



Statement

on

the 'Encouragement' of Terrorism:
Clause 1 of the UK Terrorism Bill

London
December 2005

1. INTRODUCTION

On 5 December, the UK House of Lords will begin its detailed examination of the Terrorism Bill. Despite amendments made to this Bill in the House of Commons, ARTICLE 19¹ remains gravely concerned that several of the proposed new offences in this Bill violate the right to freedom of expression. In particular, we are concerned at the proposed new prohibition of ‘encouragement’ of terrorism, defined as including ‘indirect incitement’ and the making of statements that ‘glorify’ terrorism. These offences are vaguely worded and broad in scope, and will exert a dangerous chilling effect on the right to freedom of expression.

ARTICLE 19 does not believe that these provisions are compatible with the international guarantee of freedom of expression; moreover, we do not believe that they will help make the United Kingdom safe from terrorism. By criminalising forms of expression that are considered ‘extreme’ or otherwise offensive, there is a great risk that persons holding these ‘extreme’ views are driven underground and may actually be strengthened in their opinions. ARTICLE 19 believes that precisely at a time like this, there is a great need for open and inclusive debate around terrorism and the causes of it.

We would also remind the UK Government that freedom of expression protects not only views that are favourably received; but precisely those that are controversial, shocking or offensive. As the European Court of Human Rights has often emphasised, it is precisely these views that require protection.² While the Government may legitimately restrict incitement to violence and terrorism – it is under a positive obligation to protect its citizens’ right to life – its actions are circumscribed by the requirement to also protect every person’s right to freedom of expression. This requires that the Government’s actions must be clearly stated in law and be “necessary in a democratic society”.³

ARTICLE 19 does not believe that the proposal to prohibit ‘encouragement of terrorism’ satisfies either of these tests. As we outline in further detail below, the glorification of terrorism or any form of violence cannot be prohibited unless that glorification is clearly intended to *directly* incite such conduct. In addition, the law must be sufficiently precisely worded so that individuals can foresee what kinds of statements are likely to attract sanction.

2. PROHIBITING THE ‘ENCOURAGEMENT’ OR ‘GLORIFICATION’ OF TERRORISM IS NOT “NECESSARY IN A DEMOCRATIC SOCIETY”

Under Clause 1 of the Terrorism Bill, the making of any statement that ‘glorifies’ or ‘indirectly encourages’ terrorism will be prohibited. The new criminal offence will be in

¹ ARTICLE 19 is an international human rights organisation, based in London that works around the world to protect and promote the right to freedom of expression.

² See, for example, the Court’s judgment in *Castells v. Spain*, 23 April 1992, Application No. 11798/85.

³ See Article 10(2) of the European Convention on Human Rights (ECHR).

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addition to a range of existing criminal offences that have been successfully used in the past to prosecute suspected terrorist and individuals who incited murder.⁴

Despite assurances that the new provisions are necessary to help fight terrorism, we remain unconvinced of the Government's argument. Most of the examples given to date to justify the new provisions relate to the incitement of murder or terrorism, already actionable under existing law. To the extent that the new provisions add to existing law – with regard to 'indirect encouragement' and similar offences – we simply do not believe that such vaguely worded and broadly defined offences are reconcilable with the right to freedom of expression, or, for that matter, with the basic tenets of democracy.

The broad potential scope of this new offence has been much debated and the House of Commons has amended the original Bill to introduce a limited requirement of intent, in Clause 1(2). However, ARTICLE 19 is concerned that this amendment on its own does not suffice to render this Clause compatible with Article 10 of the European Convention on Human Rights, which protects the right to freedom of expression.

First, the requirement of intent is a limited one; a person will also be liable if he or she should reasonably have understood how their statement would be interpreted by others.

Second, under Section 1(4), the making of any statement that "glorifies" terrorism from which "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" is prohibited, regardless of intent. This removes the fundamental '*mens rea*' requirement of a criminal offence, one of the fundamental components of a society governed by the rule of law.

ARTICLE 19 does not believe that the glorification of terrorism or any form of violence can be prohibited unless that glorification is clearly intended to *directly* incite such conduct.⁵ It is fundamental to the guarantee of freedom of expression that any restriction for the purpose of national security, including preventing terrorism, is closely linked to preventing imminent violence. Restrictions of this sort have historically been abused and courts have sought to promote an appropriate balance between the need to ensure security and the fundamental right to freedom of expression by requiring a close nexus between the speech sought to be sanctioned and the risk of harm to security.

One of the fundamental principles set out in the 'Johannesburg Principles',⁶ developed by a group of experts from around the world under the auspices of ARTICLE 19, is that restrictions on freedom of expression in the name of national security may be imposed only where the speech was intended to incite imminent violence and there is a direct and immediate connection between the expression and the likelihood or occurrence of such violence. Principle 6 provides:

⁴ See, for example, *R. v. Al Faisal* [2004] EWCA Crim 456.

⁵ Section 3 of this Statement comments on the broad definition of glorification, as well as on the vague definition of 'terrorism' itself.

⁶ Johannesburg Principles on National Security, Freedom of Expression and Access to Information, adopted October 1995.

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[E]xpression may be punished as a threat to national security only if a government can demonstrate that:

- (a) the expression is intended to incite imminent violence;
- (b) it is likely to incite such violence; and
- (c) there is a direct and immediate connection between the expression and the likelihood or occurrence of such violence.

This test has been endorsed by the UN Special Rapporteur on Freedom of Opinion and Expression⁷ and often recommended to States for their consideration by the UN Commission on Human Rights in its annual resolutions on freedom of expression since 1996.⁸

A similar standard has been embraced by the European Court of Human Rights, whose decision in the case of *Karatas v. Turkey*⁹ is highly instructive. The complainant had been convicted for the publication of poetry that allegedly condoned and glorified acts of terrorism (note the similarity to the proposed new offence of Clause 1). The Court accepted as a matter of fact that in Turkey violent terrorist attacks occurred regularly. But even in the context of regular threats to national security, the Court emphasized the applicant's fundamental right to freedom of expression and held that his conviction constituted a violation of this right. Highlighting that there was simply no causal connection between the poems and violence, the Court held:

In the instant case, the poems had an obvious political dimension. Using colourful imagery, they expressed deep-rooted discontent with the lot of the population of Kurdish origin in Turkey. In that connection, the Court recalls that there is little scope under Article 10 § 2 of the Convention for restrictions on political speech or on debate on matters of public interest ... In a democratic system the actions or omissions of the government must be subject to the close scrutiny not only of the legislative and judicial authorities but also of public opinion. Moreover, the dominant position which the government occupies makes it necessary for it to display restraint in resorting to criminal proceedings, particularly where other means are available for replying to the unjustified attacks and criticisms of its adversaries ...

[E]ven though some of the passages from the poems seem very aggressive in tone and to call for the use of violence, the Court considers that the fact that they were artistic in nature and of limited impact made them less a call to an uprising than an expression of deep distress in the face of a difficult political situation ...¹⁰

It is clear from the Court's judgment in *Karatas* that **a general prohibition of glorification of violence cannot be justified**; only those statements of glorification that can be said to **actually** incite violence may be legitimately prohibited. The same concern applies to statements that 'indirectly encourage' terrorism; the prohibition is simply too broad to stand under international law.

We also note with concern that the definition of 'terrorism' itself has remained unacceptably broad. This only serves to increase the kind of statements that are caught under the new offence.

⁷ See, for example, UN Doc E/CN.4/1996/39, 22 March 1996, para. 154.

⁸ See UN Doc. E/CN.4/1996/53, 19 April 1996. The Johannesburg Principles have also been referred to by superior courts of record around the world. See, for example, *Athukoral v. AG*, 5 May 1997, SD Nos. 1-15/97 (Supreme Court of Sri Lanka).

⁹ 8 July 1999, Application No. 23168/94.

¹⁰ *Ibid*, paras. 50-52.

Recommendation:

- The glorification of terrorism may be prohibited only when there is a clear intent in the statement to incite violence of that nature.
- The definition of terrorism should be tightened up.

3. CLAUSE 1 IS TOO VAGUE TO SATISFY THE ‘PROVIDED BY LAW’ TEST

Article 10(2) of the European Convention on Human Rights (ECHR) requires that any restriction on the right to freedom of expression should be “formulated with sufficient precision to enable the citizen to regulate his conduct: he must be able – if need be with appropriate advice – to foresee, to a degree that is reasonable in the circumstances, the consequences which a given situation may entail.”¹¹

Clause 1 of the Terrorism Bill, as amended in the House of Commons, fails to satisfy that standard. It prohibits the making of any statement “that 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”, when the person making that statement either intends to incite terrorism or “is reckless as to whether or not it is likely to be so understood.” Under Clause 1(3), a person will be considered reckless if he or she should reasonably have been aware of the likelihood that their statement might be understood as indirectly encouraging terrorism.

This is a highly problematic clause. First, it introduces the concept of “indirect encouragement”. “Encouragement” itself is a vague term already; “indirect” encouragement is so vague as to be virtually without meaning. It may be understood to apply to nearly every expression of support, sympathy with or even understanding of terrorism (the definition of which is similarly broad), or to statements that address the need for dialogue with terrorists.

Second, making such a statement will be an offence if the person making it: a) intends to incite, or indirectly incite, terrorism; or b) should reasonably have been aware that the statement might be understood as directly or indirectly encouraging terrorism. The second part of this definition introduces a highly subjective element into the proposed offence, which is not only out of step with current criminal law in the UK¹² but also renders it impossible for a person to foresee whether he or she might be committing a terrorist offence by expressing support with, for example, suicide bombers in Israel or Iraq.

Clause 1(4) goes on to introduce the concept of ‘glorification’ of terrorism, prohibiting the making of any statement that glorifies terrorism and from which “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”. “Glorification” is defined in Clause 20(2) as “any form of praise or celebration, and cognate expressions are to be

¹¹ See *The Sunday Times v. United Kingdom*, 26 April 1979, Application No. 6538/74, para. 49 (European Court of Human Rights).

¹² See the House of Lords judgment in *Regina v. G and another*, [2003] UKHL 50

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construed accordingly”. Again, these are very vague formulations that do not provide a person with any guidance as to where the line is drawn between a legitimate discussion of terrorism, and perhaps expressing an understanding of its causes or sympathy with certain actions, and the criminal offence of Clause 1.

Clause 1(5), which provides that in the interpretation of Clause 1 the manner and context in which the statement was made is to be taken into account, probably intends to provide an element of clarity in Clause 1. It also serves to counter any allegations that persons such as Cherie Blair would be vulnerable under Clause 1 for having expressed sympathy with ‘terrorists’. However, we doubt whether it is sufficient to counter the subjective test of ‘recklessness’ that has been introduced in Clause 1(3). Even if it is sufficient to do that, we are concerned that Clause 1(5) would in fact only serve to focus attention on ‘the usual targets’, and would have a serious chilling effect on freedom of expression in places such as mosques or at campaign rallies. The application of the new offence would then gain a discriminatory aspect, criminalising the speech of “Muslim extremists” but not of anyone else. This would only serve to marginalise a community that already feels under threat.

For all these reasons, we do not believe that, as currently drafted, the prohibition on ‘encouragement of terrorism’ can be considered to be ‘provided by law’ as required under the European Convention on Human Rights.

Recommendation:

- The use of vague terms such as ‘glorify’ and ‘indirectly encourage’ should be abandoned in favour of internationally accepted terminology, such as ‘incite’.

Annex 1:

Terrorism Bill
HL Bill 38

Part 1
Offences

Encouragement etc. of terrorism

1 Encouragement of terrorism

- (1) This section applies to a statement that 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 or Convention offences.
- (2) A person commits an offence if—
 - (a) he publishes a statement to which this section applies or causes another to publish such a statement on his behalf; and
 - (b) at the time he does so, he intends the statement to be understood as mentioned in subsection (1) or is reckless as to whether or not it is likely to be so understood.
- (3) For the purposes of this section the cases in which a person is to be taken as reckless as to whether a statement is likely to be understood as mentioned in subsection (1) include any case in which he could not reasonably have failed to be aware of that likelihood.
- (4) For the purposes of this section the statements that are likely to be understood by members of the public as indirectly encouraging the commission or preparation of acts of terrorism or Convention offences include every statement which—
 - (a) glorifies the commission or preparation (whether in the past, in the future or generally) of such acts or offences; and
 - (b) is a statement from which those members of the public could reasonably be expected to infer that what is being glorified is being glorified as conduct that should be emulated by them in existing circumstances.
- (5) For the purposes of this section the questions how a statement is likely to be understood and what members of the public could reasonably be expected to infer from it must be determined having regard both—
 - (a) to the contents of the statement as a whole; and
 - (b) to the circumstances and manner of its publication.
- (6) It is irrelevant for the purposes of subsections (1) to (4)—

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- (a) whether the statement or how it is likely to be understood relates to the commission, preparation or instigation of one or more particular acts of terrorism or Convention offences, of acts of terrorism or Convention offences of a particular description or of acts of terrorism or Convention offences generally; and,
 - (b) whether any person is in fact encouraged or induced by the statement to commit, prepare or instigate any such act or offence.
- (7) In proceedings against a person for an offence under this section it is a defence for him to show—
- (a) that he published the statement in respect of which he is charged, or caused it to be published, only in the course of the provision or use by him of a service provided electronically;
 - (b) that the statement neither expressed his views nor had his endorsement (whether by virtue of section 3 or otherwise); and
 - (c) that it was clear, in all the circumstances, that it did not express his views and (apart from the possibility of his having been given and failed to comply with a notice under subsection (3) of that section) did not have his endorsement.
- (8) A person guilty of an offence under this section shall be liable—
- (a) on conviction on indictment, to imprisonment for a term not exceeding 7 years or to a fine, or to both;
 - (b) on summary conviction in England and Wales, to imprisonment for a term not exceeding 12 months or to a fine not exceeding the statutory maximum, or to both;
 - (c) on summary conviction in Scotland or Northern Ireland, to imprisonment for a term not exceeding 6 months or to a fine not exceeding the statutory maximum, or to both.
- (9) In relation to an offence committed before the commencement of section 154(1) of the Criminal Justice Act 2003 (c. 44), the reference in subsection (8)(b) to 12 months is to be read as a reference to 6 months.