turn, legitimate law – and, in view of the consequences of conviction, criminal law in particular – should be characterised by its neutral and transparent application. In that individuals in possession of equal rights

[7] Explanatory Report, para 39.

[8] C Walker, "The Treatment of Foreign Terror Suspects" [2007] 70(3) MLR 427, citing A Sajo (ed), *Militant Democracy* (Eleven International Publishing, 2004).

[9] Explanatory Report, para 30. See also para 226 (as of 16 May 2005, one Council of Europe member state had yet to ratify the European Convention on Human Rights).

nonetheless should remain alert to the political contexts in which laws are interpreted and applied, it is of preliminary concern that article 5 seemingly permits a high level of political control over the criminal labelling process. Article 5 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.
> 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. [Emphasis added.]

Article 5(1) seeks to make criminal behaviour which is deemed officially to create a *risk* that a terrorist offence might be committed. For the criminalisation of "public provocation" in article 5, expressions of support for terrorist offences and/or groups may be direct or indirect, as well as *ex ante* or *ex poste* to the possibility of a terrorist offence.[10] Also required is a physical act: the dissemination of information to the public. An attempt to create a potential risk of terrorist violence is not contemplated, as article 9(2) (attempt) does not apply to article 5. The Explanatory Report simply notes that it was felt to be "conceptually difficult".[11] Article 5(2) then confines the prohibited risk-creation specifically to unlawful and intentional behaviour, as is now discussed.

The Issue of "Status"

The Convention is concerned with the status of an actor. One "common aspect" of articles 5 – 7 of the Convention is that government action, *inter alia*, is exempt. As noted in the Explanatory Memorandum,

> 82. The expression "unlawfully" derives its meaning from the context in which it is used. Thus, without restricting how Parties may implement the concept in their domestic law, it may refer to conduct undertaken without authority (whether legislative, executive, administrative, judicial, contractual or consensual) or conduct that is otherwise not covered by established legal defences or relevant principles under domestic law.
> 83. The Convention, therefore, leaves unaffected conduct undertaken pursuant to lawful government authority.[12]

In other words, the official power to identify prohibited "expressions of support for terrorist offences" permits the exemption from prosecution of those who wield that very power. Consequently, what is said seems less the issue than who says what, when, where, and to whom. Whether or not this particular approach encapsulates and incorporates the immunity traditionally afforded by the act of state doctrine,[13] the fact that the politically dominant class can automatically exempt itself and its agents from prosecution illustrates a potential for double standards when the time arrives to delimit transparently any justifiable frameworks of the state's monopoly on the use of force.

[10] See Explanatory Report, para 87.

[11] Explanatory Report, para 133.

[12] Contrast para 282: "this Convention does not condone or make lawful otherwise unlawful acts, or preclude prosecution under other laws" in the context of the armed forces.

[13] By which a differentiation is allowed between the conduct required of ordinary citizens, and that of state officials or other representatives. See, *eg*, the United Nations Convention on Jurisdictional Immunities of States and Their Property, Annex to UNGA Resolution 59/38 (16 December 2004); G Hafner, *et al* (eds), *State Practice Regarding State Immunities* (Martinus Nijhoff, 2006).

The automatic exemption of government action thus impacts on legitimacy. Although purporting to be a question of context,[14] the prohibited behaviour is instead preliminarily determined on the basis of personal status. A presumption that Council of Europe members and other participating states are stable and law-abiding enough to be termed "like-minded" is then stretched to incorporate "non-provoking", which further imposes on an accused a heavy burden of proof indeed when the time arrives to fight prosecution or extradition. In turn, a second level of flexibility exists for co-operating states which choose to approach their respective security policies in modes of solidarity: individuals who are deemed to express support for terrorism across state borders can be treated more systematically through seemingly similar contexts.[15]

Although it smacks somewhat of trite relativism to state that the generalised official rhetoric of "like-minded states" on issues such as terrorism and national security can obscure equally viable language regarding "rights" entitlements, once the un-/lawfulness of a statement or other dissemination of information is made a function of personal or social identity, that statement can more readily be approached in governmental language employed to describe measures necessary for the maintenance of law and order.[16] The use of official techniques to isolate and segregate dissenters is then but a step away, as the silencing of competing claims to legitimacy is systematised and hence, normalised.[17] However, if civil discord erupts, or is otherwise exacerbated, national cohesion and integration are harmed.

Uncertainty in effect is also to be anticipated, as any clear distinctions between lawful authority and unlawful behaviour can be difficult to trace. The grey area growing within the economics of Western security policies provides a case in point, as many core functions, including policing and imprisonment, are contracted-out to third parties.[18] Frequently sourced in private rather than public law, such corporate arrangements find their putative rationale in market models of accountability, thereby creating a legal vacuum in which "deniability" can thrive. As for the liability of legal entities in general,[19] the Committee of Ministers of the Council of Europe made recommendations as early as 1988.[20] In Recommendation No R (88) 18, Appendix, paragraph 8, the following is noted:

> When determining what sanctions or measures to apply in a given case, in particular those of a pecuniary nature, account should be taken of the *economic benefit* the enterprise derived from its illegal activities, to be assessed, where necessary, by estimation. [Emphasis added.]

[14] Explanatory Report, para 82.

[15] *Eg*, of (1) binary branding (good/evil, right/wrong), or (2) coercive, differential labelling (how the *provocateur* is to be characterised). JG Merquior, *Foucault* (Fontana Press, 1985), at 92, links such terms to Foucault's attributes of "carceral society". See also H Stewart, "Protection pips US production", *Sunday Observer, Business*, 29 April 2007, at 2 (over 20 *per cent* of workforce employed in "garrison" economy).

[16] For a similar conclusion in the context of English criminal law, see C Harding, "The Offence of Belonging: Capturing Participation in Organised Crime" [2005] Crim LR 690, at 698.

[17] Chomsky terms this "the totalitarian discipline deemed appropriate with the (anti-terrorist) propaganda system". N Chomsky, *Pirates and Emperors* (Black Rose Books, 1991), at 86. Of interest, see also V Dodd and R Norton-Taylor, "Al-Qaida plan to infiltrate MI5 revealed", *The Guardian*, 7 April 2006, at 1 (suspension of state benefits to households linked to suspected terrorists).

[18] For a discussion in the context of armed conflict, see C Walker and D Whyte, "Contracting Out War? Private Military Companies, Law and Regulation in the United Kingdom" [2005] 54 ICLQ 651.

[19] Defined as "corporations, associations and similar legal persons", Explanatory Report, para 135.

[20] Recommendation No R (88) 18, and Appendix, of the Committee of Ministers to Member States Concerning Liability of Enterprises Having Legal Personality for Offences Committed in the Exercise of Their Activities (adopted 20 October 1988, 420th meeting of the Ministers' Deputies).

The 2005 Terrorism Convention permits the criminalisation of legal entities in Article 10. The purpose of article 10 is to permit the imposition of liability "for the criminal actions undertaken for the *benefit* of that legal person",[21] as follows:

1. Each party shall adopt such measures as may be necessary, in accordance with its legal principles, to establish the liability of legal entities for participation in the offences set forth in Articles 5 to 7 and 9 of this Convention.
2. Subject to the legal principles of the party, the liability of legal entities may be criminal, civil or administrative.
3. Such liability shall be without prejudice to the criminal liability of the natural persons who have committed the offences.

Therefore, to pose one example, a strategy of provocation by "the distribution, or otherwise making available, of a message to the public", as made (conditionally) criminal by article 5 of the Convention, could be pursued by a journalist, a private prison employee, or a law enforcement officer. In accordance with the status bias of the Convention, each actor would be capable of lawful differentiation, even though each could, by so acting, provide benefit (not merely "economic") to the organisation for which each worked. The journalist could face prosecution, the prison employee might; the case of the law enforcement officer is even less clear.

There is thus an obvious potential for article 5 on its face to "chill" journalistic coverage as easily as extremist commentary. Accordingly, the Committee of Ministers of the Council of Europe has chosen to remind governments and members of the press of their reciprocal responsibilities. On 2 March 2005, at the 917th meeting of the Ministers' Deputies, it issued its "Declaration on freedom of expression and information in the media in the context of the fight against terrorism".[22] This Declaration contains two lists: one "calls on" the member state public authorities, *inter alia*, not to curtail or obstruct media professionals "unnecessarily" when reporting on terrorist matters; the other "invites" the media and journalists to consider various "suggestions", such as a responsibility not to contribute to the aims of violent groups, and the duty not to self-censor if to do so would deprive the public of necessary information.[23] The aims of both lists are equally laudable.

The Issue of Intent

The mental element, or *mens rea*, required to secure a conviction under article 5 is that of "intent". As proof of intent varies from country to country in accordance with constitutional arrangements and local tradition, the Explanatory Report for the Convention notes simply that "[t]he drafters of the Convention agreed that the exact meaning of 'intentionally' should be left to interpretation under national law".[24] However, by retaining such flexibility regarding domestic law standards for the requirement of *mens rea*, the Council of Europe has made assessments of the appropriate contexts for prosecution even more problematic, uncertain, and open to abuse. While mutuality of state interest in the suppression of international terrorism is of course necessary before assistance and co-operation arrangements can be made workable, to leave the mental element of "provocation" to individual state discretion

[21] Explanatory Report, para 135 [emphasis added].

[22] Accessed at http://wcd.coe.int/Treaty/EN/.

[23] An example of this balance is provided by editorial decisions in September and October 2005 (not) to publish the now-infamous "Danish cartoons". See, *eg*, L Harding, "How one of the biggest rows of modern times helped Danish exports to prosper", *The Guardian*, 30 September 2006, at 24 (global protests sparked in which at least 139 people were killed).

[24] Explanatory Report, para 85.

undercuts the transparency of that mutuality; any remotely politicised aspect of the processes of characterisation and identification is potentially left to reflect the dictates of domestic culture and the power relations within it.

Moreover, the notion that liability should fall only on persons having sufficient awareness of the possible consequences of their actions is fairly uncontroversial, so it is somewhat surprising that both "knowledge and intent" are not required by article 5.[25] The cognitive conditions for criminal responsibility become especially crucial in the interpretation of "context", given that a terrorist incident need not occur (article 8), and that "the distribution, or otherwise making available, of a message to the public" must merely "cause a danger" (article 5). To require both elements would also seem useful for purposes of a fair trial. As noted by Werle and Jessberger, writing of the "highest" level of international criminal law, that of "universal" jurisdiction,

> [T]he intent requirement relates to conduct and consequences only, while the knowledge requirement relates to circumstances and consequences only. Therefore, the intent of the perpetrator need not cover the circumstances of the crime, while his or her knowledge need not cover the criminal conduct. The only material element which has to be covered by both intent and knowledge is the consequence of a crime.[26]

Nonetheless, such a high standard of proof does not apply to terrorist crimes, which remain creatures of treaty law and, generally speaking, UN Security Council action.[27] There is no over-arching international definition of, or prohibitory convention for, "terrorism", as such.[28] Instead, terrorist crimes are more indirectly suppressed internationally by means of a piecemeal approach to bi- and multi-lateral crime-control treaties, and through domestic penal laws designed to suppress the harmful behaviour of non-state actors, which typically have only actual or potential trans-boundary effects.[29] This type of international prohibitory regime is not intended to create "universal" obligations, but rather, to minimise or eliminate the potential havens from which such crimes can be committed and to which criminals can flee to escape prosecution and punishment.[30]

Therefore, compliance with the 2005 Terrorism Convention, although a matter of inter-state treaty obligation for those states which choose to adopt it, remains a matter for domestic state implementation, interpretation and effect. As crime-control conventions at the trans-national level require an incriminating act only to have specific consequences, the addition of a standardised "knowledge" element would of course compound any difficulties in implementation. In the present example of the many behavioural elements specifically proscribed by article 5 when in combination, the intent requirement of "creating a risk" is especially circumscribed, as it can only with difficulty be made to extend objectively both to conduct *and* terroristic consequences, beyond the merely speculative. Also to require proof of knowledge of "risk creation" would make prosecution inordinately difficult.

[25] See, *eg*, G Werle and F Jessberger, "'Unless Otherwise Provided': Article 30 of the ICC Statute and the Mental Element of Crimes under International Criminal Law" [2005] 3 J Int'l Cr 35, at 36.

[26] *Ibid*, at 38. There is no jurisdiction, *per se*, over crimes of international terrorism under the Rome Statute of the International Criminal Court, article 5, UN Doc A/CONF 183/9 (17 July 1998), reprinted [1998] 37 ILM 1002. However, the Rome Statute perhaps indicates future standards.

[27] See, *eg*, N Boister, "Transnational Criminal Law?" [2003] 14 EJIL 953. *Cf* the Preamble to UNSC Resolution 1377 (12 November 2001), S/Res/1377 (2001): "the financing, planning and preparation of as well as any other form of support for acts of international terrorism ... are ... contrary to the purposes and principles of the United Nations".

[28] See, *eg*, "Measures to eliminate international terrorism", Ongoing summaries of the work of the 6th Committee pursuant to UNGA Resolution 51/210 (17 December 1996), accessed at www.un.org'law'cod/sixth/57-60/summary.htm.

[29] *Eg*, see above, n 4.

[30] N Boister, *loc cit*, n 27, at 955.

Assuming knowledge or awareness of the prohibited conduct is not provided for by the Convention, it is regrettable nonetheless that proof of a cognitive condition alongside, or even within, the voluntative one is not also required. As one can surmise that the only material element covered by intent is that of "conduct-within-context", *ie*, without lawful authority, there must then be gathered merely the narrow proof of intent to disseminate information in support of terrorism; any concrete terroristic consequences of such dissemination are irrelevant. It could also well be asked precisely how, when the time arrives for individual states to assess the evidence of the requisite offending minds, terrorist crime is actually deterred. To require so little from official assessments of "risk creation" instead seems only to open the door to potential abuse, to lack legitimating transparency, to offer few guarantees as to consistency in effect, and to risk compounding the potential for status bias in Convention differentiation.

ENFORCEMENT OF THE SYSTEM

The Explanatory Report makes it quite clear that the criminalisation of "incitement to terrorism", or "*apologie du terrorisme*",[31] is intended to fill a gap which CODEXTER found in member and observer state legislation and case-law.[32] As such, the concept of "public provocation" is central to the drafting efforts, as it implicates measurable conduct. In thus targeting certain positive acts of communication by private and/or corporate individuals, within the context of a projected commonality in purpose among "like-minded states" for a crime-prevention approach to behaviour and speech, the essence of the 2005 Terrorism Convention seems to permit the strengthening of institutional orthodoxies such as could lead to the alienation of entire communities, as is now discussed.

An Assumption of Commonality?

Koskenniemi notes that "international law is a European tradition. Nevertheless, like many other European traditions, it imagines itself as universal".[33] Intriguingly, he adds, "the appeal to common interest often reflects the speaker's wish to realise his special interest without having to fight".[34] With specific regard to the Convention, the relevant "speaker" is quickly identified: the Council of Europe. However, if in fact imagining European needs and values to be "universal", might it also be further postulated that the Council's attempt to criminalise certain aspects of public behaviour carries some obvious dangers of "over-reach" such that the Convention could constitute "a hegemonic manoeuvre, an attempt by Europe to regain some control in a novel configuration of forces?"[35] Phrased another way, is there an expectation that this European model for controlling behaviour could, or indeed, should, be applied more widely?

If so, the resulting framework of analysis is revealing. First, the Convention excludes the actions of government. Of course, governments can and do exempt themselves from

[31] Curiously, not equivalent terms. *Cf* the Preamble to UNSC Resolution 1624 (14 September 2005), S/Res/1624 (2005), relating to "the justification or glorification (*apologie*) of terrorist acts that may incite further terrorist acts". Article 1 of Res 1624 refers only to "incitement".

[32] Explanatory Report, para 17.

[33] M Koskenniemi, "Symposium: International Law in Europe: Between Tradition and Renewal" [2005] EJIL 113. Contrast Mahatma Gandhi's opinion of western civilisation: "it would be a good idea", quoted in Editorial Comment, "Common sense and sensibilities: Islam and free speech", *The Guardian*, 30 September 2006, at 32.

[34] M Koskenniemi, *loc cit*, n 33, at 116.

[35] *Ibid*, at 118.

prosecution,[36] but one fundamental assumption then appears to be that member and observer state government personnel are not capable of "intentional" (albeit consequence-less) provocation of terrorist offences and/or groups, or if so capable, such action can otherwise be justified for reasons of state.[37] Secondly, as the speaker's (or member state's) "official" activities are expressly exempt, only private individuals or groups may be pursued. The resulting hierarchy of potential culpability is implicitly non-conducive to transparency in jurisdictional approach, and any question of deterrence is immediately transformed from one where the ratifying state asserts its jurisdiction over prohibited conduct, to one where, after the intersection of identity and activity triggers the relevant status, prosecutorial proceedings may, or may not be commenced.

Accordingly, any decision to prosecute an article 5 offence will reflect official policy.[38] Safeguards are built into the Convention, certainly, but prosecutorial flexibilities come into play at the national level. For example, the "political offence exception"[39] to the extradition of suspected terrorist provocateurs is excluded by article 20(1),[40] but article 20(2) permits states not to apply paragraph (1).[41] If extradition is denied in application of article 20(2), there remains a duty to prosecute pursuant to paragraph (7), "unless the requesting Party and the requested Party agree otherwise". Article 21 provides additional means to refuse extradition should it appear that an alleged perpetrator could, if extradited, be subjected to torture, inhuman or degrading treatment or punishment, or the death penalty,[42] or where extradition has been requested in order to prosecute a person for political or other impermissible purposes. Article 21 is silent on any duty to prosecute.

Given Council of Europe concerns when drafting article 5 of the Convention regarding domestic state flexibility in the context of freedom of expression, the Explanatory Report in paragraphs 76 – 105 provides a lengthy discussion within which the following generic demarcation appears:

> The Committee therefore focused on the recruitment of terrorists and the creation of new terrorist groups; the instigation of ethnic and religious tensions which can provide a basis for terrorism; the dissemination of "hate speech" and the promotion of ideologies favourable to terrorism, while paying particular attention to the case-law of the European Court of Human Rights concerning the application of Article 10(2) of the ECHR, and to

[36] See, *eg*, J Revill and P Kelbie, "Lords to shame MPs over secrecy bill", *The Observer*, 20 May 2007, at 6 (bill to exempt public scrutiny of MP expenses); R Norton-Taylor, "Watchdog urges end to ban on MP phone taps", *The Guardian*, 20 February 2007, at 4; N Chomsky, *op cit*, n 17, at 89, who stresses the limits of a doctrinal system in which definitions of "terrorism" and "terrorist" are restricted to a certain class of criminal acts and actors.

[37] *Cf* V Dodd and R Norton-Taylor, *loc cit*, n 17. Contrast S Laville, "MI5 and MoD battle to keep Ulster secrets", *The Guardian*, 10 April 2007, at 1 (security force collusion with loyalist paramilitary figures in Northern Ireland revealed), and in similar vein, Comment and Debate, D Campbell, "This exposes Britain not as peacemaker, but perpetrator", *ibid*, 23 January 2007, at 26.

[38] For a similar argument, albeit within a different context, see Notes, Anon., "Constructing the State Extraterritorially" [1990] Harv L Rev 1273, at 1304.

[39] Speaking generally, this exception means politically-motivated acts of violence are deemed non-extraditable; a custodial state may nonetheless retain a duty to prosecute. However, see C Walker, *loc cit*, n 8, at 438 n 84, citing the Joint Committee on Human Rights, *Counter-Terrorism Policy and Human Rights: Terrorism Bill and related matters* (2005 – 06 HL75, HC 561), para. 176 ("there are today no circumstances in the world in which violence can be justified as a means of political change").

[40] Article 20(1) states in pertinent part, as follows: "None of the offences referred to in Articles 5 to 7 and 9 . . . shall be regarded, for the purposes of extradition or mutual legal assistance, as a political offence, an offence connected with a political offence, or as an offence inspired by political motives. Accordingly, a request for extradition or for mutual legal assistance based on such an offence may not be refused on [those] sole ground[s]".

[41] Denmark has made such a reservation in relation to art 9, valid from 1 August 2007. "List of declarations and reservations", accessed at http://conventions.coe.int/Treaty/Commun/ListeDeclarations.asp? A reservation is valid for three years, renewable, art 20(5). See also CH Pyle, "The Political Offense Exception" in MC Bassiouni (ed), *Legal Responses to International Terrorism – U.S. Procedural Aspects* (Martinus Nijhoff, 1988), at 181.

[42] *Cf* Committee of Ministers, *Guidelines on Forced Returns* (adopted 4 May 2005, 925th meeting of the Ministers' Deputies).

> the experience of states in the implementation of their national provisions on "*apologie du terrorisme*" and/or "incitement to terrorism" in order to carefully analyse the potential risk of a restriction of fundamental freedoms.[43]

The Council of Europe concedes that "[t]he provision [article 5] allows parties a certain amount of discretion with respect to the definition of the offence and its implementation",[44] and the discretion, or margin of appreciation allowed by article 10(2) ECHR similarly permits "like-minded state" flexibility over individual expression when policy appears to mandate a curtailment of speech. Article 10(2) of the ECHR permits the freedom of expression to be qualified by

> [S]uch formalities, conditions, restrictions or penalties as are prescribed by law and are *necessary* in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary. [Emphasis added.]

Obviously, individual speech which poses a danger to wider community interests has little place in a democratic society. It must be queried nonetheless whether the structure of the article 5 initiative against some communicators and not others is in fact a proportionate restriction on thought and conscience, expression, association and assembly in terms of public safety, public order or the protection of rights and freedoms of others, or instead, is simply too draconian a response, unlikely to address associated failings in intelligence-gathering, and risks creating a schism capable of destroying the commonality generated by the more positive aspects of globalisation between immigrant communities and the more indigenous populations.[45]

Some Benefits of Mutuality in Approach

Terrorist offences are traditionally the subject of international concern.[46] While state complicity in such offences taking such diverse forms as relatively open support for particular "humanitarian causes" poses different challenges than more surreptitious, "deniable" funding streams,[47] the centrality of flexibility in state decision-making in individual cases can frequently generate undesirable synergies. For example, the adoption by a state of a liberal approach to non-extradition can risk its reputation, as it could be seen to condone particular violent acts, an impression compounded by any subsequent "light-touch" custodial state prosecution undertaken in compliance with the maxim "*aut dedere, aut judicare*",[48] or in the alternative, and much more seriously, the offer of a safe haven to an alleged violent offender.

Even though variations in policy choice do cause distortions in transparency in approach to international crime, such variations permit sovereign states to signal issue-solidarity, and/or make seem more natural (or "national") those differences for which state borders stand. The geographical and/or cultural extension of jurisdiction collectively by "like-minded states" may further assist in reinforcing or restoring the

[43] Explanatory Report, para 88.

[44] Explanatory Report, para 98.

[45] For a similar argument made about governmental responses to the Irish "Troubles" of the 1970s, see D Bonner, "Responding to Crisis: Legislating Against Terrorism" [2006] 122 LQR 602.

[46] See, *eg*, the Preamble to The Convention for the Prevention and Punishment of Terrorism (16 November 1937), Vol VII Hudson, *International Legislation* No 499: "[b]eing desirous of making more effective the prevention and punishment of terrorism of an international character".

[47] See, *eg*, the list of terrorist incidents, wars, *coups* and revolutions between 1945 and 1988, in P Brogan, *World Conflicts* (Random House of Canada Ltd., 1989), at 555 – 583. See also N Chomsky, *op cit*, n 17.

[48] "Extradite or prosecute".

dialogue of a more localised, national interest, and facilitate the re-positioning of individuals within a more appropriate, policy-controlled juridical space. Such known operational variations mean however that a purportedly neutral jurisdictional discourse can carry the potential for any but neutral effects. S/he, in possession of her or his "civil equality", will then stand alone before laws which prohibit certain acts, yet, due to background status classifications or more insidious bias, may be afforded a justification in limited circumstances.

A quite separate challenge for modern foreign policy makers in the fight to contain terrorism is to reconcile the first function of diplomacy – communication among states – with the different realities of "standard-setting" and "standard-keeping" in the area of human rights, particularly as "it is in connection not with trade but with security that the card of national interest is most frequently played against human rights".[49] This implies that any universality in substantive approach to article 5 implementation and interpretation cannot be anticipated; the social and economic contexts of terrorism vary widely within "like-minded" Council of Europe member and participating states as different as the United Kingdom, the Russian Federation, and Turkey. Instead, any benefits to be derived from collective state action must reside in the "proportionate" limitation of speech permitted by article 5 flexibility, which can facilitate as easily as deter official displays of armed force to control municipal life.

Therefore, the exemption of "lawful" government action (however characterised) from prosecution under articles 5 – 7 and 9 of the 2005 Terrorism Convention does not quite re-assure. The close control over national security certainly so frequently deemed paramount in Western social order can also help germinate the seeds for elite reinforcement of many culturally insular or conservative aspects of national life. For example, to view various legally-regulated areas, such as foreign aid, immigration, education, and sport to name but a few, through the lens of colonial history, makes more readily apparent any lingering fragments of ethnic bias that may persist. Moreover, in the event of a declaration of a state of emergency due to terrorism or other reason, governments retain the power to curtail rights and to re-assert domestic control over individuals;[50] article 15 of the ECHR was drafted for this purpose.[51]

Debate about the causes of terrorism can thus become the first casualty of efforts to stem the occurrence of terrorism simply because much anti-terrorism legislation, including article 5 of the 2005 Terrorism Convention, stifles wider debate.[52] Moreover, once the definitions of "terrorism" and "terrorist" have been neatly confined by distinctions between "lawful" and "unlawful" acts and actors, and criminal liability attributed accordingly, the search for "causes" has been lost. Given the varying parameters of coercive power existing within different states, the law-making "speaker" within each will also mediate the interpretation of the law, whilst perhaps occasionally handing to law enforcement agencies the more visual role of "neutral" arbiter whenever that speaker feels it incumbent to pursue private and/or corporate individuals whose public speech "should" be proven (under domestic evidentiary rules) to carry an

[49] RJ Vincent, "Human Rights in Foreign Policy" in DM Hill (ed), *Human Rights and Foreign Policy: Principles and Practice* (MacMillan Press in association with the CIPS, 1989), 54, at 57.

[50] See, *eg*, D Bonner, *loc cit*, n 45. *Cf* RF Devlin, "Law's Centaurs: An Inquiry into the Nature and Relation of Law, State and Violence" [1989] Osgoode Hall LJ 219, at 237.

[51] Derogation must be "strictly required by the exigencies of the situation", and done in accordance with other international law obligations, ECHR, art 15(1). Article 15(2) does not permit derogation from arts 2 (non-war-related right to life), 3 (no torture, *etc.*), 4(1) (no slavery, etc.), and 7 (no *ex poste facto* criminal convictions).

[52] See, *eg*, "Guidance for higher education providers to help tackle violent extremism in the name of Islam on campuses", accessed at www.dfes.gov.uk/pns/pnattach/20060170/1.txt; Research Notes, "Teacher, scholar, spy: now academics need export licence to teach", *The Guardian, Education*, 24 October 2006, at 10; V Lowe, "'Clear and Present Danger': Responses to Terrorism" [2005] 54 ICLQ 185. *Cf* F Megret, "'War'? Legal Semantics and the Move to Violence" [2002] EJIL 361.

> [I]ntent [as domestically interpreted] to incite . . . [unlawful violence], where such conduct, . . ., causes a danger ["*elite*"-assessed] that one or more such offences may [but, need not] be committed.

If flexibility in approach to domestic law-and-order issues proves to be the key to the Convention's operational effectiveness, it will then be arguable that the Convention memorialises what would appear to be a tacit agreement among Council of Europe member and participating states to ignore each other's domestic excesses. Unless close scrutiny of human rights records cannot be so easily avoided, any "contextual" assault effected by article 5 of the Terrorism Convention on the, admittedly outer, acceptable perimeters of freedom of expression and association could thus effectively deliver to Convention signatories a further "golden" opportunity with which to project as "universal" another potential Western "hegemonic manoeuvre".[53]

IMPLEMENTATION BY THE UNITED KINGDOM

On 30 March 2006, the Terrorism Act 2006 received the Royal Assent.[54] It is to come into force "on such day as the Secretary of State may by order made by statutory instrument appoint".[55] One of the stated purposes of this Act is to implement the "distribution, or otherwise making available" of article 5 of the Terrorism Convention,[56] which is done in sections 1 (encouragement of terrorism), 2 (dissemination of terrorist publications), and 3 (application of sections 1 and 2 to internet activity, *etc*). As previously discussed, the 2005 Terrorist Convention is an international law instrument, so the United Kingdom retains flexibility as regards its domestic implementation. Treaty incorporation is a matter of international obligation, however, and if a statute is specifically intended to incorporate a treaty, the statute and treaty should be interpreted consistently.[57] As of the time of writing, the United Kingdom has not ratified the Convention, but the matter is under consideration.[58]

What is immediately noticeable about the British implementation of article 5 is a subtle alteration of both language and perspective. In section 1(1) of the Act, the phrases contained in Convention article 5 – "public provocation to commit a terrorist offence", "distribution, or otherwise making available, of a message", "intent to incite", and "causes a danger" – are re-configured as follows:

> 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. [Emphasis added.]

Section 1(2) makes it an offence to publish or to have had published a prohibited "statement", and either to intend to encourage or induce members of the public to

[53] M Koskeniemmi, *loc cit*, n 33, at 118, and 113, respectively.

[54] "An Act to make provision for and about offences relating to conduct carried out, or capable of being carried out, for purposes connected with terrorism; to amend enactments relating to terrorism; to amend the Intelligence Services Act 1994 and the Regulation of Investigatory Powers Act 2000; and for connected purposes" (2006 Ch 11).

[55] Terrorism Act 2006, s 39(2). This has since been done. The Terrorism Act 2006 (Commencement No 1 and No 2) Orders 2006, SI 2006/1013 (in force 13 April 2006), and SI/2006/1936 (in force 25 July 2006), respectively.

[56] Explanatory Notes, para 20, accessed at http://www.homeoffice.gov.uk. Paragraph 20 adds: "[t]his new offence supplements the existing common law offence of incitement to commit an offence".

[57] See, *eg*, the 1969 Vienna Convention on the Law of Treaties, art 18, 1158 UNTS 331.

[58] Emails 8 September 2006 and 7 June 2007, from the Home Office Direct Communications Unit, at public.enquiries@homeoffice.gsi.gov.uk. See also Joint Committee on Human Rights, *First Report: the Council of Europe Convention on the Prevention of Terrorism*, (22 January 2007, HL26/HC247) accessed at http:www.publications.parliament.uk/pa/jt200607/jtselect/jtrights/26/2602.htm.

commit an act of terrorism, or to be reckless as to whether a publication has such an effect.[59] References to the "public"

> (a) are references to the public of any part of the United Kingdom or of a country or territory outside the United Kingdom, or any section of the public; and
> (b) ... also include references to a meeting or other group of persons which is open to the public (whether unconditionally or on the making of a payment or the satisfaction of other conditions).[60]

In respect of this new offence, "direct encouragement" presumably would be clear enough. "Statement" is defined in section 20(6) as referring to "a communication of any description, including a communication without words consisting of sounds or images or both".[61] How a statement is to be determined depends on its contents as a whole, and the "circumstances and manner of its publication".[62] As for "indirect" statements, section 1(3) provides the following guidance:

> For the purposes of this section, the statements that are *likely* to be understood by members of the public as indirectly encouraging the commission or preparation of acts of terrorism or Convention offences include *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. [Emphasis added.]

Section 20(2) states that "'glorification' includes any form of praise or celebration, and cognate expressions are to be construed accordingly".

The shift in emphasis from a specific standard (causes a danger, as determined officially) to a more diffuse one (reasonable inference by members of the public) is perhaps not as striking as at first appears; in the final analysis, both will be judicially interpreted. Moreover, the section 1(2) requirement of individual intent *or* recklessness somewhat mitigates against the need to show a credulous audience. In other words, as section 1(1) appears to focus primarily on audience "effect", there must only be some measurable indication that members of the public have paid attention long enough reasonably to infer that what they have seen, heard or read could be a prohibited statement. Assuming some measurable degree of audience receptivity, section 1(2) then requires proof either of individual intent or of recklessness as to the likely effect on the public of the communication.

The equal attention paid to the intentional or reckless communication potential of a prohibited statement is of course explicable on the basis of the British adversarial, common law tradition involving three parties in a courtroom (judge, prosecution, defence). The Convention emphasis on official assessments of risk creation purportedly depends rather more on the "prosecutorial" and confessional approach (prosecuting magistrate, defence) favoured by many Council of Europe member states. However, section 1 does not sit entirely compatibly alongside article 10 ECHR in that the relative

[59] An earlier version required an offender to "know or believe, or have reasonable grounds for believing". Annex to Letter, 6 October 2005, from the then Home Secretary, Charles Clarke, to Parliamentary party opposition leaders, accessed at http://www.homeoffice.gov.uk.

[60] Terrorism Act 2006, s 20(3).

[61] This definition presumably includes facial and/or hand expressions, as the Explanatory Notes, para 95, refer to "a communication of any description", for example, "images such as videos".

[62] Terrorism Act 2006, section 1(4).

value of political speech is not made a mitigating factor.[63] Indeed, section 17 ("commission of offences abroad") implies that the nature of the regime being attacked is irrelevant. This alone indicates a wide prosecutorial discretion,[64] and stands in contrast to the long history of support afforded by the United Nations for post-colonial rights of national self-determination.[65]

The British approach to article 5 of the Convention might further permit a flexibility that may well prove in fact to interfere more with the freedoms of expression, information and of the press, as section 1 seemingly incorporates wider issues, such as those posed by potential or future risks.[66] For example, a particular individual not yet in command of the rhetorical or communicative ability to attract a relevant "public" may still be deemed to create a risk of "encouragement".[67] While article 5 of the Convention does address such a person, in that it is the individual "intent to incite" in disseminating a message to the public that creates the risk, it should be recalled that due to the conceptual difficulty of standardising the mental element article 9(2) (attempt) of the Terrorism Convention does not apply to article 5. Although section 5 of the Act ("preparation of terrorist acts") does not apply to the section 1 offence,[68] section 17(2)(a) and (g) of the Act does prohibit "attempt" if a suspect does anything outside the United Kingdom that would breach section 1,

> [S]o far as it is committed in relation to any statement, instruction or training in relation to which that section has effect by reason of its relevance to the commission, preparation or instigation of one or more Convention offences.

The British approach to implementation does however contain a visible (albeit opaque) "principle of certainty". When presented in draft form to parliament in September 2005, it was the stated intention of the then British Home Secretary to draw up a list of historical terrorist acts committed over the last twenty years which it would be a criminal offence to "glorify".[69] Immediately, free speech advocates, the academic community and others protested about the effect of such an "offence" on research, and/or on those groups which advocate the use of violence to achieve political change, as was the case with the ANC in its struggle against apartheid-era South Africa. The putative list was duly abandoned by the following October. Thus, although the requirement of intent or recklessness applies equally only to "unlawful" behaviour as originally delineated by article 5 of the Convention, a British emphasis on audience effect or receptivity may assist in narrowing prosecutorial discretion to a more concretely ascertainable level.

As for the other aspects of the article 5 prohibition of "provocation", sections 2 and 3 of the Terrorism Act 2006 concern, respectively, the dissemination of terrorist publications and the application of sections 1 and 2 to internet activity, etc. Curiously,

[63] See C Walker, *loc cit*, n 8, at 436. For a brief account of the lineage of "glorification" in British immigration law, see *ibid*, at 434 – 436. See also I Traynor, "EU crackdown to target employers of illegal migrants", *The Guardian*, 17 May 2007, p 24 (British opt-out on EU criminal justice regimes).

[64] However, "[t]he government has emphasised that account will be taken of art 10 in its application". C Walker, *loc cit*, n 8, at 436, citing the *Government Response to the Committee's Third Report of this Session: Counter-Terrorism Policy and Human Rights: Terrorism Bill and related matters* (2005 – 06 HL 114, HC 888) 15) at n. 75.

[65] See, *eg*, "Measures to eliminate international terrorism", above, n 28.

[66] Arguably, the earlier definition, above, n 59, would also have done so. See also Terrorism Convention 2005, Explanatory Report, para 103: "[t]he term 'to the public' makes it clear that private communications fall outside the scope of this provision".

[67] Or, attract a defence of merely "joking with friends". See, *eg*, V Dodd, "Terror accused admits joking about bombing Commons", *The Guardian*, 16 September 2006, at 6. Section 1(6) provides for a defence to prosecution under the section.

[68] Section 5 prohibits intentional preparatory acts such as possessing items that could be used for terrorism. Explanatory Notes, para 50.

[69] See, *eg*, S Jeffery, "Q & A: the glorification of terrorism", *Guardian Unlimited*, 15 February 2006, accessed at http://guardianunlimited.co.uk. See also C Walker, *loc cit*, n 8, at 436 n 71.

section 17 (offences committed abroad) does not apply to sections 2 or 3. Section 2 prohibits various acts of distribution, *eg*, selling, lending, transmitting, "providing a service to enable", *etc.*[70] Section 3, in applying sections 1 and 2 to internet activity, provides for a form of "take-down" notice (presumably of use to ISPs) as a means of self-protection from prosecution,[71] and thus complements the increasingly regulatory online environment, as deepened in recent years by amendments to "civil-side" copyright infringement required by domestic implementation of the 2001 "Infosoc" Directive of the European Community,[72] and extraordinary criminal offences provided by the Council of Europe's 2001 Convention on Cybercrime.[73]

British implementation of Convention article 5 *via* a standard which depends on measurable proof of audience "understanding" has yet to be proved either an inspired choice in the fight against terrorism, or a flexible semantic tool for use by the government when called upon to avoid hard questions regarding possible administrative failures or awkward policy choices. However, any question as to whether initiatives to deter terrorist acts should be focused exclusively on the civilian population, or conversely, should also incorporate strong mechanisms of oversight to ensure continuous governmental accountability, needs to be ever at the fore when the time arrives to prosecute individuals for such "predicate" offences, as carved from a value-laden, and non-absolute freedom of expression. To do otherwise risks an escalation in provocation by each side in the "war on terror", making it far more difficult to solve wider questions of human solidarity between immigrant and indigenous populations within Council of Europe member and participating states.

CONCLUSION

Rapid industrialisation throughout the 20th century shifted the social fabric of life from the local to broader concerns, *eg*, through economies of scale, greater social mobility, and mass consumption. In the wake of such changes, it has been fairly inevitable that opposing factions have arisen: those wishing to preserve the stability and controls of the past, and those pushing at the boundaries of such control. Equally, both sides to the "war on terror" utilise the same or similar technologies, yet do so from very different perspectives. One side – the state – holds centralised power and due authority, as enforced through its legal monopoly on the use of force; the other side – the "terroristic" – refines its powers of surprise, and its willingness to break rules.[74] While each side must rely on its most convenient, if not precisely "best", weapons, it is in the choice of weaponry that different battle strengths are revealed.

[70] See C Walker, *loc cit*, n 8, at 434, for an account of recent government efforts to use lists of extremist bookshops to deport non-UK citizens. See also A Barnett, "Bookshop's messages of racist hate", *The Observer*, 4 February 2007, at 5 (Birmingham bookshop raided by police).

[71] See, *eg*, V Dodd, "Extremists used internet to urge Muslims to follow Bin Laden and join holy war, court told", *The Guardian*, 24 April 2007, at 4 (trial of men seized on 21 October 2005).

[72] 1988 Copyright, Designs and Patents Act, Ch 48, ss 16, 18, 18A, 20, 22 – 24, and 26; EC Directive 2001/29, on the harmonisation of certain aspects of copyright and related rights in the information society, arts 2–4.

[73] CETS No 185, in force 1 July 2004, criminalises certain acts of copyright infringement. The Terrorism Convention 2005 Explanatory Report, para 93, states regarding article 5 that: "The current provision is construed on the basis of the Additional Protocol to the Cybercrime Convention concerning the criminalisation of acts of a racist and xenophobic nature committed through computer systems (ETS No 189, Article 3)". Of interest, see Editor's Week, Bell, "Are regulators too late for the internet party", *The Guardian*, 9 September 2006, at 42 (jurisdictional difficulties in regulating online content); I. Traynor, "Russia accused of unleashing cyberwar to disable Estonia", *The Guardian*, 17 May 2007, at 1.

[74] See, *eg*, E Chadwick, "It's war, Jim, but not as we know it: A 'reality-check' for international laws of war?" [2003] 39 *Crime, Law and Social Change* 233; E Colby, "How to Fight Savage Tribes" [1927] AJIL 279.

Change – particularly rapid change – can lead to entrenchments in position, and an intensifying repetition of familiar routine. States which react to non-state uses of violence with a blunt law-and-order approach may seek to control the many whilst maintaining the facades of democratic governance.[75] Such predictable methods as repressive legislation aimed at individual movement, association, behaviour and thought represent attempts only to contain the often uncontainable, yet serve to illustrate the many ways in which governments employ the bureaucratically-anachronistic language of 20th century chain-of-command mass production (*eg*, through rule-bound institutionalised hierarchies, *etc*), which, in turn, can reinforce a "bunker mentality" in "like-minded states" and alienated communities, alike. This stands in contrast to the modern terror network, which, being more fluid and often peer-to-peer, "gets things done" by relying on self-managing, committed local cells, organised and sophisticated online contacts and local agendas.

There are thus many dangers posed by international legislation such as the 2005 Terrorism Convention, not the least of which is that mutually-agreed flexibility can come at the cost of democratic accountability. As noted by Kureishi, "[i]f the home-grown British bomber is our headache, he is also our symptom".[76] Hierarchical, centralised control over the lives of individuals not only can indicate unequal civil "partnerships"; it can also push individuals into forming self-help communities which may or may not be deemed "trustworthy" by the authorities. Short-termist governments, ensconced in the "familiar, understood" which utilise the rhetoric of social exclusion, risk a herd-like, popular backlash against the globalised "other, within". To call upon the certainty, fixity and moral absolutes of some notional past is to do little other than to alienate certain sectors of society further, provoke renewed forms of discrimination, and awaken the xenophobia lurking within many criminal justice systems.

The 2005 Terrorism Convention is therefore an excellent example of international law with a decidedly European twist. In attempting to be a "one size fits all, with a heart", it expresses a concern for human rights and freedoms, and leaves states as disparate as Russia and Italy free to incorporate its terms "flexibly" in order to name and prosecute what each may choose to view as "terrorism". The in-built differentiation in status codified by the Convention, and the flexibility permitted as to the implementation and enforcement of its provisions, thus should put paid to any lingering doubts there may yet be regarding "whether" unlawful violence should be approached solely as "unauthorised" acts or actors, as a decision to prosecute now may so easily function as policy. Accordingly, if this initiative is indeed intended for more "universal" application, it can only be hoped that the term "universal" acquires a new meaning, as not only is it apparent that "bombs cannot break terror networks";[77] it is equally clear that the perpetrators of violence can wear many masks.

[75] Contrast C Walker, *loc cit*, n 8, p. 427, who notes that, after the London bombings of 7 July 2005, the government did not pass any "legislation within short order".

[76] H Kureishi, "Reaping the harvest of our self-disgust", *The Guardian*, 30 September 2006, at 30.

[77] S Zuboff, "Multinationals should listen to the street – not the City", *The Observer*, 10 September 2006, at 9.