

THE FLY IN THE CHINA SHOP

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BRITISH EMBASSY LECTURE ON INTERNATIONAL LAW THE HAGUE, 26 SEPTEMBER 2018

1. It is an honour to be here with you all, though if you are expecting an international lawyer comparable to Sir Christopher Greenwood, Sir Daniel Bethlehem or Professor Christine Chinkin, who gave the last three editions of this lecture, I am afraid I must prepare you for something more domestic, or Europe-focussed, in its scope.
2. My experience has amounted to 30 years practising law, in particular before the European Court of Justice and the European Court of Human Rights, and six years as the UK's Independent Reviewer of Terrorism Legislation¹ – a post replicated in Australia² and recommended just last week by the Commission on the Future of Policing in Ireland.³
3. The essence of the job, which has existed since the 1970s, is to take an independent person off the street, give them full security clearance, allow them to engage as widely as possible, and oblige them to report annually to Parliament on the operation of the counter-terrorism laws enacted in its name. The post has historically enjoyed a degree of influence both in Parliament and in the courts.⁴ By interacting with all sections of the public via media and social media, the Reviewer can also offer reassurance where it is needed, and raise the alarm if necessary.
4. For me, the job was life-changing. My somewhat sheltered existence as a lawyer preoccupied with state aids and harmonisation was expanded by frequent visits to Northern Ireland, to British Muslim communities and to other parts of the world, and enlivened by meetings with people ranging from terrorists and their sympathisers to those who are entrusted with identifying, disrupting and prosecuting them.
5. I am going to touch on three topics: the nature of the threat; what terrorists are trying to do; and where, in particular through the European courts, we are going right and wrong in formulating our domestic response.

¹ https://en.wikipedia.org/wiki/Independent_Reviewer_of_Terrorism_Legislation.

² https://en.wikipedia.org/wiki/Independent_National_Security_Legislation_Monitor

³ <http://www.policereform.ie/en/POLREF/Pages/PB1800007>

⁴ <https://www.daqc.co.uk/2017/12/06/shades-independent-review/>

THE THREAT

6. Terrorism differs from other crimes in that *appearance* counts for at least as much as *reality*. So I start by saying a word about *perceptions* of the threat.

Perceptions

7. The European Union conducted a Eurobarometer survey in March of this year on “*the two most important issues facing the EU at the moment.*” Terrorism was considered to be the second most important issue, some way behind immigration but well ahead of the economic situation, in third place. In Lithuania, Cyprus, Ireland, Croatia, Portugal, Spain and Romania terrorism was considered to be the *most* important issue facing the EU: and only in Italy and the Netherlands was it outside the top three.⁵
8. In the United States, the preoccupation with terrorism is more striking still. In a Pew research poll this January, citizens were asked to identify what they considered to be the top policy priorities for the President and Congress. In first place, identified by 73%, came responding to terrorism – a more popular answer than healthcare costs, reducing crime and race relations. And when asked for their *concerns* about the US Government’s anti-terrorism policies, those who thought that they did not go far enough to protect the country were far more numerous than those who thought they had gone too far in restricting civil liberties. Indeed that has been the case consistently since 9/11, save for the two years when Edward Snowden was most in the news.⁶
9. In a *global* poll conducted last summer in 18 countries across the world, ISIS was the most commonly-named “major threat to our country”. More people mentioned ISIS than global warming by margins of between 10 and 25% in the UK, France, Germany, Italy, Poland and the US. In Canada, Spain, Sweden and the Netherlands perceptions of the two were more evenly balanced. Other threats – cyber-attack, the condition of the global economy and Russian and Chinese influence – finished well down the list in all countries save those most immediately exposed, for example as neighbours of China.⁷

⁵<http://ec.europa.eu/commfrontoffice/publicopinion/index.cfm/Survey/getSurveyDetail/instruments/STANDARD/surveyKy/2180>, p29

⁶ <http://www.pewresearch.org/fact-tank/2018/09/11/defending-against-terrorism-has-remained-a-top-policy-priority-for-americans-since-9-11/>

⁷ <http://www.pewglobal.org/2017/08/01/globally-people-point-to-isis-and-climate-change-as-leading-security-threats/>

10. Nor is concern about terrorism directed solely to ISIS, or the jihadist ideology of which ISIS is the latest expression. Extreme right wing views now account for almost a third of referrals to Channel, the mentoring programme designed to stop Britons from being drawn into terrorism. That may do something to reassure Muslims that anti-terrorism policy is not only concerned with them. But it also reminds them that they are potential victims. And no such reminder is needed by the Jews, who are targeted by both types of extremist – and by some on the left as well. The overall *impression* is of a society facing a *huge*, some have even said *existential* threat from terrorism, which takes multiple forms and from which nobody is immune.

The reality

11. How do those perceptions stack up against the reality of terrorism in the west? The United Kingdom will do, I hope, as an example, since after France we have been as badly affected as any European country over the past few years.

12. Between March and September of last year, London and Manchester saw five attacks – four Islamist, one extreme right wing – in which men tried to use vehicles, knives and explosives to kill and maim members of the public. Tourists, revellers, worshippers, a police officer, even young girls attending a concert were all targeted. 36 innocent people were killed in the attacks, and almost 200 more were injured.

13. Those attacks were in many ways typical of those we have seen in western Europe over the past three or four years, as regards targets, modus operandi and profile of the attackers.

14. Nor can we forget the 7/7 attacks in London, which killed 52 innocent people and injured almost 800 more in the summer of 2005.

15. Those who suffered in these atrocities can never be reduced to mere numbers, any more than can the victims of other kinds of crime. But to be brutally frank about it, the numbers are not large.

- a. 89 innocent lives have been taken in the UK by Islamist terrorists in the 17 years since 9/11: around 5 a year on average.⁸ Until last year, the 7/7 bombings were the only example of a multiple-casualty jihadist plot.

⁸ <http://researchbriefings.files.parliament.uk/documents/CBP-7613/CBP-7613.pdf>

- b. To those must be added the small number of deaths still attributable to paramilitary violence in Northern Ireland,⁹ and three murders by right-wing extremists that were judged to have crossed the line from hate crime to terrorism.¹⁰
16. It is not to minimise that tally but to place it in perspective that I mention the 23 deaths in police custody last year, the 80 or 90 women killed annually by partners or former partners, and the more than 50 victims of stabbing and shooting, in London alone, in the first quarter of 2018. Everyone in Britain remembers the brutal killing by two Muslim converts of the off-duty soldier Lee Rigby, in 2013. But few could name even one of the other 186 people to be killed that year in England and Wales by a knife or bladed instrument.¹¹
17. And in America, an annual average of around 10 deaths from all forms of terrorism since 9/11¹² compares to an annual total of over 10,000 homicides by firearm.¹³ This is the country where, you will remember, sorting out terrorism is seen as a more important federal priority than reducing crime.
18. Of course killings motivated by personal hatred, gang loyalty or even racism are in a different legal category from terrorist attacks. Terrorism requires an ideological motivation and an intention to intimidate the public and coerce or at least influence the government. Terrorists strike symbols of our democracy, and of our state; and they spread fear by attacking randomly on religious, cultural and festive occasions. Such elements render their crimes more serious, a factor reflected in the sentences passed by the courts. But violent acts of terrorism are invariably offences under the ordinary criminal law; and the grief of the bereaved is the same, whatever the motivation of the attack.
19. It must also be acknowledged that terrorism might have claimed *more* lives than it has. Though 9/11 with its almost 3000 deaths has never been repeated, we still live in its shadow. Militant Salafism poses a generational challenge. Plots are being

⁹ https://www.psni.police.uk/globalassets/inside-the-psni/our-statistics/security-situation-statistics/2018/august/security-situation-statistics-to-august_2018.pdf

¹⁰ The murders of Mohammed Saleem (2013), Jo Cox MP (2016) and Makram Ali (2017).

¹¹ Figures for terrorist deaths in the UK and Europe since 1970 are set out here <https://www.telegraph.co.uk/news/0/many-people-killed-terrorist-attacks-uk/>. The peak years for terrorist deaths in the UK were 1972 (368 killed, mostly in Northern Ireland) and 1988 (372 killed, mostly when a PanAm flight was destroyed by a bomb over Scotland).

¹² http://www.start.umd.edu/pubs/START_AmericanTerrorismDeaths_FactSheet_Nov2017.pdf

¹³ <https://www.vox.com/policy-and-politics/2017/10/2/16399418/us-gun-violence-statistics-maps-charts>

uncovered with greater frequency than a few years ago, though many of them are extremely unsophisticated. The Commissioner of the Metropolitan Police in London was speaking on the basis of the evidence as he understood it when in December 2006 he described “the threat of another terrorist attempt” as “*a far graver threat in terms of civilians than either the Cold War or the Second World War*”.¹⁴ One can reject such apocalyptic fears while still believing, quite reasonably, that things will get worse. But in the general climate of apprehension, we should not lose sight of some more positive signs:

- a. The phenomena of nuclear terrorism, biological weapon terrorism and cyber-terrorism by non-state groups – confidently forecast since well back in the last century – have been barely seen in the West to date.
- b. ISIS has now lost its territory, its dream of a physical caliphate and so much of its allure to the young and impressionable.
- c. The return of battle-hardened fighters from the Levant to Europe has so far been both less extensive, and less consequential in terms of attacks, than was widely feared.
- d. And there are even signs that social media sites, so accommodating in the past to terrorist propaganda and terrorist organisations, are finally beginning to get their act together under the threat of serious regulation and penalties from western governments, and now the EU.¹⁵

20. So there is wisdom as well as courage in the words of Jonathan Evans, who in his last public speech as Director General of our internal security service MI5, delivered shortly before the London Olympics, said:

“Those of us who are paid to think about the future from a security perspective tend to conclude that future threats are getting more complex, unpredictable and alarming. After a long career in the Security Service, I have concluded that this is rarely in fact the case. The truth is that the future always looks unpredictable and complex because it hasn’t happened yet.”¹⁶

¹⁴ <https://www.independent.co.uk/news/uk/crime/met-chief-warns-of-christmas-terror-threat-429633.html>

¹⁵ https://ec.europa.eu/commission/sites/beta-political/files/soteu2018-preventing-terrorist-content-online-regulation-640_en.pdf

¹⁶ <https://www.mi5.gov.uk/zh-hans/node/402>

21. To summarise so far, I would suggest that terrorism, though a serious societal problem, is not uniquely dangerous or threatening. That is so whether you compare it to other types of violent crime, to other causes of death such as hospital-acquired infections, or indeed to other types of national security threat such as epidemic, cyber-attack, nuclear proliferation or the manipulation of information sources to threaten our democracy.
22. How is that reality to be reconciled with the status of terrorism in the popular mind as a uniquely serious threat, at home as well as abroad? The answer, I'm afraid, is that Islamist terrorism in particular has punched well above its weight. And we have helped it to do so, in part by failing to understand its purpose.
23. I turn now to my second theme: what the terrorists are trying to do.

WHAT THE TERRORISTS ARE TRYING TO DO

Terrorists

24. I start with a word about terrorists. Most the ones I have met are pretty unremarkable individuals.
25. A common mistake is to assume that there is a terrorist type, or a single path into terrorism. That is not the case, as has been illustrated by the Norwegian scholar Petter Nesser in his authoritative study of European jihadis.¹⁷ Nesser identifies three principal types.
26. **The entrepreneur** is a committed, charismatic activist with a talent for manipulating people. He has a strong ideological conviction and may have spent time fighting in overseas theatres of war. He is a recruiter, with a skill for translating miscellaneous grievances into a militant worldview and violent activism. Entrepreneurs are the chief organisers of terrorism, sometimes with the help of protégés, but are outnumbered by the misfits and the drifters whom they have attracted to the cause.
27. **The misfit** is often anti-social, with a troubled background and a criminal record. He tends to become part of a militant circle as a means to cope with family problems, drug abuse or a violent past: often, he is recruited from prison or a criminal network. Physically fit and aggressive, he is useful on the ground. But lacking the deep

¹⁷ https://www.amazon.co.uk/Islamist-Terrorism-Europe-Petter-Nesser/dp/1849044058/ref=sr_1_1?s=books&ie=UTF8&qid=1538129539&sr=1-1&keywords=Petter+Nesser

ideological commitment of the entrepreneur, he is the most likely to turn an informant when captured.

28. **The drifter**, apparently the largest category, is a family member or neighbour who could have gone in a very different direction if he had associated with a different crowd. It is his social networks which determine where he ends up, rather than personal grievances of the misfit or the ideological mindset of the entrepreneur.
29. Helpful as they are, these indicative portraits don't offer much help in spotting terrorists in advance, given that most racists and violent criminals will never turn to terrorism, just as the great majority of mentally ill people and indeed of ideologically minded Salafi Muslims will live blameless lives in the eyes of the law. We have to be modest about our predictive capabilities.
30. Most terrorists are male, and some are motivated by extreme misogyny. But there are female terrorists too. Scholars estimate that 17% of those who travelled from Europe to Iraq and Syria were female. Their average age was younger than the men, and in many cases they went to become wives and mothers, raising the "cubs of the Caliphate". But in contrast to al-Qaida, whose magazine for women is full of unintentionally humorous tips on washing up and how not to anger your husband,¹⁸ females in the Islamic State have been involved in recruitment, registration, propaganda, health and education. They have also been entrusted with security and surveillance, weapon handling and bomb assembly, and have fought on the front line.
31. Females have been involved in attacks in the West – particularly in the UK and in France, where the Notre Dame bombing attempt in Paris was an all-female affair, though the ringleader initially posed as a man when recruiting her accomplices online. These modern female attackers are less dependent on the instruction and supervision of men than their well-known predecessors, the Chechen Black Widows. And modern jihadist propaganda is adept at using the achievements of the "sisters" to goad the men into action of their own.

¹⁸ <https://www.economist.com/middle-east-and-africa/2018/02/03/al-qaedas-chick-lit-how-to-please-your-holy-warrior>; regularly digested for Twitter by @Dr_E_Kendall.

The objectives of terrorism

32. What do terrorists want? Louise Richardson, Vice-Chancellor of Oxford University, wrote a book on precisely that theme.¹⁹ Leaving aside the specific political objectives of the separatist or nationalist terrorists that we saw for example in Northern Ireland or in Sri Lanka, her answer was the Three Rs: *Revenge* (for their grievances), *Renown* (for their actions) and *Reaction* (from the state where they are operating).
33. The emphasis on reaction is particularly important. What reactions are terrorists looking for?
34. *Attention*, first of all, and *fear*. As envisaged by the Anarchists of Josef Conrad's day, terrorism is, after all, "*the propaganda of the deed*". For these purposes a visual spectacular is best of all – particularly if, like the Twin Towers attacks, it plays well on television. But as time has gone by, the realisation has dawned that the same effect can be produced by something much lower-budget: As Brian Jenkins wrote in 1975, the terrorist needs only "*a lot of people watching, not a lot of people dead*".
35. A blood-stained machete, as brandished by the killers of Lee Rigby who lingered on the scene to ensure that they were filmed. The dressing of victims in orange jumpsuits, to imitate Guantanamo (and satisfy the Revenge function). Beheading with swords, drowning in cages. Electronically-captured images of ideological cruelty, medieval barbarity.
36. In maximising the impact of such low-budget horror, I am afraid that the western media have been heavily complicit. Not of course because they *sympathise* with the terrorists, but because they have a *shared interest* with them: the word TERROR in big type on the front page, the reader or viewer shocked, transfixed and eager for more.
37. Part of the problem, it has always seemed to me, is the word "TERROR" itself: an evocative label that *attracts* people but *distorts* anything to which it is attached by its sheer emotional power. Terror stands for everything that is extreme, dangerous, frightening and secret – qualities which render it glamorous to all who associate with it.

¹⁹ https://www.amazon.co.uk/What-Terrorists-Want-Understanding-Containing/dp/0812975448/ref=sr_1_1?s=books&ie=UTF8&qid=1538129914&sr=1-1&keywords=what+terrorists+want

38. Seasoned criminals in Northern Ireland, chiefly concerned with enriching themselves by the smuggling of tobacco or of diesel, profit from the status of terrorist to improve their standing in their small communities of sympathisers. European Muslims travel to lawless parts of the world, seduced as young men have always been by the certainties of strong belief and the romance of hardship, comradeship and conflict.
39. Terrorism can make the careers of political leaders, prosecutors, journalists, activists and lawyers. It swells the budgets of military and intelligence services, equipment manufacturers, publishers, universities and film studios. The police officer transferred to a counter-terrorism unit walks that bit taller.
40. All these people are by the mere use of the T-word taken out of the normal vocabulary of crime, government, commerce or academe into a mental space inhabited by Robespierre, Irish dynamiters, anarchists, hijackers, Olympic hostage-takers, Mujahideen, desert emirs and on the other side of the fence, Special Branch, undercover agents, Navy seals and drones. All have a shared interest in the problem being as serious and frightening as possible. For myself, though a major beneficiary of this phenomenon, I rather wish we had left the word “terror” in the French Revolution where it originated, and chosen instead a drier legal phrase that would not fit into a headline: “ideologically motivated violent crime”, perhaps.
41. The reaction sought by the terrorists is not limited to our attention and our fear: better still, if they can achieve it, is an *over-reaction* by the Government. As the terrorists rightly see, it is by such over-reactions – particularly if targeted on the community from which they seek their recruits – that Governments play into their hands.
42. The attempt to provoke an overreaction is a strategy common to the Islamists and the extreme right wing. The former paint a picture of oppressive police powers, rampant Islamophobia, and an unfeeling state trampling on cherished religious beliefs. The latter complain of creeping Islamisation, a dangerous immigrant horde and a state that has lost the will to defend its people. Their behaviour is not only similar but symbiotic: for each tribe, the best evidence of the narrative it seeks to confect is the opposite tribe, which it therefore needs and promotes.
43. The power to provoke an over-reaction is a force multiplier for terrorism. In his recent book *Homo Deus*, Yaval Noah Harari puts it like this:

“Terrorists are like a fly that tries to destroy a china shop. The fly is so weak that it cannot budge even a single teacup. So it finds a bull, gets inside its ear and starts buzzing. The bull goes wild with fear and anger, and destroys the china shop.”

44. Anyone who has watched the American news channels in the aftermath of even the smallest and most inconsequential Islamist attack will know what he means. Nor, I’m afraid, are we immune from this tendency in Europe.

THE RESPONSE

45. That brings me on to my final theme: our domestic response to terrorism, and the role of our supranational courts in calibrating it. How should we, the bull, respond to the fly, in order to protect the china shop of our free and open societies?
46. Though panic and over-reaction are not called for, a full-spectrum response plainly is: persuading the fly to find something else to do; threatening and if necessary swatting it; fitting protective clothing to the bull; deciding to sell less breakable china. Each of those elements is reflected in the United Kingdom’s “CONTEST” strategy, with its pleasingly alliterative chapters Prevent, Pursue, Protect and Prepare.²⁰ It is emblematic of the leadership that *has* been provided by the United Kingdom in counter-terrorism across our continent – I offer no prediction as to the future – that the EU’s counter-terrorism strategy is organised around the same four chapters, though with “Respond” substituted for “Prepare”.²¹
47. Important elements of that full-spectrum response rarely trouble the courts: we tend not to have cases about physical protection against terrorism, or the morale-building measures that promote resilience in the face of an attack. But I should like to offer some brief reflections on three of the more legally contentious elements of the response: *intelligence*, the *criminal law* and *counter-extremism*.

Intelligence

48. Sir David Omand, the former Director of GCHQ, co-wrote a book this year entitled “Principled spying: the ethics of secret intelligence”.²² There are difficulties, of principle and practicality, in crafting an ethical code to regulate a trade that depends on deception. But when Just War theory has been debated at least since the time of

²⁰ <https://www.gov.uk/government/publications/counter-terrorism-strategy-contest-2018>

²¹ <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=LEGISSUM%3A133275>

²² <https://www.amazon.co.uk/Principled-Spying-Ethics-Secret-Intelligence/dp/1626165602>

St Augustine, a discussion of just intelligence might be thought overdue. It will be needed, anyway, as intelligence issues find themselves with greater frequency the subject of legal cases and enquiries, as currently in the UK in relation to the abuses perpetrated by undercover police officers.

49. The most prominent legal issue currently arising out of intelligence is the exercise of bulk powers: the collection and retention of large quantities of data, most of it not relating to persons under suspicion, which can subsequently be accessed by intelligence or law enforcement for the purpose of investigating terrorism or other serious crime. Bulk powers range from the simple requirement that telephone or broadband providers retain their customers' communications data for a period of time, to the more controversial hacking of undersea cables in order to harvest content which can then be searched by intelligence agencies using approved identifiers (or selectors). Collectively, these techniques are often referred to as "mass surveillance" – quite wrongly, since though the collection is en masse, any resultant surveillance is selective and should be subject to proper authorisation.
50. These capabilities are useful. As I wrote in 2016, in a report accompanied by 60 real-life case studies that I verified with my own team, bulk powers are used across the range of intelligence agency activity, from cyber-defence, counter-espionage and counter-terrorism to fighting child sexual abuse and organised crime. They play an important part in identifying, understanding and averting threats; and where alternative methods exist, they are often less effective, more dangerous, more resource-intensive, more intrusive or slower.²³
51. If that much is accepted, two directions of travel are possible:
- a. that the use of bulk powers should be permitted to the state, with sufficient safeguards; or
 - b. that the powers are so sinister that states should be prohibited from using them altogether.
52. The European Court of Human Rights has taken the first of these approaches, most recently and decisively in two Section judgments issued in June and September of this year: *Centrum för Rättvisa v Sweden*²⁴ and *Big Brother Watch v United*

²³ <https://www.gov.uk/government/publications/investigatory-powers-bill-bulk-powers-review>

²⁴[https://hudoc.echr.coe.int/eng#{"fulltext":\["Rattvisa"\],"documentcollectionid2":\["GRANDCHAMBER","CHAMBER"\],"itemid":\["001-183863"\]}](https://hudoc.echr.coe.int/eng#{)

Kingdom.²⁵ The Court in those cases showed the green light to bulk powers not because governments were inherently to be trusted, but because it believed that sufficiently good safeguards can be constructed for the considerable benefits of the powers to outweigh their intrusive consequences.

53. As Judges Pardalos and Eicke acknowledged in *Big Brother Watch*, those judgments of the Strasbourg court were “*in clear contrast*” to the more absolutist approach taken in recent years by the European Court of Justice in *Digital Rights Ireland*²⁶ and *Tele 2/Watson*:²⁷ Grand Chamber decisions which appeared to suggest that not even the need to fight terrorism and organised crime could justify a general requirement on service providers, whether imposed by EU directive or by individual Member States, to retain the traffic and location data of their subscribers for properly authorised use by police.
54. This sharp and developing rift between Europe’s two senior human rights courts is of the highest interest to the *constitutional lawyer*.
55. Their respective approaches are of interest also to the scholar of *comparative legal method*. The Strasbourg court’s judgment in *Big Brother Watch* extends to more than 200 pages and draws extensively on the evidence published by a range of independent security-cleared tribunals and oversight mechanisms – including, for full disclosure, three of my own. The ruling in *Tele2*, by contrast, is predicated on the assertion that the retention of call data by service providers “*is likely to cause the persons concerned to feel that their private lives are the subject of constant surveillance*”: a prophecy with the capacity to be self-fulfilling rather than a conclusion based on evidence.
56. The European Court of Justice cases ruled the most basic and straightforward type of bulk collection to fall foul of the Charter, notwithstanding the unchallenged evidence of its utility in fighting terrorism, organised and internet-enabled crime. This jurisprudence has already despatched the Data Retention Directive of 2006, and may threaten the Passenger Name Record Directive of 2015. Though there is a national security carve-out in Article 4(2) of the Treaty on European Union, another pending

²⁵ [https://hudoc.echr.coe.int/eng#{"fulltext":\["Big Brother Watch"\],"documentcollectionid2":\["GRANDCHAMBER","CHAMBER"\],"itemid":\["001-186048"\]}](https://hudoc.echr.coe.int/eng#{)

²⁶<http://curia.europa.eu/juris/document/document.jsf?text=&docid=150642&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=1794879>

²⁷<http://curia.europa.eu/juris/document/document.jsf?text=&docid=186492&pageIndex=0&doclang=en&mode=lst&dir=&occ=first&part=1&cid=1795281>

case questions its scope.²⁸ So we cannot entirely discount the possibility that the Court of Justice may apply the principles of its case law to the intelligence agency powers, far more extensive than the police powers it considered in *Tele2*, whose exercise was recently approved in Strasbourg subject to strengthening of the applicable safeguards.

57. In defence of the Court of Justice, one might say that the secrecy which has attended these powers until very recently has made it difficult for courts to take an evidence-based approach, even if they wished to do so. I suggest that if rational and consistent case law is to be achieved in this area, it can only be by putting into the public domain more evidence, from rigorous and independent oversight bodies, of the manner in which these controversial powers are used. And by doing whatever we can to ensure that they operate in such a way as to intrude minimally into individual privacy: one objective of the new Technology Advisory Panel, an expert body recommended in one of my reports and now operating in the UK.²⁹

Criminal law

58. Turning, secondly, to *the criminal law*, one might ask why special laws are required at all, given that violence and the destruction of property is everywhere a criminal offence, and can be prosecuted as such, regardless of whether it has a terrorist motivation. The usual answer is that the impact of terrorism on the population, or at least on public opinion, is so uniquely damaging that police need to be able to intervene to protect the public before they have the evidence that they might need to charge suspects with conventional offences of attempt, incitement or conspiracy.

59. That argument is stronger against the background of large-scale atrocities like 9/11, or the airline liquid bomb plot that was foiled in 2006,³⁰ than in relation to the smaller-scale, do-it-yourself terrorism that dominates the current threat picture in Europe. Nonetheless, specific terrorism legislation is now required by the EU and even the UN. Courts – including the European Court of Human Rights – have accepted that in the context of terrorism it is legitimate to criminalise “precursor” behaviour such as possessing information likely to be useful in terrorism and preparing terrorist acts.³¹ Contrary to general belief, the direction of travel is not all

²⁸ <https://www.ipt-uk.com/docs/IPT%20BULK%20DATA%20ORDER%20FOR%20REFERENCE%20TO%20CJEU.pdf>, registered in the Court of Justice as Case C-623/17.

²⁹ <http://www.legislation.gov.uk/ukpga/2016/25/section/246/enacted>

³⁰ https://en.wikipedia.org/wiki/2006_transatlantic_aircraft_plot

³¹ [https://hudoc.echr.coe.int/eng#{"fulltext":\["Jobe"\],"documentcollectionid2":\["GRANDCHAMBER","CHAMBER"\],"itemid":\["001-105428"\]}](https://hudoc.echr.coe.int/eng#{)

one-way: as I chronicled in my reports, the period 2010-2014 saw a significant and welcome liberalisation of the counter-terrorism laws in the UK.³² But as new threats have become apparent, the laws are being tightened again. Where they are formulated or applied with insufficient thought or consultation, the European Convention has provided a useful corrective.

60. For example, the British Government and police fought strongly – and in the English courts, successfully – to preserve a no-suspicion stop and search power, which was used around a million times over 10 years, generating considerable resentment but not a single terrorist conviction. In its *Gillan and Quinton* judgment of 2010,³³ the Court of Human Rights declared it to be disproportionate, and the power was repealed. For years afterwards I made a point of asking senior counter-terrorism officers whether they missed the power. In every case, they admitted that they did not.
61. More marginal perhaps was the ruling of the Grand Chamber in *Othman*,³⁴ which required the UK to obtain additional assurances before deporting the dangerous ideologue Abu Qatada to face trial in Jordan. That decision of 2012 was the most recent Strasbourg judgment to generate significant public disquiet in my country. The Government managed to do what was required of it, though only after a couple of trips to Jordan by Theresa May, and Abu Qatada was duly removed.
62. But there are signs, and not only from the UK, that in this area the Court may have reached the limits of what contracting states will accept. The current edition of the Council of Europe’s factsheet on “Terrorism and the European Convention” has, rather shockingly, a section headed “*Cases in which the State concerned extradited/deported suspected terrorists despite the Court’s indication under Rule 39 (interim measures) of the Rules of Court not to do so until further notice*”.³⁵ That section contains details of cases involving five countries, including three founder members of what is now the European Union. A troubling chapter for the rule of law.

³² <https://www.gov.uk/government/publications/the-terrorism-acts-in-2015>

³³[https://hudoc.echr.coe.int/eng#{"fulltext":\["Gillan"\],"documentcollectionid2":\["GRANDCHAMBER"\],"CHAMBER":\["R"\],"itemid":\["001-96585"\]}](https://hudoc.echr.coe.int/eng#{)

³⁴[https://hudoc.echr.coe.int/eng#{"fulltext":\["Othman"\],"documentcollectionid2":\["GRANDCHAMBER"\],"CHAMBER":\["R"\],"itemid":\["001-108629"\]}](https://hudoc.echr.coe.int/eng#{)

³⁵ https://www.echr.coe.int/Documents/FS_Terrorism_ENG.pdf

Counter-extremism

63. The third and final element of the response that I want to touch upon is countering non-violent “extremism”: a subject which sits a little unhappily between counter-terrorism on the one hand and, on the other, initiatives to address distinct societal harms (forced marriage, FGM, sectarianism) and to promote integration and cohesion. The elusive nature of the concept is reflected in the UK Government’s definition of extremism as *“vocal or active opposition to fundamental British values, including democracy, the rule of law, individual liberty and mutual respect and tolerance of different faiths and beliefs”*.
64. The most attractive answer to extremism, at least in theory, is to be found in John Stuart Mill’s market place of ideas, in which after rational public discussion, the good may be counted upon to drive out the bad. Communism was driven from the intellectual market place without making it illegal: why should the same not be true of islamofascism and other objectionable ideologies?
65. But a functioning market place of ideas depends on its participants placing the highest value on what is good and true. It seems that many of us prefer, on the contrary, what is sensational, bias-confirming, discriminatory and false. Research conducted at MIT and recently published in the periodical *Science* concluded that over a 10-year period, falsehoods on Twitter travelled *“significantly farther, faster, deeper, and more broadly than the truth, in all categories of information and in many cases by an order of magnitude.”* The results left the researchers, in their own words, *“somewhere between surprised and stunned”*.³⁶ But they are indicative of market failure. This suggests to some that counter-speech is not enough; and that the state should resort to coercive measures in relation even to extremist speech that does not reach the conventional threshold for hate crimes or incitement to violence.
66. Frequently cited in this connection is the example of Anjem Choudary, a former lawyer who appeared to preach bigotry and intolerance rather than violence, at least until 2016 when he was caught inciting support for ISIS. His organisation al-Muhajiroun however had connections with around a quarter of convicted British terrorists – far more than were linked to As-Qaida or ISIS – and is believed to have influenced, through other organisations such as Sharia4Belgium, many other north Europeans who went to fight in Iraq and Syria.³⁷ Choudary’s frequent appearances

³⁶ <http://news.mit.edu/2018/study-twitter-false-news-travels-faster-true-stories-0308>

³⁷ <https://www.theguardian.com/uk-news/2016/aug/16/revealed-how-anjem-choudary-inspired-at-least-100-british-jihadis>

in British media, far from seeing his ideas defeated in the market place, seem only to have spread and given the appearance of respectability to his message.

67. With Choudary in mind, the last UK government in 2015 and again in 2016 promised a system of coercive measures including “extremist disruption orders”, imposed by civil courts, which would have restricted the expressive and associative freedoms of persons who had not broken the law but who had been assessed by the authorities – no doubt by use of the surveillance powers already discussed – to have engaged in extremist activity.³⁸

68. Those who peddle hatred and prejudice in order to sow division in our societies deserve nobody’s sympathy. But having read the draft Counter-Extremism Bill that was prepared in 2015, I felt compelled to describe it as the most alarming document I had seen in my years as Independent Reviewer. To concentrate only on the intended targets of such measures does not address the dangers that are inherent in all over-broad laws and discretions: dangers which are present even in the relatively confined area of anti-terrorism, law, and which become still more marked as the range of suspect behaviour is extended. If it becomes a function of the state to identify which individuals are engaged in, or exposed to, an ill-defined range of “*extremist activity*”, it will become legitimate for the state to scrutinise, and the citizen to inform upon, the exercise of core democratic freedoms by large numbers of law-abiding people. It is in this area that the apocalyptic words of Lord Hoffmann, delivered (in a different context) in a judgment of 2004, hit home for me:

"The real threat to the life of the nation, in the sense of a people living in accordance with its traditional laws and political values, comes not from terrorism but from laws such as these."³⁹

69. The proposals, I am pleased to say, were not proceeded with and instead we have a Counter-Extremism Commission, headed by Sara Khan, the campaigner against Islamist bigotry who incidentally was also on record as opposing the coercive measures that were trailed in the Counter-Extremism Bill. We may hope for an approach focussed not so much on stamping out extremism as on defending the diversity, tolerance and broad-mindedness that are the essence of democracy.⁴⁰ As a member of the Advisory Board of the new Commission, I should be interested to hear your thoughts.

³⁸ <http://researchbriefings.files.parliament.uk/documents/CBP-7238/CBP-7238.pdf>

³⁹ <https://publications.parliament.uk/pa/ld200405/ldjudgmt/jd041216/a&oth-6.htm>

⁴⁰ <https://www.gov.uk/government/news/commission-for-counteracting-extremism-publishes-plans-for-wide-ranging-study-into-extremism>

Conclusion

70. To conclude:

- a. Terrorism, though a serious problem, is not an existential threat to western societies.
- b. The less we panic, the less successful terrorism will be.
- c. We need strong intelligence and strong laws, both to suppress terrorism and to keep ourselves calm.
- d. But we must not abandon the rights-based approach which, far from hampering the fight against terrorism and extremism, underlines its legitimacy.

71. It is sometimes said that, in the words of Eric Posner, we are living through the twilight of human rights law.⁴¹ But surely not even humans could be so foolish as to extinguish that light.

⁴¹ <https://www.amazon.co.uk/Twilight-Human-Rights-Law-Inalienable/dp/019931344X>