

Chapter 13

Freedom of Expression and the Incitement to Terrorism

This chapter considers the question of the incitement to terrorism, its proscription and the human rights implications of such proscription. It does so in the abstract to begin with, detailing international and European obligations and recommendations on the subject, and identifying safeguards against the potential for the criminalisation of the incitement to terrorism to unduly impinge upon rights and freedoms. Consideration is then given to applicable laws in New Zealand and the United Kingdom, which represent contrasting positions. The law in New Zealand, it will be concluded, is inadequate to deal with the problem of the incitement to transnational terrorism, while the applicable provisions in the UK's Terrorism Act 2006 progress, in some important respects, beyond proper limits.

The Phenomenon of the Incitement to Terrorism

There have been numerous instances of incitement to, and glorification of, terrorism, some of which have been noted in chapter 2. The now well-known World Islamic Front Statement of 1998, the *Jihad Against Jews and Crusaders*, which purports to be a fatwa (a religious ruling) is a good example.¹ It calls for the killing of Americans, claiming to base itself upon a call by Allah to “slay the pagans wherever ye find them, seize them, beleaguer them, and lie in wait for them in every stratagem (of war)”.² The document concludes with the direction that:³

We - with Allah's help - call on every Muslim who believes in Allah and wishes to be rewarded to comply with Allah's order to kill the Americans and plunder their money wherever and whenever they find it. We also call on Muslim ulema, leaders, youths, and soldiers to launch the raid on Satan's US

¹ World Islamic Front, *Jihad Against Jews and Crusaders*, 23 February 1998 (signed, amongst others, by Usama bin Laden), online: <<http://www.fas.org/irp/world/para/docs/980223-fatwa.htm>> (last accessed 23 January 2005).

² Ibid un-numbered para 1. The phrase is taken from *The Holy Qura'an*, 9:5.

³ *Jihad Against Jews and Crusaders* (n 1) un-numbered para 8.

troops and the devil's supporters allying with them, and to displace those who are behind them so that they may learn a lesson.

While this fatwa is particularly directed towards Americans, due to the purported occupation and plundering by the United States of the Arabian Peninsula during its presence there during *Operation Desert Storm* in 1990 and *Operation Desert Fox* in 1998,⁴ the sentiment of the jihad is one that is opposed to modernity in general. Its desire is to eliminate modernity and return to the era when Islam formed a prosperous ummah (a community of Islamic believers) in the Middle East (and possibly beyond) without restriction by State borders – an era in which modernity was absent in the region.⁵ It is a particularly common tool of global jihadists.⁶

Following the commencement of the multi-national *Operation Enduring Freedom* in Afghanistan a further manifesto, issued by Salem Almakhi and first aired on Aljazeera in October 2002,⁷ announced a warning to Christians and members of the alliance waging war against Afghanistan and Al-Qaida.⁸ This most palpably applies to States participating in *Operation Enduring Freedom*, and might therefore be characterized as incitement of an insurgent nature, but it is also of much broader application. By identifying those acting against Al-Qaida, the warning conceivably also attaches to all those taking action against Usama bin Laden, the Taliban and Al-Qaida. Since all members of the United Nations are required to take action against those entities pursuant to various resolutions of the Security Council, and directions of the Security Council's 1267 Sanctions Committee, the warning is at least in principle applicable to

⁴ Ibid un-numbered para 3.

⁵ See further Alex Conte and Boaz Ganor, *Legal and Policy Issues in Establishing an International Framework for Human Rights Compliance When Countering Terrorism* (International Policy Institute for Counter-Terrorism, Herzlyia 2005), II(D)(3) and II(D)(4).

⁶ The International Policy Institute for Counter-Terrorism has written much on this subject. See, for example (all available online: <<http://www.ict.org.il>>): Yoni Figchel and Yael Shahar, 'The Al-Qaida-Hizballah Connection' (26 February 2002); Yael Shahar, 'Al-Qaida's Asian Web' (15 October 2002); Yoram Kahati, 'The Continuing Al-Qaida Threat' (10 May 2003); and Yoram Kahati and Yoni Figchel, 'Osama bin Ladin as the New Prophet of Islam' (15 July 2003).

⁷ Salem Almakhi, *Mending the Hearts of the Believers*, online: <<http://www.jihadonline.bravepages.com/mending.htm>> (last accessed 22 August 2005). Salem Almakhi is said to be one of Usama bin Laden's supporters and admirers, and personally knowledgeable of Al-Qaida operations: see Yoni Figchel and Yoram Kehati, 'Analysis of Recent Al-Qaida Documents, Part 1', Paper of the International Policy Institute (28 November 2002), online: <<http://www.ict.org.il/articles/articledet.cfm?articleid+453>> (last accessed 1 July 2004).

⁸ Ibid un-numbered para 23.

all 191 members of the United Nations.⁹ The Sanctions Committee, which describes itself as “a key instrument in the fight against terrorism”,¹⁰ maintains a list of individuals and entities that are part of, or associated with, the Taliban, Al-Qaida and Usama bin Laden. UN member States are required to freeze funds and other financial resources, and ensure that their nationals do not make funds or financial resources available to such listed entities.¹¹ The manifesto finally instructs:¹²

Anyone who possesses an arrow in his quiver, make haste and [shoot] it for the sake of Allah, and aim it at the enemies of religion – the Jews and the Christians...

In an audio tape aired by Aljazeera in 2003, a senior aide to Usama bin Laden, Ayman Zawahri, exhorted his audience with the following words:¹³

Oh Muslims! Carry out attacks against the embassies, companies, interests and officials of the US, Britain, Australia and Norway. Burn the ground under their feet.

A more recent video found in the hideout of Malaysian terrorist Noordin Mohamad Top contained the following threats:¹⁴

As long as you keep your troops in Iraq and Afghanistan and intimidate Muslim people, you will feel our intimidation... You will be the target of our next attack... Our enemy is America, Australia, England and Italy... We especially remind Australia that you, Downer and Howard, are killing Australia, leading it into darkness and misfortune and mujahedeen terror...

⁹ The Taliban/Al-Qaida Sanctions Committee was established under SC Res 1267, UN SCOR, 54th Sess, 4051st Mtg, UN Doc S/Res/1267 (1999), para 6.

¹⁰ See Security Council Committee Established Pursuant to Resolution 1267 (1999), *Guidance for Reports Required of all States pursuant to paragraphs 6 and 12 of Resolution 1455 (2003)*, online: <http://www.un.org/Docs/sc/committees/1267/guidanc_en.pdf> (last accessed 15 August 2005).

¹¹ See SC Res 1267, UN SCOR, 54th Sess, 4051st Mtg, UN Doc S/Res/1267 (1999), para 4(b); SC Res 1333, UN SCOR, 55th Sess, 4251st Mtg, UN Doc S/Res/1333 (2000), para 8(c); SC Res 1390, UN SCOR, 56th Sess, 4452nd Mtg, UN Doc S/Res/1390 (2002), para 2(a) in particular; and SC Res 1617, UN SCOR, 59th Sess, 5244th Mtg, UN Doc S/Res/1617 (2005).

¹² Salem Almakhi (n 7) penultimate para.

¹³ Aljazeera, ‘New Al-Qaeda Tape Calls for Attacks’ (Aljazeera.net, 21 May 2003), online: <<http://english.aljazeera.net/NR/exeres/293D19D4-CBB9-4296-B158-D54246F6259E.htm>> (last accessed 22 November 2005).

¹⁴ Associated Press, ‘Indonesia Video Warning on Terror’ (CNN.com International, 17 November 2005), online: <<http://edition.cnn.com/2005/WORLD/asiapcf/11/16/indonesia.terror.ap/>> (last accessed 22 November 2005).

Criminalising the Incitement to Terrorism

There are two general means by which the incitement to terrorism may be criminalised. The first is by reactive means, where a person who has incited or glorified terrorism may be prosecuted as a party to a principal terrorist act. Many jurisdictions have such party offences, where the conduct of anyone who incites, counsels, or procures any person to commit an offence is also guilty of the offence. The second, proactive, means of criminalisation is one that seeks to create liability without needing to wait for a terrorist act to occur. A 'proactive' offence would criminalise the act of incitement itself as a primary, rather than secondary, offence.

The UN Office on Drugs and Crime (UNODC) Terrorism Prevention Branch takes the view that the general obligation of States to abstain from tolerating terrorist activities implies that they must adopt active measures in order to prevent those acts.¹⁵ As will be discussed in more detail, the adoption by States of a proactive approach in countering terrorism is also encouraged within resolutions of the General Assembly and Security Council.¹⁶ Security Council resolution 1373 (2001) in fact requires States to take proactive measures, paragraph 2(b) stating that member States shall: "Take the necessary steps to prevent the commission of terrorist acts..."¹⁷

Notably, the prohibition against incitement is not unique. Article 3(1)(c)(iii) of the Convention Against the Illicit Traffic in Narcotic Drugs and Psychotropic Substances requires States parties to establish as a criminal offence the intentional public incitement or inducement of others to commit any of the Article 3 offences, or to use narcotic drugs or psychotropic substances illicitly.¹⁸ The 1998 Statute of the International Criminal Court also contemplates criminal responsibility in the case of any

¹⁵ See the United Nations Office on Drugs and Crime, *(Draft) Guide for the Legislative Incorporation and Implementation of the Universal Instruments Against Terrorism* (Division of Treaty Affairs, Terrorism Prevention Branch, 2005 Draft), 106.

¹⁶ See: GA Res 58/136, UN GAOR, 58th sess, 77th plen mtg, UN Doc A/Res/58/136 (2003), paras 1 and 5; GA Res 58/140, UN GAOR, 58th sess, 77th plen mtg, UN Doc A/Res/58/140 (2003), para 2; GA Res 59/46, UN GAOR, 59th sess, 65th plen mtg, UN Doc A/Res/59/46 (2004), paras 13 and 15; GA Res 59/80, UN GAOR, 59th sess, 66th plen mtg, UN Doc A/Res/59/80 (2004), paras 1 and 2 (see also newly adopted GA resolutions 60/43, 60/73 and 60/78); SC Res 1456, UN SCOR, 4668th mtg, UN Doc S/Res/1456 (2003), para 5; SC Res 1566, UN SCOR, 5053rd mtg, UN Doc S/Res/1566 (2004), para 2; SC Res 1618, UN SCOR, 5246th mtg, UN Doc S/Res/1618 (2005), para 6; and SC Res 1624, UN SCOR, 5261st mtg, UN Doc S/Res/1624 (2005), paras 1, 2 and 3.

¹⁷ SC Res 1373, UN SCOR, 4385th mtg, UN Doc S/Res/1373 (2001), para 2(b).

¹⁸ *Convention Against the Illicit Traffic in Narcotic Drugs and Psychotropic Substances*, opened for signature 14 December 1984, 28 ILM 493 (entered into force 11 November 1990).

person who: “In respect of the crime of genocide, directly and publicly incites others to commit genocide”.¹⁹ Similarly, Article 20(2) of the International Covenant on Civil and Political Rights requires States to prohibit the advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence.

International and Regional Anti-Terrorism Obligations and Recommendations

There is currently no common obligation upon States to proscribe the incitement to terrorism. The matter is not addressed within any of the 12 extant universal terrorism-related conventions (nor within the newly adopted Suppression of Nuclear Terrorism Convention).²⁰ It is, however,

¹⁹ *Statute of the International Criminal Court*, opened for signature 17 July 1988, 2187 UNTS 90, entered into force 1 July 2002), Art 25(3)(e).

²⁰ The latter convention, the *International Convention for the Suppression of Acts of Nuclear Terrorism*, was adopted by the United Nations General Assembly and opened for signature under GA Res 59/290, UN GAOR, 59th sess, 91st plen mtg, UN Doc A/Res/59/290 (2005). The other 12 universal conventions on anti-terrorism are: [on the subject of the safety of aviation] the *Convention on Offences and Certain Other Acts Committed on Board Aircraft* (Tokyo Convention), opened for signature 14 September 1963, 704 UNTS 219 (entered into force 4 December 1969), the *Convention for the Suppression of Unlawful Seizure of Aircraft* (Hague Convention), opened for signature 16 December 1970, 860 UNTS 105 (entered into force 14 October 1971), the *Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation* (Montreal Convention), opened for signature 23 September 1971, 974 UNTS 177 (entered into force 26 January 1973), and the *Protocol on the Suppression of Unlawful Acts of Violence at Airports Serving International Civil Aviation* (Montreal Protocol), opened for signature 24 February 1988, ICAO Doc 9518 (entered into force 6 August 1989); [on the subject of maritime navigation and fixed platforms] the *Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation* (Rome Convention), opened for signature 10 March 1988, 1678 UNTS 221 (entered into force 1 March 1992), and the *Protocol for the Suppression of Unlawful Acts against the Safety of Fixed Platforms Located on the Continental Shelf* (Rome Protocol), opened for signature 10 March 1988, 1678 UNTS 304 (entered into force 1 March 1992); [on the protection of persons] the *Convention on the Prevention and Punishment of Crimes against International Protected Persons, including Diplomatic Agents*, opened for signature 14 December 1973, 1035 UNTS 167 (entered into force 20 February 1977), and the *International Convention against the Taking of Hostages* (Hostages Convention), opened for signature 18 December 1979, 1316 UNTS 205 (entered into force 3 June 1983); and [related to the means of perpetrating and advancing terrorism] the *Convention on the Physical Protection of Nuclear Material* (Nuclear Materials Convention), opened for signature 3 March 1980, 1456 UNTS 124 (entered into force 8 February 1987), the *Convention on the Marking of Plastic Explosives for the Purpose of Detection* (Plastic Explosives Convention), opened for signature 1 March 1991, ICAO Doc 9571 (entered into force 21 June 1998), the *International Convention for the Suppression of Terrorist Bombing* (*Suppression of Bombing Convention*), opened for signature 12 January 1998, 2149 UNTS 286 (entered into

required of States parties to the 2005 Council of Europe Convention on the Prevention of Terrorism, which is not yet in force but in respect of which the United Kingdom was an original signatory.²¹ Within the United Nations framework, the subject is addressed in resolutions of the UN General Assembly and Security Council.

1. Suppressing the incitement to terrorism

Turning first to the resolutions of the United Nations, General Assembly resolution 40/61 (1985) calls on UN member States to refrain from organising, instigating, assisting or participating in terrorist acts in other States, or “in acquiescing in activities within their territory directed towards the commission of such acts”.²² Again, the UNODC Terrorism Prevention Branch takes the view that this portends that active measures of prevention and suppression must be taken.²³ Similarly, the Declaration on Measures to Eliminate International Terrorism, adopted by the General Assembly in 1994 and subsequently reaffirmed on an almost annual basis, calls for States:²⁴

To refrain from organizing, instigating, facilitating, financing, encouraging or tolerating terrorist activities and to take appropriate practical measures to ensure that their respective territories are not used for terrorist installations or training camps, or for the preparation or organization of terrorist acts intended to be committed against other States or their citizens; (emphasis added).

The emphasised portions of the extract can be taken to support a proactive approach in countering terrorism, and emphasise the need to suppress terrorism against other States. Any criminalisation of the incitement to terrorism needs, therefore, to be both applicable within the territory of the State and also outwardly looking. Added to this, General Assembly

force 23 May 2001), and the *International Convention for the Suppression of the Financing of Terrorism* (Suppression of Financing Convention), opened for signature 10 January 2000, 2179 UNTS 232 (entered into force 10 April 1992).

²¹ *Council of Europe Convention on the Prevention of Terrorism*, opened for signature 16 May 2005, CETS 196 (not yet entered into force). The proscription against the incitement to terrorism is set out in Article 5. The Convention requires 6 ratifications to enter into force but, as at 30 June 2006, has only been ratified by Russia – see Council of Europe, *Fight against terrorism*, online: <http://www.coe.int/T/E/Legal_affairs/Legal_co-operation/Fight_against_terrorism> (last accessed on 30 June 2006).

²² GA Res 40/61, UN GAOR, 40th sess, 108th plen mtg, UN Doc A/Res/40/61 (1985), para 6.

²³ (Draft) *Legislative Guide* (n 15) 107.

²⁴ *Declaration on Measures to Eliminate International Terrorism*, adopted under GA Res 49/60, UN GAOR, 49th Sess, 84th Plen Mtg, UN Doc A/Res/49/60 (1994), para 5(a).

resolution 59/195 (2004): “condemns the incitement ethnic hatred, violence and terrorism”.²⁵ Naturally, it has to be acknowledged that resolutions of the General Assembly are recommendatory only.²⁶ It might be argued, given the consistent pattern of reaffirming the Declaration on Measures to Eliminate International Terrorism for a decade now,²⁷ that the calls for action within the Declaration form part of customary international law. Such an assertion, however, would need to be treated carefully.²⁸ Suffice it to say, for the purposes of this chapter, that there have been repeated calls for States to be proactive in their countering of terrorism, including the incitement thereof.

As far as the Security Council is concerned, two of its resolutions address the issue of incitement to terrorism. The first is resolution 1373 (2001), in which paragraph 5(3) declares:²⁹

...that acts, methods, and practices of terrorism are contrary to the purposes and principles of the United Nations and that knowingly financing, planning and inciting terrorist acts are also contrary to the purposes and principles of the United Nations; (emphasis added).

Paragraph 1 of resolution 1624 (2005) is even more direct, providing that the Security Council:³⁰

Calls upon all States to adopt such measures as may be necessary and appropriate and in accordance with their obligations under international law to

²⁵ GA Res 59/195, UN GAOR, 59th sess, 74th plen mtg, UN Doc A/Res/59/195 (2004), para 12.

²⁶ *Charter of the United Nations 1945*, Article 10.

²⁷ The Declaration was reaffirmed in the following two years, with a *Declaration to Supplement the 1994 Declaration on Measures to Eliminate International Terrorism* adopted in 1996: GA Res 51/210, UN GAOR, 51st Sess, 88th Plen Mtg, UN Doc A/Res/51/210 (1996), Annex. The Declaration and Supplement were reaffirmed within: GA Res 52/165, UN GAOR, 52nd Sess, 72nd Plen Mtg, UN Doc A/Res/52/165 (1997), para 7; GA Res 54/100, UN GAOR, 54th Sess, 75th Plen Mtg UN Doc A/Res/54/100 (1999), para 8; GA Res 55/158, UN GAOR, 55th Sess, 84th Plen Mtg, UN Doc A/Res/55/158 (2000), para 9; GA Res 56/88, UN GAOR, 56th Sess, 85th Plen Mtg, UN Doc A/Res/56/88 (2001), para 10; GA Res 57/27, UN GAOR, 57th Sess, 52nd Plen Mtg, UN Doc A/Res/57/27 (2002), para 10; GA Res 58/81, UN GAOR, 58th Sess, 72nd Plen Mtg, UN Doc A/Res/58/81 (2003), para 10; and GA Res 59/46, UN GAOR, 59th Sess, 65th Plen Mtg, UN Doc A/Res/59/46 (2004), para 12.

²⁸ For that to be the case, it would need to be shown that the relevant provision(s) of the declaration represent the conduct of States, such conduct being undertaken out of a sense of legal obligation (*opinio juris*): see the Statute of the International Court of Justice, opened for signature 26 June 1945 (entered into force 24 October 1945), Art 38(1)(b).

²⁹ SC Res 1373 (n 17).

³⁰ SC Res 1624, UN SCOR, 5261st mtg, UN Doc S/Res/1456 (2005).

- (a) Prohibit by law incitement to commit a terrorist act or acts;
- (b) Prevent such conduct;

It should be noted that, although Article 25 of the Charter of the United Nations directs Member States to comply with decisions of the Security Council, the particular wording of the latter provisions are not couched in mandatory language and do not, therefore, have binding effect.³¹ As statements emanating from the body of the United Nations responsible for the maintenance of international peace and security, however, they should be treated as highly persuasive.

2. Penalties for the incitement to terrorism

The universal instruments related to terrorism specify that the penalties for terrorism offences must be serious, and in conformity with the principle of proportionality as between the gravity of the sanction and the gravity of the act. The Hague Convention, for example, requires States parties to impose “severe penalties” in the event of the hijacking of an aircraft, and the Convention for the Suppression of the Financing of Terrorism calls on States parties to adopt measures necessary to “make those offences punishable by appropriate penalties which take into account the grave nature of the offences”.³² While acknowledging that determining the level of sanctions is a matter for each member of the United Nations (recognising the sovereign independence of each State), the UNODC (*Draft*) *Legislative Guide* on countering terrorism advocates that: “The sanctioning system must be particularly dissuasive and have heavy sentences for the perpetrators of such acts”.³³

³¹ On this point, see the decision of the International Court of Justice on the effect of mandatory versus exhortatory provisions within resolutions of the Security Council in *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South-West Africa) notwithstanding Security Council Resolution 276 (1990)*, *Advisory Opinion* (1971) ICJ Rep, 49 ILR 2.

³² *Convention for the Suppression of Unlawful Seizure of Aircraft* (n 20) Article 2; *Convention for the Suppression of the Financing of Terrorism* (n 20) Article 4. See also the *Convention on the Prevention and Punishment of Crimes Against Internationally Protected Persons, including Diplomatic Agents* (n 20) which requires each State Party to penalise and to impose “appropriate penalties which take into account their grave nature” (Article 2(2)); the *Convention Against the Taking of Hostages* (n 20) which indicates that each State shall punish the offences set forth “by appropriate penalties which take into account the grave nature of those offences” (Article 2); the same applies to the *Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation* (n 20) Article 5, and the *Convention for the Suppression of Terrorist Bombings* (n 20) Article 4(b).

³³ UNODC (*Draft*) *Legislative Guide* (n 15) 104.

3. The Council of Europe Convention on the Prevention of Terrorism

The Council of Europe Convention on the Prevention of Terrorism, adopted on 16 May 2005, requires States parties to criminalise the unlawful and intentional “public provocation to commit a terrorist offence”, defining that phrase in Article 5(1) as:³⁴

...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.

The Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism has expressed the view that this provision represents a best practice in defining the proscription of the incitement to terrorism.³⁵ Although the Convention is a regional instrument, the proscription in Article 5 was the result of careful negotiation. In defining what amounts to a “public provocation to commit a terrorist offence”, Article 5 contains three elements. There must first be an act of communication (“the distribution, or otherwise making available, of a message to the public..”). Secondly, there must be a subjective intention on the part of the person to incite terrorism (“...with the intent to incite the commission of a terrorist offence...whether or not directly advocating terrorist offences...”). Finally, there must be an additional objective danger that the person’s conduct will incite terrorism (“...where such conduct... causes danger that one or more such offences may be committed”). The latter objective requirement separates the incitement to terrorism from an act of glorification of terrorism. The requirement of intention in Article 5(2) reaffirms the subjective element within the definition of public provocation to commit a terrorist offence and requires the act of communication to be intentional also.

Of note, Article 8 clarifies that a terrorist offence need not actually be committed for the provocation of such offending to amount to conduct proscribed under Article 5. The offence is thus proactive in nature. Of note also, the term “terrorist offence” is defined under Article 1 as any of the offences within 10 of the 12 anti-terrorism conventions in force (excluding the Tokyo Convention and the Convention on the Marking of Plastic Explosives). The latter convention is properly omitted as a ‘trigger offence’

³⁴ *Council of Europe Convention on the Prevention of Terrorism* (n 21) Article 5.

³⁵ Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism, Martin Scheinin, *Australia: Study on Human Rights Compliance While Countering Terrorism*, UN Doc A/HRC/4/26/Add.3 (2006), paras 26-27.

treaty, since it does not proscribe any conduct, but instead places obligations upon States relating to the marking of explosives. The Tokyo Convention was omitted due to the broad nature of the conduct proscribed under the treaty which, while criminalising terrorist conduct, also captures conduct with no bearing at all to terrorism (for example, conduct which may jeopardise good order on an aircraft).³⁶

The Freedom of Expression

Having considered the obligations and recommendations concerning the suppression of terrorism and, more precisely, the incitement to terrorism, it is now necessary to examine the rival to such proscription: the freedom of expression. Consideration will be given to the International Covenant on Civil and Political Rights, as well as parallels within regional human rights instruments.

1. The International Covenant on Civil and Political Rights

Article 18(1) of the International Covenant on Civil and Political Rights guarantees the freedom of thought, mirrored in Article 19(1) of the Covenant as the right to hold opinions without interference.³⁷ The freedom of expression (including the freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers) is subsequently guaranteed under Article 19(2). Recognised within paragraph (3) of Article 19 is the fact that the exercise of the right to freedom of expression carries with it special duties and responsibilities permitting the imposition of restrictions upon the right, which may relate either to the interests of other persons or to those of the community as a whole:

Article 19

3. The exercise of the rights provided for in paragraph 2 of this article carries with it special duties and responsibilities. It may therefore be subject to certain restrictions, but these shall only be such as are provided by law and are necessary:

- (a) For respect of the rights or reputations of others;
- (b) For the protection of national security or of public order (*ordre public*), or of public health or morals.

³⁶ See further on this point the report of the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism, Martin Scheinin, *Promotion and Protection of Human Rights*, UN Doc E/CN.4/2006/98 (2006), paras 32-36.

Within the terms of paragraph (3), then, any restriction must cumulatively meet the following conditions: it must be provided for by law, it must address one of the aims enumerated in paragraph (3)(a) and (b) of Article 19, and it must be necessary to achieve those legitimate purposes. The cumulative nature of these requirements was emphasised by the Human Rights Committee (HRC) in *Mukong v Cameroon*.³⁸ Any limitation must also be proportional and not implemented in a manner that nullifies the substance of the right to expression, as explained by the Committee in its General Comment on Article 19.³⁹ Where a State seeks to justify a limitation as falling within the ambit of paragraph (3), the Human Rights Committee will require the State party to specify the precise nature of the threat allegedly posed by a person's exercise of freedom of expression and how the limitation achieves dissipation of that threat.⁴⁰

The question of limiting the freedom of expression on the basis of national security was considered in *Park v Republic of Korea*. Korea stated, in that communication, that the restrictions in question (prohibiting the "praising, encouraging, or siding with or through other means the activities of an anti-State organization") were justified in order to protect national security, and that they were provided for by law under Article 7 of the National Security Law 1980 (Korea). Despite the potentially sensitive nature of security issues, the Committee took the view that it was nevertheless required to determine whether any measures taken were in fact necessary for the purpose stated. On the facts of the communication, the State party invoked national security by reference to the general situation in the country and the threat posed by "North Korean communists". The Committee considered that the State had failed to specify the precise nature of the threat posed by the author's exercise of freedom of expression and therefore found that there was no basis upon which the restriction could be considered compatible with Article 19(3).⁴¹

Added to the permissible limitations upon the freedom of expression within Article 19(3), and of even greater relevance to suppressing the

³⁷ *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976).

³⁸ *Mukong v Cameroon*, Human Rights Committee Communication 458/1991, para 9.7.

³⁹ *General Comment 10. Article 19*, CCPR General Comment 10 of 1983, reprinted UN Doc HRI/GEN/1/Rev.1 at 11 (1994), para 4.

⁴⁰ See, for example, *Kim v Republic of Korea*, Human Rights Committee Communication 574/1994, para 12.5; *Laptsev v Belarus*, Human Rights Committee Communication 780/1997, para 8.5; and *Pietrataroia v Uruguay*, Human Rights Committee Communication r10.44/1979, para 17.

⁴¹ *Park v Republic of Korea*, Human Rights Committee Communication 628/1995. See also *Kim v Republic of Korea*, Human Rights Committee Communication 574/1994, para 10.3.

incitement to terrorism, Article 20 demands a further ‘restriction’ by way of a prohibition against certain forms of expression:

Article 20

1. Any propaganda for war shall be prohibited by law.
2. Any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence shall be prohibited by law.

This is something that builds upon an early statement of the idea in the Universal Declaration of Human Rights.⁴² Article 7 of the Declaration provides that: “All are equal before the law and are entitled without any discrimination to equal protection of the law. All are entitled to equal protection against any discrimination in violation of this Declaration and against any incitement to such discrimination”. Article 20(2) of the ICCPR stands as a reflection of the context in which the document was negotiated (as a post-World War II human rights instrument),⁴³ and of the importance attached to the principle of non-discrimination. It is noteworthy in the latter regard that Article 4 of the ICCPR provides that any derogation of rights in times of emergency may not involve discrimination solely on the ground of race, colour, sex, language, religion or social origin.⁴⁴ In the context of terrorism and counter-terrorism, the Committee on the Elimination of Racial Discrimination has declared that the prohibition against racial discrimination is a peremptory norm of international law from which no derogation is permitted.⁴⁵ If the Committee is correct in characterising the principle of non-discrimination as a peremptory one, this gives further weight to the prohibition in Article 20(2) of the ICCPR.

Significantly, Article 20(2) not only impacts upon an individual’s exercise of the freedom of expression, but also places a positive duty upon States parties to adopt the necessary legislative measures prohibiting the actions referred to in its provisions. Each of the paragraphs state that these forms of expression “shall be prohibited by law”. In this respect, the

⁴² *Universal Declaration of Human Rights*, as adopted by the United Nations General Assembly in its resolution GA Res 217(III)A, UN GAOR, 3rd sess, 183rd plen mtg, UN Doc A/Res/217(III)A.

⁴³ Consider the parallel in German and Austrian law (required of both States under the post-WWII Peace Treaties) prohibiting membership in, or glorification of, the National Socialist Party.

⁴⁴ Emphasised in Human Rights Committee, *States of Emergency (Article 4)*, CCPR General Comment 29 of 2001, reprinted UN Doc HRI/GEN/1/Rev.6 at 186 (2003), paras 8 and 16.

⁴⁵ Committee on the Elimination of Racial Discrimination, “Statement on Racial Discrimination and Measures to Combat Terrorism”, in *Report of the Committee on the Elimination of Racial Discrimination*, UN GAOR, 57th sess of the UNGA, Supplement 18, 61st sess of the CERD, UN Doc A/57/18, 107.

Human Rights Committee has expressed disappointment that many State party periodic reports show that in some States such actions are not prohibited by law and that there do not appear to be appropriate efforts to do so.⁴⁶ For Article 20 to become fully effective, the HRC articulated a need for legislative proscriptions making it clear that propaganda and prohibited advocacy are contrary to public policy, and providing for an appropriate sanction in the case of violation.⁴⁷ Lack of State action in this area is, interestingly, reflected in a lack of proper proscription of the incitement to terrorism by a number of States. This is the case in Australia, for example, and also in New Zealand (as will be discussed).⁴⁸

2. Human Rights Committee General Comment 11

As part of its practice under Article 40(4) of the ICCPR, the Human Rights Committee issued a General Comment on Article 20 of the Covenant for the guidance of States parties.⁴⁹ Three points of particular relevance to this chapter were made. The first is that Article 20 contains a positive duty to prohibit incitement and propaganda, as identified. This is particularly relevant to the proactive approach to criminalising incitement advocated by the UNODC, and the General Assembly and Security Council calls for action in this area.

The second aspect of the General Comment concerns the Committee's view on the compatibility of Article 20 with the freedom of expression (as guaranteed under Article 19 of the ICCPR). In describing the two provisions as fully compatible, the HRC emphasised that the exercise of the freedom of expression "carries with it special duties and responsibilities".⁵⁰ The final point, particularly pertinent to the transnational nature of terrorism and the incitement thereof, was the Committee's clarification that the prohibition in Article 20 applies "whether such propaganda or advocacy has aims which are internal or external to the State concerned". This reinforces a similar point made in the Declaration on Measures to Eliminate International Terrorism already discussed.⁵¹

For the sake of completeness, it is worth mentioning that the Committee made specific reference to the right of self-determination,

⁴⁶ Human Rights Committee, *General Comment 11. Article 20*, CCPR General Comment 11 of 1983, reprinted UN Doc U.N. Doc. HRIGEN\1\Rev.1 at 12 (1994), para 1.

⁴⁷ *Ibid* para 2.

⁴⁸ See the Special Rapporteur's report on Australia (n 35) para 25.

⁴⁹ *General Comment 11* (n 46).

⁵⁰ *Ibid* para 2.

⁵¹ *Declaration on Measures to Eliminate International Terrorism* (n 24) para 5(a).

recognising that Article 20 does not prohibit advocacy of the sovereign right of self-defence or the right of peoples to self-determination and independence in accordance with the Charter of the United Nations.⁵² It is clear, however, that acts of terrorism are not justified as the means of achieving self-determination or any other objective. Early resolutions of the UN General Assembly addressing the issue of terrorism contained express affirmations of the principle of self-determination.⁵³ Since the 1994 Declaration on Measures to Eliminate International Terrorism, however, the United Nations has been very clear that this does not legitimate the use of terrorism by those seeking to achieve self-determination.⁵⁴ As such, this part of General Comment 11 should not be misunderstood as legitimating the advocacy of terrorism within the context of self-defence or self-determination.

3. Parallel human rights provisions

In similar terms to the ICCPR, Article 10 of the European Convention on Human Rights guarantees the freedom of expression, subject to limitations prescribed by law and necessary in a democratic society.⁵⁵ The European

⁵² *General Comment 11* (n 46) para 2.

⁵³ See, for example, GA Res 3034(XXVII), UN GAOR, 27th sess, 2114th plen sess, UN Doc A/Res/3034(XXVII) (1972), para 3, which urged States to solve the problem of terrorism by addressing the underlying issues leading to terrorist conduct and then reaffirmed: "...the inalienable right to self-determination and independence of all peoples under colonial and racist regimes and other forms of alien domination and upholds the legitimacy of their struggle, in particular the struggle of national liberation movements, in accordance with the purposes and principles of the Charter and the relevant resolutions of the organs of the United Nations".

⁵⁴ Para 1 of the *Declaration* provides that: "The States Members of the United Nations solemnly reaffirm their unequivocal condemnation of all acts, methods and practices of terrorism, as criminal and unjustifiable, wherever and by whomever committed, including those which jeopardise the friendly relations among States and peoples and threaten the territorial integrity and security of States" [emphasis added]. The General Assembly was even more clear on this point in its Resolution 50/53, reiterating that: "criminal acts intended or calculated to provoke a state of terror in the general public, a group of persons or particular persons are in any circumstances unjustifiable, whatever the considerations of a political, philosophical, ideological, racial, ethnic, religious or any other nature that may be invoked to justify them" [emphasis added]: GA Res 50/53, UN GAOR, 50th sess, 87th plen mtg, UN Doc A/Res/50/53 (1995), para 2. The Security Council has likewise directed that terrorism cannot be justified by any political, ideological or similar consideration: SC Res 1269, UN SCOR, 4053rd sess, UN Doc S/Res/1269 (1999), para 1; and SC Res 1566, UN SCOR, 5053rd sess, UN Doc S/Res/1566 (2004), para 3.

⁵⁵ *Convention for the Protection of Human Rights and Fundamental Freedoms*, opened for signature 4 November 1950, 213 UNTS 222 (entered into force 3 September 1953).

Court of Human Rights has taken this to include not only ideas and information that are favourably received or regarded as inoffensive, but also those that “offend, shock or disturb”, unless they may be proscribed within the terms of Article 10(2).⁵⁶ In *Sener v Turkey*, the European Court of Human Rights reiterated that there is little scope under Article 10(2) of the *Convention* for restrictions on political speech or on debate on questions of public interest, but continued:⁵⁷

Nevertheless, it certainly remains open to the competent State authorities to adopt, in their capacity as guarantors of public order, measures, even of a criminal-law nature, intended to react appropriately and without excess to such remarks... Finally, where such remarks incite people to violence, the State authorities enjoy a wider margin of appreciation when examining the need for an interference with freedom of expression.

The Inter-American Convention on Human Rights also proscribes the incitement to violence or racial hatred, Article 13(5) providing:

Any propaganda for war and any advocacy of national, racial, or religious hatred that constitute incitements to lawless violence or to any other similar action against any person or group of persons on any grounds including those of race, color, religion, language, or national origin shall be considered as offenses punishable by law.

These general limitations provisions are further reflected within Article 29(2) of the Universal Declaration of Human Rights, with paragraph (3) of that Article of particular relevance to the incitement to terrorism:

2. In the exercise of his rights and freedoms, everyone shall be subject only to such limitations as are determined by law solely for the purpose of securing due recognition and respect for the rights and freedoms of others and of meeting the just requirements of morality, public order and the general welfare in a democratic society.

3. These rights and freedoms may in no case be exercised contrary to the purposes and principles of the United Nations.

Options and Safeguards

The incitement to terrorism is becoming a common tool of terrorist organisations. As opposed to that, all UN members are under an obligation to prevent the commission of terrorist acts, and have been urged and called

⁵⁶ See, for example, *Lingens v Austria* ECtHR judgment of 8 July 1986.

⁵⁷ ECtHR judgment of 18 July 2000, para 40.

upon by both the General Assembly and Security Council to prohibit the incitement to terrorism. In respect of the incitement of conduct that is both terrorist in nature and also amounts to genocide, the prohibition of such incitement is required of States parties to the Rome Statute of the International Criminal Court. Furthermore, States parties to the International Covenant on Civil and Political Rights are obliged to criminalise the advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence. Those European States that become party to the Council of Europe Convention on the Prevention of Terrorism will be required to prohibit the unlawful and intentional public provocation to commit a terrorist offence, as defined within the Convention. Common to the latter three prohibitions is the proactive nature of the prohibitions, not requiring the act incited to have been committed for an offence to occur. Of general application, sanctions imposed for those convicted of the incitement to terrorism should be particularly dissuasive and in conformity with the principle of proportionality between the gravity of the sanction and the gravity of the act.

The freedom of expression may be limited to the extent necessary for the protection of national security, public order, or of public health or morals and does not justify the advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence. Against the background of the points made within General Comment 11 of the Human Rights Committee, and having regard to the substantive requirements of Article 20(2) of the ICCPR, this paper concludes that the positive duty under Article 20(2) is particularly relevant to the issue of the incitement to terrorism. Article 20(2) prohibits “advocacy of national, racial or religious hatred...” (each aspect of which is promoted within the quoted incitements to terrorism above) “that constitutes incitement to discrimination, hostility or violence...” (again, each aspect of which is promoted within the quoted incitements to terrorism).

In responding to the problem of the incitement to terrorism, the first option available to States is to implement a general proscription of incitement to discrimination, hostility or violence through the advocacy of national, racial or religious hatred, in compliance with the obligation under Article 20(2) of the ICCPR. Such a proscription would capture conduct amounting to the incitement to terrorism. Reflecting the more general nature of such a proscription, however, the maximum penalties for such offending would need to be limited. This may not impose a sufficiently appropriate level of sanction, given the calls for terrorist offending to be punished by heavy sentences. The better approach, it seems, is for States to

criminalise the particular conduct of incitement to terrorism, with an appropriately corresponding criminal sanction.

The most important question concerning the criminalisation of the incitement to terrorism is the description of the proscribed conduct. Reference to various provisions of the ICCPR, together with elements drawn from commentaries and a comparison of relevant international instruments, leads to the identification of a number of ‘safeguards’ applicable to the description of the proscribed conduct. Drawing from these sources, this chapter identifies seven safeguards applicable to ensuring that any proscription of the incitement to terrorism is compliant with international human rights standards. In the New Zealand context, such compliance would also render the proscription a justifiable limitation upon the freedom of expression, within the terms of section 5 of the New Zealand Bill of Rights Act 1990. Similarly, compliance with these safeguards will also ensure that the United Kingdom is compliant with the European Convention on Human Rights and its own Human Rights Act 1993.

1. Compliance with Articles 19 and 20 of the ICCPR

Any proscription of the incitement to terrorism is likely to fall within the requirement under Article 20(2) to prohibit the incitement to discrimination, hostility or violence through the advocacy of national, racial or religious hatred. It is conceivable, however, that a proscription against the incitement to terrorism will go further than this. Where that is the case, States will need to ensure that the formulation of the proscription is in compliance with the provisions of Article 19(3). This means that a formulation going beyond the bounds of Article 20(2) will need to be “for the protection of national security or of public order (*ordre public*), or of public health or morals” (Article 19(3)(b)).

2. Precision

Of relevance to the formulation of any criminal offence provision is Article 15(1) of the ICCPR, which sets out various standards pertaining to the legality of criminal law proscriptions. The first of its requirements means that any prohibition against the incitement to terrorism must be undertaken by national or international prescriptions of law. To be ‘prescribed by law’ the prohibition must be framed in such a way that the law is adequately accessible (so that the individual has a proper indication of how the law limits his or her conduct) and is formulated with sufficient precision (so that the

individual can regulate his or her conduct). These two requirements were held by the European Court of Human Rights to flow from the expression ‘prescribed by law’ in the *Sunday Times* case of 1978, with similar explanations given by the Human Rights Committee and other documentation on rights limitations.⁵⁸ Terrorism offences should also plainly set out what elements of the crime make it a terrorist crime. Similarly, where any offences are linked to “terrorist acts”, there must be a clear definition of what constitutes such acts.⁵⁹ The latter point is particularly significant in ‘safeguard 3’ below.

On a more general note, the Sub-Commission Special Rapporteur on human rights and counter-terrorism has commented that: “States must ensure that the expression of alternative political views, as well as peaceful meetings, are permitted...”.⁶⁰ This is particularly relevant to the framing of any proscription against incitement to terrorism, to ensure that the wording of the proscription is not so broad as to capture legitimate expressions or peaceful meetings.

Precision also raises the question of the permissible bounds of the prohibition against the incitement to terrorism. A concerning trend has been the proscription of the glorification (*apologie*) of terrorism, involving statements which may not go so far as to incite or promote the commission of terrorist acts, but might nevertheless applaud past acts. While such statements might offend the sensibilities of persons and society, particularly the victims of terrorist acts, it is important that vague terms such as “glorifying” or “promoting” terrorism are not used when restricting expression. A joint declaration of experts on freedom of expression explains that “[i]ncitement should be understood as a direct call to engage in terrorism, with the intention that this should promote terrorism, and in a

⁵⁸ See: *Sunday Times v United Kingdom* (1978) 58 ILR 491, 524-527; Human Rights Committee, *States of Emergency (Article 4)* (n 46) para 16; United Nations Economic and Social Council Sub-Commission on Prevention of Discrimination and Protection of Minorities, *Siracusa Principles on the Limitation and Derogation of Provisions in the International Covenant on Civil and Political Rights*, UN Doc E/CN.4/1985/4 (1985), paras 15 and 17; Inter-American Commission on Human Rights, *Report on Terrorism and Human Rights*, Doc OEA/Ser.L/V/II.116 (22 October 2002), para 53; and Council of Europe, *Guidelines on Human Rights and the Fight Against Terrorism*, (Council of Europe Publishing, 2002), Guideline III.

⁵⁹ Special Rapporteur, *Promotion and Protection of Human Rights* (n 36) paras 45-46.

⁶⁰ Sub-Commission on the Protection and Promotion of Human Rights, *A Preliminary Framework Draft of Principles and Guidelines Concerning Human Rights and Terrorism*, E/CN.4/Sub.2/2005/39 (2005), para 55 comment.

context in which the call is directly causally responsible for increasing the actual likelihood of a terrorist act occurring".⁶¹

3. Confinement to countering terrorism

Arising from the need for precision, and to avoid use of the fight against terrorism as an excuse to unnecessarily extend the reach of criminal law, it is essential that any offence directed to the incitement of terrorism (as opposed to a general incitement offence) be limited to countering terrorism, and the incitement of conduct which is truly 'terrorist' in nature.⁶² This is a matter that has been identified and discussed in chapter 7, and will be further considered in chapter 16.

4. Non-discrimination

A matter required by Article 26 of the ICCPR, and by the rule of law, is the need for any legal prescription to respect the principle of non-discrimination and equality before the law. As discussed, Article 4(1) of the ICCPR provides that any derogation of rights in times of an emergency threatening the life of the nation may not involve discrimination solely on the ground of race, colour, sex, language, religion or social origin.⁶³ The General Assembly and Commission on Human Rights have, in their latest resolutions on the protection of human rights and fundamental freedoms while countering terrorism, stressed that the enjoyment of rights must be without distinction upon such grounds.⁶⁴ The Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism has also emphasised this requirement.⁶⁵

⁶¹ See the joint declaration of the UN Special Rapporteur on Freedom of Opinion and Expression, the OSCE Representative on Freedom of the Media, and the OAS Special Rapporteur on Freedom of Expression, 21 December 2005.

⁶² Special Rapporteur, *Promotion and Protection of Human Rights* (n 36) para 47. See also two reports of the Sub-Commission on the Protection and Promotion of Human Rights: *Final Report of the Special Rapporteur on Terrorism and Human Rights*, E/CN.4/Sub.2/2004/40 (2004), para 33(c); and *A Preliminary Framework*, *ibid* para 33.

⁶³ See also Human Rights Committee, *States of Emergency (Article 4)* (n 46) paras 8 and 16.

⁶⁴ GA Res 59/191, UN GAOR, 59th sess, 74th plen mtg, UN Doc A/Res/59/191 (2004), preambular para 12, and CHR Res 2005/80, 61st sess, 60th mtg, UN Doc E/CN.4/Res/2005/80, preambular para 15.

⁶⁵ *Promotion and Protection of Human Rights* (n 36) para 48.

5. Non-retroactivity

A further element of Article 15 of ICCPR concerns non-retroactivity. Any provision defining a crime must not criminalise conduct that occurred prior to its entry into force as applicable law. Likewise, any penalties are to be limited to those applicable at the time that any offence was committed and, if the law has subsequently provided for the imposition of a lighter penalty, the offender must be given the benefit of the lighter penalty. In the context of counter-terrorism, these are, again, matters reiterated by the Special Rapporteur.⁶⁶

6. Unlawful incitement

The Council of Europe Convention on the Prevention of Terrorism requires States to proscribe the unlawful and intentional public provocation to commit a terrorist offence. The explanatory report to the Convention clarifies that the term 'unlawful' is used in order to leave any conduct undertaken pursuant to lawful government authority unaffected, and to also preserve the application of any legal defences or principles leading to the exclusion of criminal liability.⁶⁷ This would preserve the ability, for example, to claim a defence of duress where an individual is compelled to make an inciting public statement upon a threat of harm to the person or his or her family.

While desirable, the inclusion of this element is not required of any universal anti-terrorism or human rights instrument, nor advocated by any resolution of the General Assembly or Security Council. The Special Rapporteur has, however, identified the Council of Europe Convention proscription against the incitement to terrorism as an instance of best practice, and proscription of 'unlawful' incitement is therefore to be preferred.⁶⁸

7. Intentional incitement

A matter of some uncertainty is whether intention should form an express element of any proscription of the incitement to terrorism. This is not addressed within the resolutions of the General Assembly or Security

⁶⁶ Ibid para 49.

⁶⁷ Council of Europe, *Explanatory Report to the Council of Europe Convention on the Prevention of Terrorism*, online: <<http://www.conventions.coe.int/Treaty/EN/Reports/Html/196.htm>> (last accessed 20 December 2005), paras 81-83.

⁶⁸ Special Rapporteur, *Australia Study* (n 35) paras 26-27.

Council. Intention is an element of the Council of Europe Convention on the Prevention of Terrorism, but not expressed to be so within the ICCPR or Rome Statute of the International Criminal Court.

The Council of Europe Convention, Article 5(1), defines the public provocation to commit a terrorist offence as “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...” (emphasis added). Article 5(2) then requires any public act of provocation to be intentional. As explained earlier, this means that the act of communication must also be intentional.⁶⁹ In contrast, Article 20(2) of the ICCPR requires States parties to prohibit “any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence...” (thus requiring a purely objective assessment of whether the advocacy constitutes incitement). Similarly, the Rome Statute, Article 25(3)(e), requires a person to be made criminally responsible if he or she “directly and publicly incites others to commit genocide” (leaving out any mention of intention in this list of participation offences, many of which do expressly require intention as an element of the offence).

Notwithstanding the neutral language of the ICCPR and the Rome Statute, three matters point to the desirability of intention forming an element of the offence of incitement to terrorism. The first concerns the nature of criminal law and the general presumption against strict liability offences, being offences where the intent of the perpetrator is not relevant to the issue of guilt. Strict liability offences are an exception to the general rule that criminal offending requires both an *actus reus* (an act or omission constituting the physical element(s) of the offence) and a *mens rea* (an intention on the part of the actor to certain ends). This presumption is borne out in the rule of many common law jurisdictions, including New Zealand and the United Kingdom, that when a statute does not employ terms expressly importing the need for *mens rea*, the element of *mens rea* is nevertheless to be implied as an ingredient of the offence, unless there is sufficient reason to the contrary. The New Zealand Court of Appeal, for example, has accepted that it is “a universal principle that if a penal provision is reasonably capable of two interpretations, that interpretation which is most favourable to the accused must be adopted”.⁷⁰ A need for the prosecution to establish *mens rea* is particularly likely when the offence is ‘serious’ or ‘truly criminal’, rather than being a ‘public welfare’ or

⁶⁹ See also the Special Rapporteur’s view to this effect, *ibid* para 30.

⁷⁰ *Civil Aviation Dept v MacKenzie* [1983] NZLR 78 (CA), 81.

'regulatory' offence.⁷¹ This approach can also be seen in the international context. Article 5 of the Statute of the International Criminal Tribunal for former Yugoslavia, for example, sets out the Tribunal's jurisdiction over crimes against humanity without any mention of intent.⁷² The Tribunal has nevertheless ruled that intent is an element of the offence to be proved by the prosecutor.⁷³

The second matter calling for the inclusion of intention as an element of any offence relates to the text of the Council of Europe Convention. The Convention is the only treaty proscribing the incitement to terrorism and it is therefore not insignificant that the negotiating parties agreed upon a double requirement of intent to incite, with an objective danger that a terrorist offence might result. A final matter for consideration is the issue of certainty, as required by Article 15 of the ICCPR. Although this is a question to be answered upon consideration of the particular words of any offence provision, the absence of intent may mean that such a provision is applicable to so broad a range of conduct that certainty is not achieved. Given the general presumption in favour of requiring intent for non-regulatory offences, the need for certainty, and the presence of intent within the only agreed-upon treaty definition of the incitement to terrorism, it seems safe to assert that intent should form an element of any proscription of the incitement to terrorism.

8. Summary of options and safeguards

Given the call for dissuasive penalties to be applied in the sentencing of terrorist offenders, it appears to be prudent for States to criminalise the particular conduct of incitement to terrorism, with an appropriately corresponding range of criminal sanctions, rather than leaving this to a more general prohibition against incitement. Although the formulation of any particular proscription of the incitement to terrorism is a matter for each State to determine, seven safeguards or minimum requirements have been identified. First, any proscription must not limit the freedom of expression any more than permitted by Article 19(3) of the ICCPR (i.e. no more than necessary for the protection of national security, public order, or of public health or morals). Second, the proscription must be adequately

⁷¹ Consider, for example, the position to this effect in New Zealand: *Millar v MOT* [1986] 1 NZLR 660 (CA), 666.

⁷² *Statute of the International Criminal Tribunal for former Yugoslavia*, adopted on 23 May 1993 by SC Res 827, UN SCOR, 3217th mtg, UN Doc S/Res/827 (1993).

⁷³ See, for example, *Prosecutor v Kupreskic* Trial Chamber Case IT-95-16-T (14 January 2000), para 556.

accessible and expressed in a precise manner so that the public is clear on what conduct is being prohibited. Next, and in the absence of a comprehensive and universal definition of 'terrorism', the incitement to terrorism should be limited in its application to the incitement of: (a) acts committed with the intention of causing death or serious bodily injury, or the taking of hostages; (b) for the purpose of provoking a state of terror, intimidating a population, or compelling a government or international organization to do or abstain from doing any act; and (c) constituting offences within the scope of and as defined in the international conventions and protocols relating to terrorism. Fourth in the list of safeguards, any proscription must be expressed in a manner that respects the principle of non-discrimination. A proscription must not apply retroactively, and it should be expressed as the 'unlawful' incitement to terrorism, thus preserving any applicable legal defences. Finally, the proscription should be expressed as the 'intentional' incitement to terrorism, thus expressly incorporating an element of mens rea and requiring an intention on the part of the person to incite the commission of a terrorist offence.

New Zealand Law

New Zealand is a member of the United Nations and party to the twelve extant anti-terrorism conventions, and to the International Covenant on Civil and Political Rights. The main body of law on counter-terrorism in New Zealand is to be found in the Terrorism Suppression Act 2002, in which appear a total of ten terrorism offences. On the subject of the suppression of the financing of terrorism (relevant to the corresponding International Convention, and Security Council resolution 1373),⁷⁴ the Act prohibits the financing of terrorism, dealing with terrorist property (having the effect of freezing that property), and making property, or financial or related services, available to designated entities.⁷⁵ Related to three further international conventions on anti-terrorism,⁷⁶ the Act makes it unlawful to undertake a terrorist bombing, to use or move unmarked plastic explosives, and creates two offences involving nuclear materials.⁷⁷ It also prohibits

⁷⁴ See the *International Convention for the Suppression of the Financing of Terrorism* (n 20); and SC Res 1373 (n 17).

⁷⁵ *Terrorism Suppression Act 2002*, ss 8, 9 and 10.

⁷⁶ The International Convention for the Suppression of Terrorist Bombings, the Convention on the Physical Protection of Nuclear Material, and the Convention on the Marking of Plastic Explosives for the Purpose of Detection (n 20).

⁷⁷ *Terrorism Suppression Act 2002*, ss 7, 13B, 13C and 13D.

recruiting members of terrorist groups, participating in terrorist groups, and harbouring or concealing terrorists.⁷⁸ Amendment of the Crimes Act 1961 in 2003 saw the introduction of new sections 298A, 298B and 307A, making it an offence to cause disease or sickness in animals; contaminate food, crops, water or other products; or make threats of harm to people or property to achieve terrorist ends.

New Zealand's Law On and Relevant to Incitement

Although New Zealand does not have a specific offence dealing with the incitement of terrorist conduct, provisions within the Human Rights Act 1993 and the Crimes Act 1961 are of relevance.

1. General proscription against incitement

The Human Rights Act 1993 prohibits threatening, abusive or insulting publications or speech likely “to excite hostility against or bring into contempt” any group of persons on the grounds of discrimination.⁷⁹ It is, in that regard, similar to the prohibition in Article 20(2) of the ICCPR but is more limited in its potential application to the incitement of terrorism. The first limitation concerns a jurisdictional restriction. The prohibition only applies to such conduct that excites hostility against persons in New Zealand (or who may be coming to New Zealand).⁸⁰ Jurisdictional limitations such as this fail to address the need for States to prohibit the incitement to terrorism (and to hostility or violence more generally) both within their own borders and those of other States.

The second limitation is that the prohibition is restricted to the incitement of discrimination and hostility. It does not prohibit incitement to violence, although it should be acknowledged that ‘violence’ is conceivably captured within the scope of ‘hostility’. The prohibited conduct under the Human Rights Act is that which, inter alia, is: “likely to excite hostility against or bring into contempt any group of persons in or who may be coming to New Zealand on the ground of the colour, race, or ethnic or national origins of that group of persons”. Furthermore, the maximum penalty for the offence of incitement under the Human Rights Act is a term of imprisonment not exceeding 3 months, or a fine not exceeding \$7,000.⁸¹

⁷⁸ *Terrorism Suppression Act 2002*, ss 12, 13 and 13A.

⁷⁹ *Human Rights Act 1993*, ss 61 and 63.

⁸⁰ *Human Rights Act 1993*, s 61(1).

⁸¹ *Human Rights Act 1993*, s 131(1).

This maximum sentence does not meet with the call for heavy sentences against those involved in terrorism.

2. Party offences

Party offences are created under section 66(1)(d) of the Crimes Act 1961, such that the conduct of anyone who “incites, counsels, or procures any person to commit an offence” is also guilty of the principal offence. Thus, a person who has incited the commission of any of the terrorism offences under New Zealand law, as identified, would be liable for prosecution. The point to be made is that this is a ‘reactive’ form of criminalisation, rather than the proactive criminalisation of the incitement to terrorism called for. To be guilty of an offence under section 66(1)(d), the principal offence (including an act of terrorism) must have actually been committed.⁸²

3. Procuring the commission of offences

Section 311 of the Crimes Act is the corollary to party offences under section 66(1)(d). Whereas party offences can only be committed where the principal offence has been carried out, section 311(2) prohibits the incitement, counselling, or attempt to procure any person to commit any offence, “when that offence is not in fact committed”. This would clearly capture the incitement of terrorist offences under New Zealand law.

However, in the way that section 311(1) can relate to terrorism-specific offences (none of which carry a sentence of life imprisonment), a person who incites, counsels, or attempts to procure the commission of such offences is liable to not more than half of the maximum punishment one would be liable for had the offence been committed. This form of secondary liability is likely grounded in the fact that section 311 applies only where the principal offence has not been committed, with the consequence that there is no victim (unlike the commission of party offences under section 66). As discussed, the UNODC ultimately takes the view that determining the precise level of sanctions is a matter for each State having regard to proportionality between the gravity of the act and the sanction imposed. Notwithstanding this, an observation to make is that incitement to terrorism (as referred to in the resolutions of the General Assembly and the Security Council) and incitement to hostility or violence (under Article 20(2) of the ICCPR) are treated as primary offences. It is thus questionable whether the reduced form of secondary liability provided

⁸² See *R v Bowern* [1915] 34 NZLR 696 (CA).

for in section 311(1) is appropriate to deal with the procuring of terrorism offences.

4. Seditious offences

Again relevant to the incitement to terrorism, section 81 of the Crimes Act 1961 defines a seditious intention as an intention: to incite, procure, or encourage violence, lawlessness, or disorder (section 81(1)(c)); or to incite, procure, or encourage the commission of any offence that is prejudicial to the public safety or to the maintenance of public order (section 81(1)(d)). An offence of 'seditious conspiracy' is then created through the combination of sections 81(3) and 82, such that an agreement between 2 or more persons to carry into execution any seditious intention makes a person liable to imprisonment for a term not exceeding two years.

Two limitations are identified within this regime. The maximum penalty for an offence of sedition is two years' imprisonment, which probably fails to meet the call for heavy sentences. Also, an intention to incite those things identified in section 81(1)(c) and (d) only becomes an offence of sedition if two or more people agree to do so. The regime would thus fail to capture a person acting alone to incite terrorism (as has occurred in the examples cited earlier).

5. Making threats of harm

Amendment of the Crimes Act in 2003 saw the introduction of section 307A, which criminalises certain threats of harm to people or property. The making of such threats is again limited in its relevance to the incitement to terrorism. The threats must be ones that significantly disrupt matters relating to New Zealand (subsection (2)), thus failing to address the need for States to prohibit the incitement to terrorism both within their own borders and those of other States. Furthermore, the threats must have resulted in certain outcomes (subsection (3)), thus adopting a reactive rather than proactive approach. Most importantly, the prohibition relates to the making of threats, rather than the incitement of others to hostility, violence or terrorism and thus only criminalises acts of incitement that themselves contain threats falling within the jurisdiction of section 307A.

Jurisdictional Issues in New Zealand's Applicable Law

The various offences described fall into one of the three categories. First are those offences committed entirely within the territory of New Zealand.

In such circumstances, by application of the offence provisions alone, there are no jurisdictional issues of concern. Next would be offences commenced (or completed) within the territory of New Zealand. By application of section 7 of the Crimes Act 1961, such offences are deemed to have been committed in New Zealand, whether or not the person charged with the offence was in New Zealand at the time of the relevant act, omission, or event. Finally are those offences that amount to a “terrorist act” (as defined by section 5(1) of the Terrorism Suppression Act 2002), and occur wholly outside New Zealand. By application of section 7A of the Crimes Act 1961, proceedings may be brought in respect of such acts if: (1) the person is a New Zealander or in New Zealand (section 7A(1)(a)); (2) any part of the offence occurs on any place in respect of which New Zealand has jurisdiction abroad (section 7A(1)(b)); or (3) the offence is perpetrated against a New Zealander (section 7A(1)(c)).

Added to this, the offences described are capable of dealing with the following persons or events overseas: (1) conduct falling within one of the defined terrorism offences relating to activities outside New Zealand (e.g. the prohibition against dealing with property owned or controlled by a designated terrorist entity, those entities all being outside New Zealand, as the position currently stands);⁸³ or (2) being a party to the latter offences, procuring the commission of the latter offences, or undertaking a seditious conspiracy relating to the latter offences.

Notwithstanding this framework of jurisdiction, none of the offences described in this part of this paper are able to deal with the situation where a person incites others to commit terrorist acts abroad.

Summary and Evaluation of New Zealand’s Law on Incitement

Having regard to the practical relevance of the incitement to terrorism to New Zealand and the Pacific region, and to the international obligations and recommendations on the prohibition of the incitement to hostility, violence and terrorism, New Zealand’s criminal law appears deficient in a number of ways. The incitement offence under the Human Rights Act 1993 is limited in its jurisdictional application, by the fact that it does not expressly apply to the incitement of violence, and in the low level of maximum penalty upon conviction. Party offences under section 66(1)(d) of the Crimes Act 1961 are reactive, requiring an actual act of hostility, violence or terrorism to occur before proceedings can commence. Procuring offences under section 311 of the Crimes Act 1961 limit the

⁸³ *Terrorism Suppression Act 2002*, s 9. Consider sections 14 to 19 of the Act in this regard.

maximum penalty upon conviction to not more than half of the relevant principal offence. Sedition offences under sections 81 and 82 of the Crimes Act 1961 have a maximum penalty of two years' imprisonment upon conviction and do not capture a person acting alone to incite terrorism. The 'threat of harm' offence under section 307A of the Crimes Act 1961 is limited in its jurisdictional application, by the reactive approach of the offence, and the fact that it only criminalises acts of incitement that themselves contain threats falling within the jurisdiction of section 307A. Furthermore, despite New Zealand's reasonably robust jurisdictional framework, none of the offences described are able to deal with the situation where a person incites others to commit terrorist acts abroad.

The United Kingdom's Terrorism Act 2006

In contrast to New Zealand's lack of legislative action on the subject of the incitement to terrorism, and the insufficiency of its current law to address the issue, the United Kingdom has introduced two proactive offences (the encouragement of terrorism, and the dissemination of terrorist publications) under the Terrorism Act 2006. The relevant provisions of the Act have changed since their original articulation within the Terrorism Bill (as presented to the House of Commons). The original version of the Bill proposed a third offence of "glorification of terrorism", but this was removed before the Bill was brought for action by the House of Lords in November 2005. Subsequent debate saw further fine-tuning of the offence provisions.

Overview of the Terrorism Act Incitement Provisions

Sections 1 and 2 of the Terrorism Act 2006 set out the substantive offences of the encouragement to terrorism and the dissemination of terrorist publications, with sections 3 and 4 expanding upon the application of the offence provisions.

1. The encouragement of terrorism

The offence of the encouragement of terrorism, under section 1 of the Act, comprises three elements. First, there must be an act of publishing a statement (or causing another to do so on the person's behalf).⁸⁴ A

⁸⁴ *Terrorism Act 2006*, s 1(2)(a).

“statement” includes a communication of any description, including one without words consisting of sounds or images or both.⁸⁵ “Publishing” a statement can occur in any manner, including provision of a statement by electronic means.⁸⁶

Next, the published statement must be likely to be understood by members of the public to whom it is published (the public anywhere in the world)⁸⁷ as a direct or indirect encouragement or other inducement to them to the commission, preparation or instigation of acts of terrorism.⁸⁸ The offence is a proactive one, since it is irrelevant whether any person is in fact encouraged or induced by the statement.⁸⁹ Statements that are likely to be understood by members of the public as indirectly encouraging the commission or preparation of acts of terrorism are deemed to 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”.⁹⁰ This is to be determined having regard to both the contents of the statement as a whole and the circumstances and manner of its publication.⁹¹ “Glorification” includes any form of praise or celebration.⁹²

Finally, the person publishing such a statement must intend (at the time of publication) that the statement be understood in the way just described, or be reckless as to whether or not it is likely to be so understood.⁹³ In the case of recklessness (where it is not proved that a person intended to directly or indirectly incite terrorism), it is a defence for a person to show: (a) “that the statement neither expressed his views nor had his endorsement”; and “that it was clear, in all the circumstances, that it did not express his views and... did not have his endorsement”.⁹⁴

⁸⁵ *Terrorism Act 2006*, s 20(6).

⁸⁶ *Terrorism Act 2006*, s 20(2) and (4).

⁸⁷ *Terrorism Act 2006*, s 20(2) and (3).

⁸⁸ *Terrorism Act 2006*, s 1(1). It is irrelevant, though, whether the statement directly relates to the commission, preparation or instigation of one or more particular acts of terrorism or Convention offences: s 1(5)(a).

⁸⁹ *Terrorism Act 2006*, s 1(5)(b).

⁹⁰ *Terrorism Act 2006*, s 1(3).

⁹¹ *Terrorism Act 2006*, s 1(4).

⁹² *Terrorism Act 2006*, s 20(2).

⁹³ *Terrorism Act 2006*, s 1(2)(b).

⁹⁴ *Terrorism Act 2006*, s 1(6).

2. The dissemination of terrorist publications

Section 2 of the Terrorism Act 2006 establishes an offence of the dissemination of terrorist publications. Dissemination includes various forms of distribution or transmission.⁹⁵ For the purpose of section 2, a “publication” includes any article capable of storing data, or any record (permanent or otherwise) containing matter to be read, looked at, or listened to.⁹⁶ A publication is a terrorist one in either of the following situations: firstly, where the information in the publication is likely to be understood by 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 (this expression is accorded the same meaning as under the encouragement of terrorism offence);⁹⁷ or, secondly, where the information in the publication is likely to be useful in the commission or preparation of terrorist acts and to be understood, by some or all recipients, as having been made available wholly or mainly for the purpose of being useful in this way.⁹⁸ Similar to the encouragement of terrorism offence, it is irrelevant whether dissemination results in the likely effects described, or whether the information is actually used for the commission or preparation of a terrorism act.⁹⁹

As brought before the House of Lords in the Terrorism Bill 2005, this offence was not to expressly include any elements of mens rea. The inclusion of a new subsection (1) now requires that, at the time of the dissemination, the person intends to encourage or assist in the commission or preparation of terrorism acts, or is reckless as to whether this will be an effect of the dissemination.¹⁰⁰ Where a person is reckless as to the likelihood of dissemination resulting in the encouragement to terrorism,¹⁰¹ it is a defence for the person to show that the information “neither expressed his views nor had his endorsement” and “that it was clear, in all the circumstances, that it did not express his views and... did not have his endorsement”.¹⁰²

⁹⁵ See *Terrorism Act 2006*, s 2(2).

⁹⁶ *Terrorism Act 2006*, ss 2(13) and 20(2).

⁹⁷ *Terrorism Act 2006*, s 2(3)(a), (4) and (5).

⁹⁸ *Terrorism Act 2006*, s 2(3)(b).

⁹⁹ *Terrorism Act 2006*, s 2(8).

¹⁰⁰ *Terrorism Act 2006*, s 2(1).

¹⁰¹ That is, the offence committed by combination of sections 2(1)(a) and 2(3)(a) applying: see *Terrorism Act 2006*, s 2(10).

¹⁰² *Terrorism Act 2006*, s 2(9).

Measuring the Terrorism Act against Human Rights Safeguards

Identified earlier were seven safeguards, each of which will now be measured against the incitement provisions of the UK Terrorism Act 2006.

1. Justifiable limitation on the freedom of expression?

Sections 1 and 2 of the Terrorism Act 2006 both contribute to the positive duty of the United Kingdom to prohibit the advocacy of hatred that constitutes incitement to hostility of violence (a duty under Article 20(2) of the ICCPR). The offences clearly also go further than this, however, and must therefore be shown to be in compliance with Article 19(3) of the International Covenant (as necessary for the protection of national security, public order, or of public health or morals) and Article 10(2) of the European Convention (as 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).

The position of the United Kingdom is that these provisions do just what the latter provisions speak of. The Home Office Explanatory Notes to the Bill described the aim of the provisions to ensure that law enforcement agencies were given the necessary powers to counter the threat to the United Kingdom posed by terrorism.¹⁰³ This move was also clearly in response to the terrorist incidents in London in July 2005.¹⁰⁴ The aims of sections 1 and 2 therefore appear to fit within the permissible objectives of the ICCPR and ECHR. However, central to the determination of whether these provisions are justifiable is the question of their necessity and proportionality. Based upon the analysis that follows, this chapter takes the view that, although the offences may be necessary, they are not proportionate and fail to comply with other human rights standards.

2. Precise prescription by law?

A further safeguard is that any proscription must be adequately accessible and expressed in a precise manner so that the public is clear on what conduct is being prohibited. The requirements of Article 15 of the ICCPR appear to be satisfied in the expression of the offences under sections 1 and 2. Although extensive, the provisions clearly define the proscribed conduct

¹⁰³ Home Office, 'Terrorism Bill. Explanatory Notes', online: <<http://www.publications.parliament.uk/pa/ld200506/ldbills/038/en/06038x--.htm>> (last accessed 5 January 2006), para 3.

¹⁰⁴ Ibid para 4.

and elements of each offence. They are also linked to existing statutory definitions of terrorist acts or Convention offences.

Outside the expression of the offences themselves, however, a matter of concern is the content of notice provisions under section 3 of the Act. Section 3 relates to the publication of a statement in the course of providing, or using, an electronic service (relevant to the encouragement of terrorism under section 1) or to the dissemination of a publication in the course of providing, or using, an electronic service (relevant to the dissemination of terrorist publications under section 2).¹⁰⁵ The effect of the notice provisions is that, where they apply, a person will be deemed to have endorsed the statement or publication.¹⁰⁶ This means that if a prosecution relies on the accused's reckless intent (section 1(2)(b)(ii), or section 2(1)(c)), and where a section 3 notice applies, the defences of lack of endorsement (section 1(6), or section 2(9)) become unavailable. The integrity of the section 3 notice provisions is therefore important.

Section 3(3) defines a notice as one which, inter alia, declares that (in the opinion of the constable giving the notice) a statement or article or record is unlawfully terrorism-related, and warns the person to whom the notice is given that failure to comply with the notice will result in the statement, or article or record, being regarded as having that person's endorsement. This places an enormous authority in the hands of the police. A notice may be given wherever a police constable is of the opinion that "the statement or the article or record is unlawfully terrorism-related" (section 3(3)(a)), without any apparent avenue of review or appeal against the formation of such an opinion. The legal effect of this power is limited, since it impacts only upon the availability of the 'lack of endorsement' defences. It is nevertheless troubling that the opinion of a police constable may have the effect of excluding a legal defence, without any apparent requirement for that opinion to be reasonably held or based upon external, reviewable, factors. The practical effect of this power is also worth noting. Outside the context of the application of the 'lack of endorsement' provisions, an innocent (or even intentional) misuse of the notice provisions has no legal effect. It does, however, result in the issuing of a notice expressing that a statement or article is "unlawfully terrorism-related" and that the notice is made under the Terrorism Act 2006.¹⁰⁷ One should not underestimate the chilling effect such notices may have, particularly in the absence of any checking mechanisms. Police constables have been

¹⁰⁵ *Terrorism Act 2006*, s 3(1).

¹⁰⁶ *Terrorism Act 2006*, s 3(2).

¹⁰⁷ *Terrorism Act 2006*, s 3(2).

provided with a powerful tool which may impact upon the exercise of the freedom of expression. The absence of checking mechanisms, and the fact that a constable's opinion does not need to be reasonably held, render section 3 in breach of Article 15 of the ICCPR for lack of sufficient precision and certainty.

3. Confined to countering terrorism?

The offences under sections 1 and 2 of the Terrorism Act are linked to existing statutory definitions of "terrorist acts or Convention offences". Terrorism is defined in the United Kingdom by section 1 of the Terrorism Act 2000. That definition is clear in its terms, although aspects of it do not meet with the characterisation of terrorist offences advocated by the Special Rapporteur on human rights and counter-terrorism (which is primarily based upon Security Council resolution 1566 (2004)):¹⁰⁸

"Terrorist offences" should be confined to instances where the following three conditions cumulatively meet: (a) acts committed with the intention of causing death or serious bodily injury, or the taking of hostages; (b) for the purpose of provoking a state of terror, intimidating a population, or compelling a Government or international organization to do or abstain from doing any act; and (c) constituting offences within the scope of and as defined in the international conventions and protocols relating to terrorism.

Considering each characteristic in turn, it is firstly notable that the certain sub-paragraphs of the Terrorism Act 2000 go beyond "acts committed with the intention of causing death or serious bodily injury, or the taking of hostages". Section 1(2)(d) relates to acts creating a serious risk to the health or safety of the public or a section of the public. Section 1(2)(e) concerns acts designed to seriously interfere with or disrupt an electronic system. While such acts are no doubt criminal in nature, they are not within the cumulative characteristics of terrorism identified.

Furthermore, section 1(3) of the Act goes beyond the second requirement in Security Council resolution 1566 (that the conduct is "for the purpose of provoking a state of terror, intimidating a population, or compelling a Government or international organization to do or abstain from doing any act"). It does so by waving the requirement that a terrorist act be designed to influence the government or intimidate the public (normally a requirement under section 1(1)(b) of the Terrorism Act 2000) where the conduct involves the use of firearms or explosives. The likely

¹⁰⁸ Special Rapporteur, *Promotion and Protection of Human Rights* (n 36) Chapter III.

intention of the provision was to act as a deeming provision. Namely, that where an act under section 1(2) is perpetrated (one involving serious violence and the like) for the purpose of advancing a cause which involves the use of explosives or firearms, then the latter aspect of such an act is deemed to satisfy subsection (1)(b) by in fact intimidating the public or a section of the public. This, however, is a generous interpretation since not all acts involving the use of explosives or firearms need come to the knowledge of the public and, if they don't, cannot therefore be said to intimidate the public.

Finally, the Terrorism Act 2000 definition fails to meet the Special Rapporteur's cumulative characteristics by not restricting itself to acts that constitute offences within the scope of and as defined in the international conventions and protocols relating to terrorism. The section 1 and 2 offences are also linked to what the Terrorism Act 2006 refers to as "Convention offences", being acts criminalised under the anti-terrorism conventions, as listed in Schedule 2 of the Act. This meets the third cumulative characteristic of "terrorist offences". Not all of those offences, however, converge with the other two characteristics discussed.

The connection of the section 1 and 2 offences with "terrorism" and "convention offences" is thus problematic and not confined to the countering of international terrorism. Furthermore, in the context of the section 3 notices discussed earlier, the lack of appropriate checks and balances render the provisions capable of improper application to the censorship of materials that are not "terrorist publications".

4. Non-discriminatory?

Any proscription must be expressed in a manner that respects the principle of non-discrimination which, on the face of the proscription clauses, appears to be met. Problematic, again, is the broad discretion of police constable in being able to issue notices under section 3, which is at least open to application in a discriminatory manner.

5. Non-retroactive?

The provisions in question are not retroactive in their application. This principle, in its application to sentencing, is specifically expressed within sections 1(8) and 2(12) of the Terrorism Act 2000.

6. Legal defences preserved?

Any proscription should be expressed as the ‘unlawful’ incitement to terrorism, thus preserving any applicable legal defences. Although sections 1 and 2 do not qualify the conduct in question as ‘unlawful’, the Act does not exclude the application of any defences normally available under the criminal law of the United Kingdom. It expresses two defences applicable to these particular offence provisions.

7. Mens rea?

The final safeguard identified in this chapter advocates that any proscription should be expressed as the ‘intentional’ incitement to terrorism. In respect of the encouragement of terrorism, an accused must have intended (at the time of publication) that the statement made be understood as encouraging terrorism, or be reckless as to whether or not it is likely to be so understood (section 1(2)(b)). As to the dissemination of terrorist publications, the inclusion in section 2 of a new subsection (1) requires that, at the time of the dissemination, the person intends to encourage or assist in the commission or preparation of terrorism acts, or is reckless as to whether this will be an effect of the dissemination.

Intending a statement to be understood in a certain manner incorporates the full extent of mens rea. It is similar in its terms to the Council of Europe Convention on the Prevention of Terrorism, Article 5, which defines the public provocation to commit a terrorist offence as “the distribution, or otherwise making available, of a message to the public, with the intent to incite the commission of a terrorist offence ...”. In contrast, recklessness as to whether the statement is likely to be understood in a certain manner involves a lower threshold. Notwithstanding this, there are two matters which render the inclusion of recklessness as justifiable. First, as has been discussed, it will be a defence if the statement or publication neither expressed the views nor had the endorsement of the accused, and it was clear in all the circumstances that this was the case (sections 1(6) and 2(9)). Furthermore, the concept of recklessness has undergone intense judicial scrutiny in England, particularly in the context of the law of manslaughter, and there is consequently an extensive body of common law on the subject. In broad terms, recklessness requires proof of foresight of dangerous consequences that could well happen, together with an intention to continue the course of conduct regardless of that risk.¹⁰⁹

¹⁰⁹ See, for example, *R v Caldwell* [1981] 1 All ER 961 (HL).

Summary and Evaluation of the Incitement Provisions in the Terrorism Act 2006

The United Kingdom's Terrorism Act 2006 prescribes offences of the encouragement of terrorism and the dissemination of terrorist publications. As they stand, this text concludes that aspects of the applicable provisions fail to meet human rights standards. The incitement offences do fall within the permissible objectives of Article 19(3) of the ICCPR and Article 10(2) of the ECHR. The offences cannot be said to be formulated in proportionate terms, however, since they lack precision (concerning notices under section 3), they are not properly confined to the countering of terrorism (by virtue of their linkage to overly-broad definitions of the term "terrorism" within the Terrorism Act 2000), and their lack of precision makes them vulnerable to use in a discriminatory manner. On the positive side of things, the current prescriptions are non-retroactive and legal defences are not excluded. Next, although the offences contain (as alternative elements of mens rea) precise intent and reckless intent, the combination of common law on the subject together with accompanying defences render a satisfactory outcome to the issue of intent.

Conclusion

The countering of terrorism has been blamed for a decline in the freedom of expression. A mixed result arises, in this regard, from the examinations undertaken in this paper. There is evidence of an overly-robust approach to the interface between counter-terrorism and the freedom of expression within the United Kingdom's Terrorism Act 2006. New Zealand's law, in contrast, lacks an express proscription against the incitement to terrorism, despite the view of the UN Office on Drugs and Crime that all members of the United Nations are obliged to proscribe the incitement to terrorism. While aspects of such offending are captured within extant provisions of New Zealand criminal law, issues concerning penalty and jurisdiction fail to suitably encompass the incitement to terrorism. Reform, in New Zealand, is therefore needed. In addressing such reform, however, New Zealand would be sensible to avoid the traps fallen into by the UK Terrorism Act 2006 in its lack of precision and failure to be properly confined to the countering of terrorism.