

Aiding the Enemy

How and why to restore the law of treason

Richard Ekins, Patrick Hennessey,
Khalid Mahmood MP and Tom Tugendhat MP

Foreword by Rt Hon Lord Judge



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Executive Summary

Betraying one's country by helping its enemies has always been recognised as a terrible crime. It is a serious threat to our common defence and to political order and ought to be punished severely. Betrayal is a breach of the duty each one of us owes to our compatriots, a breach which undermines the trust that we ought to be able to have in each other, trust which is the foundation of a decent social order. The wrong is clear – aiding the enemy. This is distinct from disagreeing with the Government or dissenting from majority opinion or failing to be a good citizen. The force of the duty of non-betrayal is at its most vivid in international armed conflict, when the UK is at war with other sovereign states. But the duty also applies in non-international armed conflict when UK forces are engaged with non-state groups. British citizens betray their compatriots if they give aid to such groups in fighting UK forces or in attacking the UK or if they aid states in attacking the UK, even if those attacks or planned attacks fall short of international armed conflict.

The law should recognise and reinforce the duty of non-betrayal, both to signal clearly that society views treachery as a distinct assault on the whole and to punish those who breach the duty, thereby helping deter those who might otherwise consider breaching it. This duty has historically been upheld by the law of treason. However, the UK's law of treason is ancient law and is now unworkable. The Treason Act 1351 has been overtaken by changes in modern social and political conditions; it is not a secure ground on which to mount prosecutions. It stands in contrast to the law in other common law jurisdictions. The UK needs to update its laws to make clear that the underlying ethos has not changed – betrayal is a specific crime against society and one that deserves punishment. At a minimum, Parliament should reform our law to follow Australia and New Zealand and thus make it clear that it is unlawful to aid the enemy either in an international armed conflict or in a non-international armed conflict.

Some argue that existing laws are sufficient to address acts of betrayal. However, those laws, including the terrorism legislation, are not an adequate substitute for a workable law of treason. The UK's set of terrorism offences is comprehensive and carefully maintained but largely fails to recognise the wrongfulness of betrayal – the way in which it undermines the fabric of our society and the integrity of our country – or the continuing danger posed to British citizens by those who choose to use their membership of our society to assist groups that plan to attack the UK. The sentences of imprisonment imposed on British citizens who choose to aid ISIS, or similar groups, are often manifestly inadequate. The problem is not that sentencing judges are too lenient but that the legal framework is too

limited. The Official Secrets Acts make it unlawful to prejudice the UK's security by misusing information that might be useful to our enemies, but this legislation fails adequately to mark the wrong of setting out to aid those enemies.

The threat the UK faces is both from non-state groups and from hostile states. The rising threat posed by hostile states is recognised by the Government in proposing the Counter-Terrorism and Border Security Bill which creates new powers to help disrupt hostile state activity. However, the Bill does not reform the criminal law to deter British citizens from aiding hostile state activity.

These shortcomings in UK law require a response. One option is to make betrayal of one's country a statutory aggravating feature, like offending while on bail. This would be an improvement but would not directly address the gravity of wrongdoing involved in, for example, inviting support for ISIS, the maximum sentence for which, under current legislation, is 10 years' imprisonment. This paper recommends instead that Parliament enact a new offence which would revive the law of treason, making provision for prosecution and punishment of those who betray our country. The offence this paper proposes would specify that it is an offence to aid a state or organisation that is attacking the UK or preparing to attack the UK or against which UK forces are engaged in armed conflict. To secure a conviction, the Crown would have to prove that the accused knew that they were aiding a hostile state or organisation. The Government should have power to specify by statutory instrument that the UK is engaged in hostilities with a particular state or organisation. In most cases, persons convicted of treason should be sentenced to life imprisonment, a sentence which reflects the gravity of the wrong of betrayal, deters others and incapacitates the offender.

Adopting and adapting the example of the Treachery Act 1940 and the Law Commission's 1977 proposal for law reform, the proposed offence would put the most important part of the ancient law of treason – the prohibition on adhering to the Sovereign's enemies – on a sound footing. The proposed offence follows the example of Australia and New Zealand in making clear that a citizen commits treason by aiding a non-state group whom UK forces are fighting. Our proposal recognises the importance of the moral duty not to betray one's country and specifies how that duty should be understood in modern conditions. Prosecutions for treason would not glorify persons who might otherwise be prosecuted for terrorism offences. A workable law of treason, of the kind we propose, promises to reinforce the bonds of citizenship by affirming the duty of non-betrayal, and deterring others from breaching it, thereby deepening social trust and community cohesion.

The proposed offence should apply differently to (a) British subjects (citizens) and settled non-citizens and (b) to other non-citizens. It should apply to actions of the former anywhere in the world but to actions of the latter only within the UK itself. This distinction recognises the different position of each group in our community and hence the different

obligation each has to refrain from aiding hostile states and organisations. The proposed offence puts the ancient law of treason in a form capable of use. It should apply to actions whenever they are committed in order that the fundamental wrong of betraying one's country is properly addressed. This limited retrospectivity would be consistent with the European Convention on Human Rights.

Reform of the law is justified because the ancient law of treason has fallen into disuse and has not been adequately replaced. The new offence this paper proposes would recognise and address the wrong of betraying one's country and the threats the UK faces from non-state groups and hostile states. Amongst the most immediate applications of the new offence may be British subjects who have aided attacks on the UK by terrorist groups or who have travelled abroad to join groups who UK forces are fighting, most notably ISIS. It bears noting that a very high number of those who have been convicted of terrorism offences in the past ten years are due to be released in the next two years. However, the offence would be of general application and may be of increasing importance in an age of rising great power competition in which the UK faces the threat of attacks, and other unfriendly military and intelligence operations, from hostile states that are designed to fall short of international armed conflict. Parliament should act to restore the law of treason: legislation to this end would serve to remind Government and citizens of the duties we have to one other.

Foreword

By Igor Judge, Lord Chief Justice of England and Wales 2008–2013

We all know what treason is: or think we do. John Harington, Elizabeth I's godson, perceptively observed:

“Treason doth never prosper, what's the reason?

For if it prosper, none dare call it treason”.

400 years later, what do we dare call treason? Most of us have not the slightest doubt that treason is and should be a very serious crime. Many of us may be surprised to be reminded, as we are by this challenging paper, that the offence of treason still current was enacted over 650 years ago in the Treason Act 1351.

As it was all so long ago we tend to forget that, like modern legislation, the Act was intended to provide legal certainty by defining the ingredients of treason and establishing its limitations. It was largely concerned with the personal safety of the monarch, then the embodiment of the state, the safety of some but not all members of his family, and officials at the heart of his administration. So, for example, while going armed to kill the monarch or his spouse fell within the definition, going armed to kill anyone falling outside this express protective banner was in future to be regarded as felony or trespass according to laws “of old time used”. This mediaeval attempt to achieve clarity and a proper balance provides a pre-echo of the most interesting questions today: whether the current laws against terrorism and disclosure of official secrets are or are not adequate to cover what might be or, arguably, should be treated as treason, and whether there should be and if so, how, any appropriate distinctions should be preserved or redefined.

The problem confronted by this paper is that “the law of treason has become unworkable”. A typical but striking anomaly exemplifies the difficulties. To this day it would be treason (and murder) to slay the Chancellor or Treasurer, that is, the Lord Chancellor (now the Minister of Justice) and presumably, the Chancellor of the Exchequer (or is it? The Prime Minister is the First Lord of the Treasury) or the Queen's Justices “being in their places and doing their offices”. It would however be murder but not treason to slay the Lord Chancellor, the Chancellor of the Exchequer or, as the case may be, the Prime Minister, while they are on

holiday. Attacks on the members of the government are not unknown. The Brighton Bombing took place when they were all at a party conference: the attack on 10 Downing Street when they were all at work, but not in Parliament. Which murderous attack would have fallen within the statutory definition of the offence?

The present paper is not directly concerned with what might be described as such esoteric questions, but the fact that they might arise demonstrates that serious attention to the statutory offence would be wise. Further anomalies underline the same point. It is unclear whether duress may or may not be a defence to treason. Whether it is a defence may depend on whether the treason alleged would constitute murder or whether it was based on “levying war against the Sovereign” or “being an adherent to Her Enemies”. That would be a serious issue. Less serious, perhaps, there are evidential requirements, based on statute, that corroboration, in its formal legal sense, is required. Thus treason is linked to the only two other offences with a similar statutory requirement, perjury and speeding. Speeding!

It is striking that the Treason Acts (that is the 1351 Act, as amended by subsequent Treason Acts) were regarded as inadequate to cope with the national crisis when the country was at war in 1939. The Treachery Act 1940 provided a workable modern definition of the ingredients of the offence. However, it was repealed after the end of World War II.

In 1977 the Law Commission recommended the repeal of the Treason Acts and their replacement with two new offences, providing a protective ambit against the “overthrow, or supplanting, by force, of constitutional government”. The recommendation was ignored. Indeed by 2010 the Law Commission reached a different conclusion. The law relating to treason did not require amendment, but, in effect, should be abolished because the development of new offences, in particular in relation to terrorism, was thought to be “far better suited for tackling problems that currently afflict society”. Which is right? Both recommendations have been ignored.

The 1351 Act remains on the statute book. The 2010 edition of Archbold explains why the details and analysis of the offence were omitted from its text: “...although there have been instances of terrorist activity which undoubtedly fell within the compass of treason but which have been prosecuted as offences of murder or under the terrorist legislation.....it seems unlikely in the extreme that there will in the foreseeable future be any such prosecutions”. Blackstone is similarly reticent. It is difficult to quarrel with the analysis. What this means is that a criminal offence which on conviction would carry a sentence of imprisonment for life is being left on the statute book and quietly allowed to disappear through disuse, not by repeal or amendment, nor indeed any formal process.

My immediate response is that this is wrong in principle.

In a balanced argument, carefully setting out contrary views, this paper supports a process of modernisation. Treason, it argues, is a heinous crime. It should be marked as such. If a citizen of this country chooses to fight with the Taliban in Afghanistan against British forces his crime is more

than terrorism. It is treason, and should be prosecuted accordingly. The paper notes that a number of nations with a common law heritage, which inherited the offence of treason defined in the 1351 Act, in particular, Australia, New Zealand and Canada, have redefined and produced appropriately worded offences stripped of mediaeval connotations and linked to the modern world and its realities. We have not, and we should.

My own view is that if existing laws relating to terrorism, and other offences, do indeed adequately cover the gravity of criminal conduct which in Australia, New Zealand and Canada is now regarded as treason, we do not need the Treason Act 1351 at all and it should formally be repealed, not just left lingering on. If however they do not, then a modern definition of law of treason is required. This paper is a serious discussion about serious crime. A public debate is surely needed.

I. Introduction

This paper aims to explain how and why the law of treason should be restored. The argument begins, in section II, by considering the moral foundations of political community, foundations which the law of treason helps to secure and maintain. Citizenship entails a duty of allegiance, which means that the citizen has a duty not to betray his or her country by aiding its enemies. Non-citizens are bound by the same duty but only for so long as they live amongst us. This duty means that the citizen (or relevant non-citizen) should not aid the UK's enemies, which includes our adversaries in international and non-international armed conflicts, as well as states that attack the UK in ways falling short of armed conflict and organisations engaged in terrorist attacks on the UK.

The paper goes on, in sections III-VI to consider the shortcomings of the UK's existing legal framework, arguing that the law as it stands fails to recognise or vindicate the duty of non-betrayal – the law does not mark out and punish the wrong of betraying one's country. Section III analyses the ancient law of treason and notes that it has fallen away – while the law still formally forbids betrayal, it does not provide a secure ground on which to bring prosecutions and thus the duty of non-betrayal is not able to be enforced or upheld. Section IV considers the law of treason in three other common law jurisdictions and argues that the law of Australia and New Zealand in particular is better framed than the UK equivalent, not least because it more clearly forbids citizens from aiding the enemy in a non-international armed conflict. Section V examines the UK's terrorism legislation, which many argue effectively displaces the law of treason. The paper argues that while many treasonous acts might also be terrorism offences, the terrorism legislation fails adequately to recognise and punish the wrong of betrayal. Section VI considers the UK's espionage laws, which also criminalises some treasonous acts but which again fails to address specifically the wrong of aiding the UK's enemies, whether these are hostile states or organisations. This section also discusses proposed legislation now before Parliament which rightly recognises the problem of hostile state activity but which does not yet forbid citizens from aiding such acts.

The balance of the paper sets out how the law should be changed to address the wrong of betrayal and thus to vindicate the duty of non-betrayal. Section VII proposes that Parliament enact a new offence, modelled in part on the Treachery Act 1940 and in part on Australian legislation. The offence we propose is intended to specify the forbidden (treasonous) acts and intentions and this section of the paper explains how this would operate in practice, viz. the types of actions to which it would apply and how the

Crown would have to go about proving guilt. Section VIII addresses the question of how treason should be punished and argues that in most cases a sentence of life imprisonment should be imposed. The paper contrasts this provision with the detail of the regime for sentencing terrorism offences which we argue fails adequately to punish betrayal.

Section IX considers some likely objections to our proposal, reflecting on arguments that have been made against earlier suggestions to attempt to employ the ancient law of treason. The paper argues that prosecutions for treason, in appropriate cases, would not glorify terrorists or undermine community cohesion. On the contrary, a restored law of treason has a part to play in maintaining social trust. Section X addresses further questions to which proposals for law reform require answers, including questions about the territorial and temporal scope of the offence and how and when it would apply to different types of non-citizen. Finally, section XI concludes by noting the difference that restoring the law of treason would make to our law and practice.

II. Allegiance, Alienation and Betrayal

The members of a political community, especially those who enjoy the status of citizen, owe important duties to one another. The distinction between citizen and non-citizen is constitutionally fundamental. Every human being is morally entitled to be a citizen of a particular state, for the world is divided, politically and legally, into states, which are national political communities. It is in these groups that the conditions for decent social life are best able to be secured and in which fundamental human rights are able to be exercised. Thus, the Universal Declaration of Human Rights recognises the right of every human being “to leave any country, including his own, and to return to his country”,¹ “to take part in the government of his country” and to have “equal access to public service in his country”.² It is noteworthy that while one’s own country must permit one to return, no other country has any duty to admit one entry. Membership clearly makes a moral difference: it changes the obligations states and citizens have to each other.

Each person should be a citizen of some state. The Convention relating to the Status of Stateless Persons 1954 makes clear that the condition of statelessness, in which a person is not recognised by any state to be its citizen, is an evil to be minimised and ameliorated.³ The citizen (national, subject) is free to live within the state and to participate in its social life and its government. He or she cannot be excluded from – banished, exiled – or refused entry to his or her own state. By contrast, while the non-citizen (alien, foreigner) may live within a state that is not his or her own, residence in that other state, or entry into that state, is always conditional and may reasonably be cancelled or denied. The non-citizen may be deported or excluded if the Government concludes that his or her continued presence in the state is not conducive to the public good.⁴ States are required to tolerate risks that may arise from their own citizens (nationals) but not from non-citizens (aliens).⁵

The law settles the bounds of the national political communities that are states. Thus, international law recognises states and each state’s law of citizenship will stipulate who counts as its citizens. But the law here tracks a social reality, namely that a particular group understands itself to be a people, to hold a defined territory, to jointly be subjects of a shared government and legal system.⁶ The foundation of political community is the willingness of that people to live together, to recognise one government and law. In the law and history of England and the United Kingdom,

¹ Universal Declaration of Human Rights 1948, art 13

² Universal Declaration of Human Rights 1948, art 21(1) and art 21(2)

³ Ratified by the United Kingdom in 1959 and in force since 1960

⁴ “The power to admit, exclude and expel aliens was among the earliest and most widely recognised powers of the sovereign state”, *R. (European Roma Rights Centre) v Immigration Officer at Prague Airport* [2004] UKHL 55; [2005] 2 A.C. 1 at [11] (Lord Bingham of Cornhill)

⁵ John Finnis, “Nationality, Alienage and Constitutional Principle” (2007) 123 *Law Quarterly Review* 417, 422-423

⁶ Richard Ekins, “How to be a Free People” (2013) 58 *American Journal of Jurisprudence* 162

membership of the political community has long been expressed in terms of allegiance owed to the King. The subjects of the King are entitled to his protection and in return owe him their allegiance.⁷

The willingness of a people to live together requires them to share a common bond, to be willing to share their resources with and to make sacrifices for one another.⁸ It follows that they need to have some common feeling, to understand and to identify with each other, and thus to identify freely and willingly with the political society of which they are all members. If these conditions are not met, social order will be difficult to maintain without extensive coercion. The building of the welfare state, the practice of democratic politics, the project of the rule of law and constitutional government, the maintenance of collective defence and participation in the international arena as a single political entity all turn, in the end, on the willingness of the members of a political community to trust one another and to work together, notwithstanding the differences amongst them in terms of class, ethnicity, religion, or political conviction.⁹ The distinction between citizens and non-citizens is thus vital, for citizens will not be disposed to trust one another, to bear common burdens and secure common benefits, unless they see that they form a group that shares a common fate.

The citizen is immune to exclusion from the realm, is entitled to the state's protection and the benefit of its public services and social life, and is able to enjoy rights to participate in its government. Non-citizens who reside in the realm are also entitled to the state's protection and indeed, subject only to an asymmetry in relation to participation in government and liability to exclusion from the realm,¹⁰ they enjoy a fundamental legal equality with citizens.¹¹ The friendly (non-enemy) alien's presence within the realm entitles him or her to the protection of the Crown, the law and the courts. This protection entails the alien's duty of allegiance during his or her stay. (The position is different in relation to enemy aliens, who are subjects of a state that is at war with the Crown.¹²) Thus, both citizens and some non-citizens have a duty of allegiance to the Crown, which is to say a duty of loyalty owed to all other citizens and to those non-citizens who live peacefully amongst us.¹³

Not all citizens will understand themselves to be members of the political community. That is, they will not recognise other citizens to be their compatriots and will deny that they share a common good or may or should trust one another. They may deny that they owe a duty of allegiance. For some, citizenship of the United Kingdom may be the less important of dual (or multiple) citizenships they enjoy, with some other state being the primary object of their affection and loyalty. For others, they may view the state with indifference or hostility, perhaps enjoying its protection and living within its borders, yet not accepting the legitimacy of the reciprocal duties imposed upon them and not understanding other citizens as persons with whom they share a common good. Alienation from one's own citizenship may have many causes, including taking one's primary loyalty to be to some other political arrangement or cause, whether that is international environmentalism, communism, or a pan-

⁷ *Calvin's Case* (1608) 7 Co. Rep. 1a at 5a; *Joyce v DPP* [1946] A.C. 347 at 366

⁸ Joseph Raz, "Multiculturalism" (1998) 11 *Ratio Juris* 193, 202-203; Finnis, "Nationality, Alienage and Constitutional Principle", 443-444

⁹ David Miller, *Citizenship and National Identity* (London, Wiley, 2000), 62

¹⁰ Article 16 of the European Convention on Human Rights expressly preserves state power to impose restrictions on the political activity of aliens.

¹¹ *Johnstone v Pedlar* [1921] 2 A.C. 263

¹² See further "Constitutional Law and Human Rights" *Halsbury's Laws of England* Vol. 8(2) (4th edition, London, Lexis Nexis, 2011), para 817

¹³ John Finnis, *Aquinas: Moral, Political, and Legal Theory* (Oxford, OUP, 1998), 264: "the subject's obligation to obey is a duty owed not, strictly speaking, to the rulers themselves but rather to, if anyone, their fellow citizens".

Islamist caliphate. It would be naïve to deny that just as during the Cold War, some British citizens, especially intellectuals,¹⁴ became alienated from their citizenship – and even in some cases betrayed their country to the Soviet Union – because of their enthusiasm for communism, so too a minority of British Muslims have become alienated from their citizenship because of the influence of Islamist teaching that insists that the only truly legitimate political community is one defined by shared belief rather than by territory or nationality.

The Muslim Brotherhood has long argued that the true focus for individual Muslim allegiance should be the global “ummah” (Islamic nation). This is held to supersede ties to any individual country (“watan”). And while the Brotherhood, in its various incarnations, has effectively made peace with the nation-state (the “dawla”) – and seeks political power within the framework of existing states – it still believes, ultimately, that globalized allegiance should lead to the creation of a caliphate. These ideas underpin the entire modern Islamist project, which holds that national loyalties and citizenship are secondary to the wider religious imperative to establish and advance an Islamic state.¹⁵ In its most aggressive form, of course, groups like Al Qaeda and ISIS have insisted that the caliphate should be brought into being immediately, through the waging of violent, revolutionary campaigns which seek to overthrow both existing states and the entire international order.

Trust amongst citizens is both fundamental and fragile. The criminal law cannot itself maintain the shared willingness of citizens to live together for it cannot reasonably require citizens to identify with the political community, to recognise that they share a common good with their fellows, or to be disposed to sacrifice for one another. However, the criminal law can rightly forbid and penalise acts that betray one’s compatriots by making war against the country one shares with them or acts which help others to do so. The duty to abstain from such acts is an essential element in the duty of allegiance which is correlative to the state’s protection. Making war on one’s country or aiding others in attacking it is a grave breach of this duty of allegiance, deliberately putting in peril the minimum conditions of peace and order under which citizens can freely live together. Betrayal is a breach of trust, a violation of the faith that citizens and government ought to keep with one another and an abandonment of the reciprocity that otherwise holds between members of a political community, who benefit from its protection and from the many other goods it creates and confers.

The enemy alien who enters our country under arms may do wrong but the wrong is different in kind from that of the citizen who takes up arms against his or her country, for the latter has betrayed the scheme of duties and protection that other citizens have honoured and which grounds political order and decent social life. Putting the point another way, the wrong is more than just the willingness to exercise lethal force. Enemy combatants may lawfully kill our forces in battle and yet not warrant punishment, whereas the citizen who aids that enemy in so doing should be severely punished. Likewise, the citizen who aids an

¹⁴ George Orwell, *The Lion and the Unicorn: Socialism and the English Genius* (London, Penguin Books, 1982 [1941])

¹⁵ See further: Aziz al-Azmeh, *Islam and Modernities*, (3rd edn, London, Verso, 2009), esp. pp.77–96 and 143–156; Tamim al-Barghouti, *The Umma and the Dawla: the Nation State and the Arab Middle East* (London, Pluto Press, 2008); Bassem Tibi, *Islamism and Islam* (London, Yale University Press, 2012); Andrea Mura, “A genealogical inquiry into early Islamism: the discourse of Hasan al-Banna” (2012) 17 *Journal of Political Ideologies* 61; and Ahmad S. Moussalli, “Hasan al-Banna’s Islamist Discourse on Constitutional Rule and Islamic State” (1993) 4 *Journal of Islamic Studies* 161.

Islamist terrorist group abroad, say in Indonesia, acts wrongly but the wrong is different in kind from that of the citizen who serves with, say, the Taliban and fights UK forces. One commits a distinct and serious wrong by betraying one's country in this way.

For some, loyalty and betrayal are ideas that have been overtaken by modern social norms or are somehow otherwise out of step with a world in which many people have complex identities (and multiple citizenships) and in which love of country is optional at best. Lord Falconer, the former Lord Chancellor, articulated this line of thought in 2010, when he was reported as saying that the law of treason was no longer appropriate because "total loyalty to the state is now no longer required by the state of its citizens" and because people might feel their strongest allegiance to be towards their religion or even, say, to an organisation like Greenpeace. "We live," he said, "in an era where the freedom of the individual is put above practically everything else".¹⁶ This is not a strong argument. The duty of allegiance (and law of treason) is certainly a limit on individual freedom insofar as it denies that anyone should be free to betray his or her country with impunity. But the duty does not and should not demand total loyalty. It is not breached by one's first loyalty being to one's religion or to the planet. The duty is simply to refrain from betraying one's country and thus one's fellow citizens. The person who aids others in attacking one's country because he or she thinks this is his or her religious or environmental duty acts wrongly and should be punished.

In any case, conflicted loyalties are scarcely a new phenomenon. They can sometimes give rise to prudential reasons to be slow to force the issue (as the conflict in Northern Ireland may suggest). However, it is certainly wrong to infer that we have somehow transcended the importance of loyalty to one's country. On the contrary, the foundation of peaceful social life is the trust that we have in one another as fellow citizens in a self-governing state (our country), trust that is undercut when one aids the enemy. One who betrays his or her country in this way breaches the trust of his or her compatriots and threatens to weaken the trust they have in one another. Recognising and denouncing such acts of betrayal as serious wrongs is important to vindicate the trust that citizens (and others who enjoy the privilege of living peacefully amongst us) ought to be able to have in one another, trust that is, as we say, the foundation of decent, free social order. In this way the criminal law contributes to community cohesion, helping assure citizens that they may trust other citizens, who, whatever else may divide them, will not betray the country they jointly share.

The duty of non-betrayal is a narrow one and is breached only by aiding the enemies of our country or by attempting violent overthrow of the Government. Again, it does not require "total loyalty" or for the citizen's first loyalty to be to their country rather than to their religion or to some other country or cause. The duty of non-betrayal is breached by acting to aid our enemies, whatever one's motivation, which includes the religious convictions of the small minority of British Muslims who, influenced by Islamist propaganda, take it to be their religious duty to aid or carry out

¹⁶ See Chris Bowlby, "Are laws against treason still relevant and useful", 15 February 2010, Analysis, BBC Radio 4, http://news.bbc.co.uk/1/hi/uk_politics/8511120.stm.

attacks on our country. This sincere but wicked religious conviction is not a ground to lift the duty of non-betrayal any more than a sincere belief in the obligation to carry out child sacrifice ought to immunise a Baal-worshipper from liability for murder. One is free to believe that it is one's religious duty to aid attacks on one's country, but there is no injustice in the law making it a criminal wrong to act on this belief. There is no violation here of rights to freedom of conscience or religion.

The citizen does not breach the narrow duty of non-betrayal by disagreeing with the Government or its policy, or by dissenting from majority opinion, or by saying or thinking that our country is acting wrongly and should be opposed.¹⁷ Indeed, one can think that one's country is mistaken or wicked, and denounce it in strong terms, without betraying one's compatriots. Likewise, one may even hope for one's country's defeat in war or other armed conflict without thereby betraying one's country by joining its enemies. Insofar as the criminal law should affirm this duty of non-betrayal – and we argue that it should – its focus must be on this narrow wrong, rather than on failures of patriotism or good citizenship more widely. Concerns about the misuse of the criminal law in this domain are understandable – we return to them later in this paper – and care should certainly be taken in framing the law. However, this is consistent with the truth that betrayal – treason – is a clear moral wrong, which civilized countries have long recognised requires legal prohibition.¹⁸

The force of the duty of non-betrayal is particularly obvious when one's country is engaged in a life-or-death struggle, of the kind in which the UK was engaged in the two world wars. However, whenever one's country is engaged in an international armed conflict – in war with another state – citizens clearly have a strong duty not to give aid to the enemy state. This aid may help the enemy to defeat our armed forces, may betray one's compatriots to death, capture, impoverishment or humiliation, or may raise the cost (in blood and treasure) of eventual victory. But even if this aid is ineffective or makes little difference to the war, no citizen should attempt to help the enemy in this way – it is a grave betrayal of the bonds of citizenship to join the enemy, to aid them, in wartime. The same is true when one's act predates hostilities, that is, when one gives aid to another state in order that the state may be able to attack us or may be better placed to defeat us if or when international armed conflict breaks out. No citizen (or non-citizen living amongst us) ought to breach the trust of his or her compatriots in this way.

In the years since the Second World War, the UK, like other leading states, has been more likely to be involved in non-international armed conflicts, such as the conflict in Afghanistan, than in international armed conflicts, and the latter have in any case been increasingly likely to rapidly become non-international conflicts, as did the second Iraq war. UK forces are likely to find themselves engaged with armed groups that are not sovereign states, even if at times they are state-like or make pretensions to statehood. UK forces may also find themselves engaged with non-state groups that are supported or directed by hostile states. The duty of non-betrayal – the duty

¹⁷ The very term "Her Majesty's Loyal Opposition" makes clear that loyalty to one's country and opposition to the Government are compatible; see Grégoire Webber, "Loyal Opposition and the Political Constitution" (2017) 37 *Oxford Journal of Legal Studies* 357.

¹⁸ Like other legal obligations, the moral obligation to obey is strong but defeasible in extremis: see John Finnis, *Natural Law and Natural Rights* (2nd edition, Oxford, OUP, 2011), 359–361.

not to aid the enemy – should apply in non-international armed conflict just as much as in international armed conflict. That is, no citizen ought to aid, including by serving with, groups whom UK forces are fighting. One is free to protest against the justice of the conflict, or to hope that the UK is defeated, but one is not free to take action in order that our foes may prevail.

Many of the groups, including quasi-state groups, that are the UK's foes in non-international armed conflicts may also have an international presence and be agents of international terrorism. The duty of non-betrayal requires citizens not only to refrain from participating in non-international armed conflict against their country but also to refrain from aiding groups that are carrying out, or planning to carry out, attacks on their country. It is wrong for anyone to participate in terrorism but it is particularly wrong for a citizen to help terrorist groups attack his or her own country. The further wrong the citizen commits is to breach the duty he or she owes to his or her compatriots.

The force of the duty of non-betrayal is at its most vivid in international armed conflict. However, it should nonetheless be clear that citizens commit the same type of wrong if they aid the UK's foes in a non-international armed conflict or if they aid non-state groups that attack the UK by way of terrorism. The nature of modern warfare and international terrorism, which is often a form of, or analogous to, unconventional warfare, provides good reason to recognise that the duty of non-betrayal extends beyond international armed conflict. Likewise, it is relevant that hostilities between sovereign states may now often be pursued by means that are analogous to but strictly fall short of traditional military operations, such as cyberwarfare. That is, states may attack the UK without necessarily initiating an international armed conflict. No British citizen ought to help, by any means whatsoever, a foreign state prepare for or carry out an attack on the UK.

III. The Atrophy of the Law of Treason

The criminal law should recognise and affirm the duty that all citizens (and some non-citizens) have to refrain from betraying our country by aiding its enemies. Historically, the law of treason has recognised this duty, denouncing its breach as a fundamental violation of the obligations of citizenship or peaceful residence in the realm and making provision for its severe punishment. In this way the law of treason has had a role to play in reinforcing the bonds of citizenship,¹⁹ in maintaining trust amongst citizens. For the law to play this role it must be clear what it prohibits and it must be possible to use the law effectively to prosecute suspected offenders for treason. Lack of clarity in the law's requirements would be unjust to those prosecuted for treason but would also make prosecutions less likely ever to succeed, which would mean that the law was unable to capture and denounce specific treasonous acts or even to mark out betrayal (treason) as wrong at all.

The problem that this paper confronts is that the law of treason has become unworkable. That law is largely to be found in the Treason Acts, the most important of which remains the Treason Act 1351. These statutes make it the case that a person is guilty of treason who:²⁰

- a. compasses or imagines the death of the Sovereign;
- b. compasses or imagines the death of the King's wife or of the Sovereign's eldest child and heir;
- c. violates the King's wife or the Sovereign's eldest daughter unmarried or the wife of the Sovereign's eldest child and heir;
- d. endeavours to deprive or hinder any person who is next in succession to the Crown for the time being from succeeding after the demise of the Sovereign to the Crown and the dominions territories belonging to the Crown and attempts the same maliciously, advisedly and directly by overt act or deed; or knowing such offence to be done, is an abetter, procurer and comforter of the offender;
- e. levies war against the Sovereign in Her realm, or is adherent to the Sovereign's enemies in Her realm giving them aid and comfort in the realm, or elsewhere; or
- f. slays the chancellor, treasurer or the king's justices, being in their places, doing their offices.

¹⁹ Lord Goldsmith QC, *Citizenship: Our Common Bond* (2008), p 81

²⁰ "Criminal Law" *Halsbury's Laws of England* Vol. 25 (5th edition, London, Lexis Nexis, 2016), para 1-419

The first four of these propositions focus on the safety of the Sovereign and the integrity of royal succession, which is unsurprising in view of the historic constitutional significance of the office of the Crown and the extent to which the King bears the person of the whole realm, such that betrayal of one's fellows has often taken the form of seeking violently to overthrow the Crown. However, the modern criminal law would do well to make separate provision for offences pertaining to the Sovereign or the royal family rather than to include them in a general law of treason.²¹ Similarly, there is no reason for royal officers to enjoy special protection aside from the ordinary law of murder, with an assault on an officer during the course of his duty being an aggravating feature.²² That part of the ancient law of treason which is of most general relevance and best captures the wrong of treason is the fifth proposition, which prohibits levying war on the Sovereign in Her realm or adhering to the Sovereign's enemies. These fourteenth-century statutory formulations are not altogether without meaning but are obscure in certain vital ways, including in their specification of the acts they prohibit, the persons to whom they apply, and their territorial reach.²³

The Treason Acts are not fit to serve as part of the modern criminal law. There is grave doubt about many of the elements of the offences they create, which makes it very difficult to mount successful prosecutions. This failing has been noted by many authorities. Lord Goldsmith QC, former Attorney-General, observed in his 2008 Citizenship Review that the principal difficulty with the current law of treason was: "that the scope of each of the elements of the offence is unclear so that in practical terms it would be very difficult to determine how the statutory language might apply in a modern context, and to present a treason case in easily explicable and intelligible terms."²⁴ Some thirty-one years earlier, when charged with reviewing the law on treason, the Law Commission had said in no uncertain terms: "Clearly it is unsatisfactory that the most serious of all criminal offences should turn on the construction of language some 600 years old, which is both obscure and difficult."²⁵ Since 2009, successive editions of the criminal lawyers' "bible" Archbold have not included substantive discussion of the law of high treason on the basis that the learned editors deem it "unlikely in the extreme that there will in the foreseeable future be any prosecutions".²⁶

The inadequacy of the Treason Acts was recognised at the start of the Second World War. In May 1940, Parliament enacted the Treachery Act, which was intended to cover largely similar ground to the Treason Acts, but to do so in a way that avoided important uncertainties and enabled effective prosecutions. (The Act was also intended to extend liability to enemy aliens who enter the UK clandestinely, who did not owe allegiance to the Crown and could not otherwise have been successfully prosecuted for treason or sentenced to death on conviction.) Introducing the Bill, the Home Secretary noted that "the Treason Acts are antiquated, excessively cumbrous and invested with a dignity and ceremonial that seems to us wholly inappropriate to the sort of case with which we are dealing here"²⁷ While the Government's focus was on the obscure trial procedures required

²¹ See e.g. proposals in The Law Commission, *Codification of the Criminal Law – Treason, Sedition and Allied Offences* (Working Paper No. 72, Second Programme, Item XVII, 1977), para 65

²² See for example Criminal Justice Act 2003, Schedule 21(5)

²³ Lord Goldsmith QC, *Citizenship: Our Common Bond* (2008), pp 41, 79-80

²⁴ *Citizenship: Our Common Bond* (2008), p79

²⁵ Law Commission (1977), para 21

²⁶ Archbold: *Criminal Pleading, Evidence & Practice* (London, Sweet & Maxwell, 2017), para 25-1: "Whilst several statutes providing for the prosecution and punishment of treason remain on the statute book... there have been no prosecutions for treason since that of William Joyce in 1945 (see *Joyce v. DPP* [1946] A.C. 347, H.L), although there have been instances of terrorist activity which undoubtedly fell within the compass of treason but which have been prosecuted as offences of murder or under the terrorist legislation. As it seems unlikely in the extreme that there will in the foreseeable future be any such prosecutions, the details of these offences have been omitted from this edition of this work. Readers wishing to refer to the law of treason should consult the 2009 and earlier editions." The same passage is in each annual edition after 2009.

²⁷ HC Vol. 361 col. 191 (22 May 1940)

by the ancient law of treason, a concern since answered by the Treason Act 1945,²⁸ this critique applies also to the substance of the law. The Treachery Act 1940 does not recite the ancient formulations, but instead puts into modern language the essence of the offence, in a form capable of being readily understood by everyone. Section 1 provides:

“If, with intent to help the enemy, any person does, or attempts or conspires with any other person to do, any act which is designed or likely to give assistance to the naval, military or air operations of the enemy, to impede such operations of His Majesty’s forces, or to endanger life, he shall be guilty of felony and shall on conviction suffer death.”

This was a very real improvement on the 1351 Act, being expressed in clear and lucid terms and successfully used to mount a number of prosecutions throughout the Second World War. The Act was subsequently repealed, but remains a good model for a reformed law of treason.²⁹

The Law Commission in 1977 recommended repeal of the Treason Acts and replacement with two new offences, one applicable in peacetime and the other in war. The former would “penalise conduct aimed at the overthrow, or supplanting, by force, of constitutional government”.³⁰ Disloyalty in time of war was the most important form of treason, the Law Commission reasoned, and it should therefore be an offence “with intent to help any enemy with whom this country is at war, to do any act which is likely to help the enemy, or, with like intent, to do any act which is likely to hinder the prosecution of the war by this country”.³¹ This was based on but deliberately broader than the terms of the 1940 Act, breadth which the Law Commission thought was necessary to adequately penalise the wrong of endangering the State in time of war.

The 1940 Act defines “the enemy” to mean “the enemy in any war in which His Majesty may be engaged”, which seems to take for granted international armed conflict between sovereign states. (The Law Commission’s proposed wartime offence was expressly limited to such cases.) In 1940 there was of course no doubt about the identity of the enemy. However, this will not always be the case, even in relation to state actors. It might be that the existing offence of treason ought to be interpreted to apply only in the context of international armed conflict. This would depart from historic practice to some extent, but more importantly such a limitation would mean that the law of treason did not adequately track the duty each of us has not to betray our country by joining in armed attacks on it, for that duty applies also to enemies who are not sovereign states. As we note above, at the very least, the duty of non-betrayal must apply in non-international armed conflict. Its extension to terrorist attacks on the UK or to state attacks falling short of international armed conflict is more difficult to specify, and will be more controversial, but is also warranted.

Thus, the nature of modern warfare and international terrorism bears on the question of which types of organisation are the UK’s enemies and on how far the duty not to betray the UK extends. The ancient law does not

²⁸ This Act assimilates the procedure for cases of treason to the procedure for cases of murder.

²⁹ Law Commission (1977), para 52

³⁰ Law Commission (1977), para 61

³¹ Law Commission (1977), para 53

adequately address these questions, which means that it cannot serve to denounce and deter British subjects from aiding attacks on UK forces, or on the UK itself, by non-state actors, which is morally indistinguishable from aiding an enemy state in international armed conflict. In other words, the ancient law of treason fails adequately to capture and express the vital moral prohibition on betrayal or to account for changes in modern conditions.

IV. Common Law Comparisons

The law of treason in the UK having become unworkable, it is salutary to contrast the law of our common law counterparts, especially Australia, Canada and New Zealand.

In Australia, section 80.1 of the Criminal Code creates an offence (treason) if a person levies war, or does any act preparatory to levying war, against the Commonwealth of Australia. Until 29 June 2018, section 80.1AA made it an offence (treason – materially assisting enemies, etc.) either to materially assist an enemy at war with the Commonwealth (whether or not a state of war has been declared) or to materially assist a country or organisation that is engaged in armed hostilities against the Australian Defence Force (ADF). The first limb of the offence required that the enemy be declared by Proclamation to be an enemy at war with the Commonwealth but this was not necessary to be liable for the second limb. Australian law thus clearly applied to acts intended to assist non-state groups that were fighting against Australia in non-international armed conflict. On 30 June, the National Security Legislation Amendment (Espionage and Foreign Interference) Act 2018 replaced section 80.1AA with a new offence of materially assisting a party (the enemy) to engage in armed conflict involving the Commonwealth or the ADF, provided that the enemy is declared by Proclamation to be an enemy engaged in armed conflict involving the Commonwealth or the ADF. The new law dispenses with the requirement that a country or organisation be engaged in armed hostilities *against* the Commonwealth. Instead, the new law provides that it is treason to assist a party that is engaged in an armed conflict involving Australia. The point of the changes was to modernise Australia's law, making it better reflect the reality that the ADF may be a party to a conflict involving multiple groups but may not necessarily be engaged directly in combat against all such groups.

In Canada, section 46 of the Criminal Code makes it an offence (high treason) to levy war against Canada or to do any act preparatory thereto or to assist “an enemy at war with Canada, or any armed forces against whom Canadian Forces are engaged in hostilities, whether or not a state of war exists between Canada and the country whose forces they are”. While it may be that “an enemy at war with Canada” extends to non-international armed conflict, the Canadian offence would seem to be limited to acts of assisting a foreign state's armed forces rather than non-state groups.

In New Zealand, section 73 of the Crimes Act 1961 makes it an offence (treason) to levy war against New Zealand or to assist “an enemy at war with New Zealand, or any armed forces against which New Zealand forces

are engaged in hostilities, whether or not a state of war exists between New Zealand and any other country". Unlike the Canadian offence, the New Zealand offence is not limited to assistance of armed forces of a foreign state. However, it is less direct than the (more recent) Australian legislation, which clearly applies to assistance of non-state groups.

At a minimum, UK law should be amended to specify that materially assisting armed forces against whom UK forces are engaged in hostilities is treason. The UK should follow the law of Australia (and to some extent New Zealand) and specify that the offence is not limited to international armed conflict and that it prohibits assistance of non-state armed groups. It ought always to have been clear, for example, that serving with the Taliban, whom UK forces fought in Afghanistan, was treason.

V. The Relevance of Terrorism Offences

One might argue that while the UK's law of treason has become unworkable, reform is unnecessary because treason has effectively been displaced by other offences. This argument was outlined by the Law Commission in 2010,³² in the course of reflecting on the 1977 recommendation to replace the ancient law of treason with a new offence applicable only in wartime and consisting in helping the enemy, and an offence, applicable in peace or war, of attempting to overthrow the Government by force. The Law Commission in 2010 took a rather different view, noting that treason:

"is an example of an area of the law shaped by political and social conditions that have ceased to be of contemporary relevance. Offences which once served a useful purpose no longer do so, in part because new offences have been developed which are far better suited for tackling the problems that currently afflict society."

The political and social conditions the Law Commission noted were the relevant frequency of war in England in the Middle Ages and of serious rebellion in the eighteenth century. The new offences they asserted were better-suited to contemporary problems were riot, to tackle civil unrest, and particular terrorism offences, to address the modern phenomenon of terrorism.

This is an important but in the end unpersuasive analysis. The Law Commission wrongly assumes that whereas medieval England was always at war, the modern UK is never at war. However, the nature of modern warfare (of which international armed conflict is only one type) and international terrorism complicate this contrast. The nature of modern warfare and terrorism may in fact be the very social and political conditions that require reform and extension of the law of treason rather than conditions that justify its atrophy. (Note that while Her Majesty's Government did not recognise the Troubles in Northern Ireland as a non-international armed conflict, terrorism is often a form of unconventional armed conflict and may constitute an act of war warranting a full state response.) The Law Commission's analysis fails to recognise the distinct wrong of betrayal. The law should pick out that wrong and make provision for its appropriate (severe) punishment. The assertion that the terrorism offences are better suited to occupy the field is questionable, for those offences may fail adequately to denounce the betrayal in which treason consists. This is not at all to say that every terrorist offence should be thought to amount to treason; on the contrary, that some acts of terrorism, but

32 The Law Commission, *Tenth Programme of Law Reform* (Law Com No. 311, 2010), paras 2.27-2.31

not all, arguably also constitute betrayal of one's compatriots is precisely a reason to conclude that the law of treason may not be irrelevant to modern conditions after all.

The UK has a developed, extensive and well-maintained set of terrorism offences. Many acts that would constitute a breach of a workable law of treason, including a law modelled on Australian or New Zealand precedent, are likely also to constitute terrorism offences. The Terrorism Acts 2000 and 2006, as amended, create a number of important offences, some of which are punishable by life imprisonment; other statutes, as well as the common law of murder, also provide a basis on which to prosecute and convict persons who commit serious acts of terrorism. In March this year, the Sentencing Council issued new guidelines for terrorism offences, in many cases raising the severity of sentence to be imposed on what are otherwise classified as less serious cases.

This is an intelligent body of law. The central problem with it, insofar as the argument of this paper is concerned, is that it does not adequately attend to the significance of the duty of allegiance. The courts have taken Parliament not to intend to distinguish between different causes or aims of terrorism and have accepted the Government's argument that it would be wrong to rank terrorist organisations or causes or to treat "criminal activity on behalf of one terrorist organisation or cause as being more serious than another".³³ The origin of this chain of reasoning was the need to refute the suggestion that the terrorism legislation recognises (and exempts or punishes more leniently) what one might term terrorism in a just cause.³⁴ But what it means is that the terrorism legislation does not distinguish between acts of terrorism that are intended to be attacks on the UK itself and acts of terrorism that have some other object, including targets abroad. Likewise, the legislation does not distinguish between the obligations owed by a British subject (citizen) and any other person, including those who enter the UK clandestinely in order to commit terrorism. This lack of differentiation makes sense insofar as one conceives of the wrong that the legislation combats to be participation in acts of terrorism simpliciter. However, the consequence is that the UK's terrorism law largely fails to mark the moral importance of betrayal or to attend to the practical importance of an offender's adherence to a group that intends to attack the UK.

Consider the main terrorism offences. The offences aim to make it unlawful to prepare to carry out acts of terrorism or to support others in committing terrorism, including by encouraging terrorism, disseminating terrorist publications or funding terrorism.³⁵ It is unlawful to belong (or profess to belong) to a proscribed terrorist organisation (PTO) or to invite others to support a PTO.³⁶ It is an offence to collect information that would be useful in the carrying out of terrorism or to possess an article where there is a reasonable suspicion this is connected to acts of terrorism.³⁷ Some of these offences are very broad indeed and they are intended to be a comprehensive regime.

The maximum sentence for encouraging terrorism or disseminating terrorist publications is 7 years' imprisonment; for inviting support for

³³ *R v Kahar* [2016] EWCA Crim 568; [2016] 1 W.L.R. 3156, at paras [8]-[13]

³⁴ *R v F* [2007] EWCA Crim 243; [2007] Q.B. 960 at paras [27] and [32]

³⁵ Sections 5, 1 and 2 of the Terrorism Act 2006

³⁶ Sections 11-12 and 15-18 of the Terrorism Act 2000

³⁷ Sections 58 and 57 of the Terrorism Act 2000

a PTO the maximum is 10 years' imprisonment. These offences and that sentencing range fail to reflect the gravity of the wrongdoing that is involved if or when a British subject (citizen) encourages others to support groups, including states, that are attacking the UK, intend to attack the UK or are otherwise fighting UK forces abroad. In 2016, Anjem Choudary was convicted for inviting support for ISIS, partly on the basis of video evidence showing that he had sworn allegiance to ISIS.³⁸ His sentence of five and a half years' imprisonment was manifestly inadequate in view of his betrayal of his country by serving as a recruiting agent for a group that intends to and has carried out attacks on the UK and which UK forces are fighting abroad.³⁹ Note that he betrayed his country by inducing others to betray their country, corrupting (mostly) young British Muslim men and sending them to their deaths in Syria. We make no criticism of the sentencing judges who were limited by existing law – our point is that the law should provide for more severe punishment in view of the true nature of the wrong.

It is an offence to be a member of a PTO, punishable by a maximum of 10 years' imprisonment. This offence is limited, by definition, to those organisations that have been proscribed, and so may not criminalise membership of all groups that intend to attack the UK. Insofar as a British subject (citizen) is a member of such a group, or is acting in coordination with such a group, and assuming it has been proscribed, prosecution for this offence would fail to recognise the gravity of his wrongdoing. The offender's adherence to this particular group, in contrast to other terrorist groups, constitutes betrayal of his country by joining with, and standing ready to assist, its enemies.

It has at times proven difficult to prosecute offenders for breach of the membership offences.⁴⁰ It seems that the authorities are now willing to prosecute offenders whose connection with a PTO, most notably ISIS, is less direct than once may have been required. The conviction of Anjem Choudary in 2016 opened the door for the prosecution and conviction of the Luton gang, who also intended to encourage others to support ISIS, a group that aims to pursue hostilities against the UK by both directing attacks and inspiring others to carry out such attacks.⁴¹ The Luton gang received sentences ranging from two and a half to six years' imprisonment. These sentences may be understandable in view of the statutory maximum – again we make no criticism of the sentencing judges – but they are inadequate in view of the wrong the offenders committed, which was to betray their country by giving aid to ISIS, a group the UK is fighting, by encouraging others to assist it.

Perhaps the most important offence in the terrorism legislation is section 5 of the Terrorism Act 2006, which makes it an offence for a person with the intention of (a) committing acts of terrorism, or (b) assisting another to commit such acts, to engage in any conduct in preparation for giving effect to his intention. It is irrelevant whether the intention and preparations relate to one or more particular acts of terrorism, acts of terrorism of a particular description or acts of terrorism generally.⁴² The offence is punishable by a maximum term of life imprisonment. It has been used to convict a wide

³⁸ *Choudary v R* [2017] EWCA Crim 1606; [2017] 4 W.L.R. 204

³⁹ As he will soon have served half his sentence, Choudary is likely to be released later this year.

⁴⁰ David Anderson QC, *The Terrorism Acts in 2015* (December 2016) notes that prosecutors value these offences (para 5.7) but notes also ways in which they might be amended to be more effective (para 9.50)

⁴¹ *R v Alamgir & Ors* [2018] EWCA Crim 21

⁴² Section 5(2) of the Terrorism Act 2006

range of actions but is most clearly directed at the planning of terrorist attacks. The proper sentencing range for this offence has not always been clear, although serious cases have at times attracted very lengthy terms of imprisonment. The Court of Appeal sought in *R v Kahar* to clarify matters,⁴³ although it has been overtaken by the Sentencing Council's recently issued guidelines.⁴⁴ In section VIII below, we discuss in detail the new sentencing regime that these guidelines introduce. The guidelines note that it is an aggravating feature that the conduct was with a view to engaging in combat with UK forces.⁴⁵ This sensible provision is the only time in the guidelines that the object of the terrorist action – its focus on UK forces – is taken to be relevant. The origins of the provision may lie in an earlier court's astute observation, in sentencing Munir Farooqi to life imprisonment, that “[h]e was a dedicated recruiter of others, doing all he could to recruit men to fight [for] the Taliban and kill allied troops at a time when he owed allegiance to this country.”⁴⁶ This was a rare but welcome recognition of the wrong of betrayal. It should be recognised more generally in UK law.

The Sentencing Council's new guidelines overhaul sentencing for terrorism offences and are expected to result in increased sentences for lower-level offences, where preparations are less advanced or an offender only offers limited assistance to others. These offences ought to be recognised to be more serious than otherwise thought, the Council reasons, because of the ease with which attacks may now be planned and carried out (often with knives or motor vehicles rather than with firearms or explosives) and the speed with which offending may escalate. The Council's hope is that increasing punishment in this way may help incapacitate terrorists and disrupt the planning of attacks.⁴⁷

These are reasonable changes within the existing framework. But that framework is itself problematic insofar as it understates the gravity of wrongdoing that is involved in choosing to give assistance to a group that intends to attack the UK or which UK forces are fighting. This specific wrong is largely absent from the legislative scheme or the new guidelines. Relatedly, while the guidelines frequently note that communication with other extremists is an aggravating feature of terrorism offending,⁴⁸ the law understates the practical significance of the fact that an offender intends to aid a group that is attacking the UK. Offenders who act with this intention are morally complicit in attacks on the UK and may be presumed to be likely to support the relevant group, or some other group with a similar agenda, in attacking the UK in future. This is distinguishable from other types of terrorist action that lack such integration with the planning of a group. For a British citizen to serve with a group like ISIS or the Taliban, viz. a group that the UK is fighting or that is attacking the UK, ought to be recognised to be a much more serious offence than for a non-citizen to be a member, even a prominent member, of some other PTO which may be wholly unconnected with the UK.

Thus, while it is true that many acts of aiding groups that intend to attack the UK would be terrorism offences, there are reasons to think that those offences do not adequately recognise the gravity of wrongdoing or

⁴³ [2016] EWCA Crim 568; [2016] 1 W.L.R. 3156

⁴⁴ Sentencing Council, *Terrorism Offences: Definitive Guidelines* (effective from 27 April 2018)

⁴⁵ *Terrorism Offences: Definitive Guidelines*, p.8

⁴⁶ *R v Farooqi & Ors* [2013] EWCA Crim 1649, per Lord Judge LCJ at [162] (emphasis added)

⁴⁷ Sentencing Council, Press Release, 28 March 2018: <https://www.sentencingcouncil.org.uk/news/item/new-sentencing-guidelines-for-terrorism-offences-published/>

⁴⁸ *Terrorism Offences: Definitive Guidelines*, pp.8, 14 and 48

the threat to the UK posed by British subjects who provide such aid. The same would be true for any new offence of entering or remaining in a “declared area”, which is an area in a foreign country in which a PTO is engaged in hostile activity. The Government is contemplating introducing an amendment to the Counter-Terrorism and Border Security Bill which would introduce an offence of this kind,⁴⁹ modelled on the Australian equivalent.⁵⁰ This may be a useful addition to the armoury of terrorism offences insofar as it is easier to prove than some other offences – we take no view on this question – but such an offence would still fail to recognise the specific wrong of British subjects aiding groups whom UK forces are fighting or groups that intend to attack the UK.

49 Sajid Javid MP (Home Secretary), Hansard, HC Vol. 642, col. 637 (11 June 2018)

50 Section 119.2 of the Criminal Code Act 1995 (Australia)

VI. Espionage Law and Hostile State Activity

The terrorism legislation largely fails to recognise the duty of non-betrayal. This is no criticism of that legislation as such, for it has a different purpose, but it does mean there is a gap in the UK's legal regime in prohibiting citizens from giving aid to the UK's enemies. Other legislation does attend to the reality that the UK faces threats from hostile states and to some extent attempts to prevent citizens from aiding those states. Nonetheless, as we now show, gaps remain.

The Official Secrets Acts, now under review by the Law Commission, make it an offence for any person, acting with any purpose prejudicial to the safety or interests of the State, to enter a prohibited place or to make any sketch, plan, model or note which is calculated to be or might be or is intended to be directly or indirectly useful to an enemy. It is also an offence to obtain, collect, record, publish, or communicate any secret official code word, or pass word, or any sketch, plan, model, article or note or other document or information which is calculated to be or might be or is intended to be directly or indirectly useful to an enemy. Thus, criminal liability turns on acting with a purpose prejudicial to the safety or interests of the State, which the legislation stipulates that a person has if he or she is acting without lawful authority, unless the contrary is proved. Liability also turns on whether the sketch, plan, etc. is calculated or intended to be useful to an enemy. The Law Commission has mooted replacing the term "an enemy" with "foreign power".⁵¹ The legislation plainly does not require one to act with intent to aid an enemy (or a foreign power), let alone to act with intent to aid an enemy state in attacking the UK. But the offence does consist in action that undercuts the UK's national security (the term the Law Commission recommends in place of safety or interests of the State) by way of creating or processing information that would be useful to a hostile state (or perhaps organisation). Some cases of betrayal have been prosecuted by way of the Official Secrets Acts, with George Blake, who spied for the Soviet Union during the 1950s, sentenced to 42 years' imprisonment.

British citizens who gather information for foreign states or for hostile groups may breach the Official Secrets Acts, if the information would be useful to the UK's enemies and is gathered for a purpose prejudicial to the UK's security. If the information relates to terrorism, the citizen may also breach section 58 of the Terrorism Act 2000. These legal prohibitions are an important part of the UK's legal regime, but do not go far enough in

⁵¹ Law Commission, *Protection of Official Data: A Consultation Paper* (Consultation Paper 230), paras 2.138-2.143

recognising the qualitative difference that obtains when the offender is a British citizen and gathers information intending to aid a state or group that is engaged in conflict with the UK, or in order that it may be better placed to attack the UK.

The risk that foreign states may pose to the UK, short of international armed conflict, has become obvious in recent months. The new Chief of the Defence Staff, General Sir Nick Carter, recently noted, and affirmed, the US Defense Secretary's observation that "great power competition – not terrorism – is now the primary focus of US national security."⁵² General Sir Nick Carter went on to observe that "[w]hat constitutes a weapon in this grey area no longer has to go 'bang'. Energy, cash – as bribes – corrupt business practices, cyber-attacks, assassination, fake news, propaganda and indeed military intimidation are all examples of the weapons used to gain advantage in this era of 'constant competition'". The ability of states to compete in ways falling short of traditional 'war' has changed – and increased beyond measure – and the UK clearly faces a growing threat from hostile states.

In the aftermath of Russia's "unlawful use of force" in Salisbury, as the Prime Minister termed it, the Government has proposed legal changes to increase the security of the UK's borders, authorising police, immigration and customs officials to stop, question, search and detain a person at the border to determine whether that person is or has been engaged in hostile state activity. The Counter-Terrorism and Border Security Bill 2018 defines hostile activity as the commission, preparation or instigation of a hostile act that is or may be carried out for, or on behalf of, or otherwise in the interests of a state other than the UK.⁵³ A hostile act is defined as an act that threatens the UK's national security or economic well-being or is an act of serious crime, which is defined as conduct that would be likely to receive a sentence of imprisonment for three years or more or conduct involving the use of violence, results in substantial financial gain or involves a large number of persons in pursuit of a common purpose. The Bill does not create an offence of participating in hostile activity, but the new regime for questioning, inspection and detention that it introduces is premised on the existence of a new class of hostile state action. The Government maintains that this new regime is required because existing terrorism laws are inadequate to address this new type of action.

It remains to be seen how Parliament will receive the proposed legislation. However, the Government's recognition of hostile state activity is an important development. The legal changes thus far proposed concentrate on the powers necessary to investigate persons at the border who are suspected of hostile state activity, some of whom may simply be denied entry to the UK, others of whom may be investigated further or charged and their property seized as evidence of criminal action or seized or destroyed in order to protect national security and the UK's economic well-being. The proposed legislation does not consider whether British citizens might be engaged in hostile state activity. If they were engaged in this way, this would, we suggest, at least be analogous to other breaches

⁵² General Sir Nick Carter, "Dynamic Security Threats and the British Army", speech at the RUSI, Whitehall, 22 January 2018

⁵³ Schedule 3, clause 1(5)–(7)

of the duty of non-betrayal. Engaging in “hostile state activity” would not necessarily constitute a breach of the duty of non-betrayal, for while some instances of this activity may be attacks on, or preparations for attacks on, the UK, other instances may not be attacks but may be profiteering by a rogue state or unlawful use of force (say, by murdering dissidents or exiles in the UK). These would be violations of UK sovereignty, and it might be particularly wrongful for any British subject to aid them, but the wrong in question would be different in kind to aiding the UK’s enemies. Actions that threaten the economic well-being of the UK, as opposed to its national security, are less easy to classify, but in our view are importantly distinct from attacks.

In short, in addition to the terrorism offences, there is legislation on which the authorities may at times rely to prosecute British subjects who provide aid to the UK’s enemies, if the aid consists in providing information to a foreign state (and perhaps also to a foreign group more generally). This legislation recognises the risk of information being useful to the UK’s enemies but does not recognise the particular significance of betrayal by acting to aid the UK’s enemies. Recently proposed legislation does perceive the risk of hostile state action falling short of war but does not introduce into the criminal law any new offence for British subjects or others to engage in such conduct.

VII. How to Restore the Law of Treason

The law as it stands fails adequately to recognise and denounce the wrong of betraying our country by aiding its enemies. The law should be reformed to address this shortcoming. Such reform is especially important in view of the numbers of British citizens who have served with, or otherwise lent assistance to, groups that UK forces are fighting in non-international armed conflicts as well as groups that have sought to carry out, and in some cases have carried out, attacks on the UK. It is also important in view of the threat of foreign states attacking the UK in ways falling short of international armed conflict, which some British citizens may be tempted (financially or ideologically) to support. The law needs to be reformed to signal very clearly that the duty of non-betrayal remains fundamental.

There are different ways in which the law could be reformed to recognise and stress the importance of keeping faith with one's fellow citizens by refraining from betraying them to their enemies. If the UK were to continue to rely primarily on terrorism offences to ground liability, Parliament should make it an aggravating feature of any offence that a British subject (citizen) intends to attack the UK or to fight UK forces or to support a group that has such an intention. This would be a limited but valuable reform. The limitation is that the focus of the offence would remain on participation in terrorism, rather than on aiding an enemy state or organisation. This may misstate the nature of the wrong and might in some cases result in gaps in liability. The most important of the terrorism offences, which proscribes preparation of terrorist acts, is sweeping in its reach but arguably may not extend to cases where a person deliberately provides support to a group like ISIS or the Taliban without also intending to enable that group to carry out further terrorist action. The law makes it an offence to invite support for a PTO but not simply to provide such support (other than by inviting others to provide support or providing information or funding). It is an offence to be a member of a PTO, but membership is often difficult to prove and does not attend to the importance of looser connections. Perhaps more importantly, it is not clear that deliberately providing support for a hostile state would always breach terrorism legislation.

Even if gaps in liability were rare, it would remain the case that the maximum terms of imprisonment for many terrorism offences do not reflect the gravity of the wrong of betraying one's country. We examine this point in some detail in section VIII below. For now, note that inviting support for ISIS, for example, is to recruit others (often thereby subverting their loyalty

to our country) to join a group that intends to carry out attacks on the UK and which UK forces are fighting. The sentence of five and a half years imposed on Anjem Choudary for this crime was manifestly inadequate; even a sentence of 10 years' imprisonment, which is the statutory maximum, would have been inadequate. Choudary betrayed his country, aiding its enemies by encouraging others to take up arms with them and thereby undermining the trust that ought to hold amongst citizens. In the absence of exceptional mitigating factors, none of which were present in his case – on the contrary, Choudary was a mature, calculating offender – his crime deserved a life sentence. Thus, while it would be an improvement if betrayal of our country were made a statutory aggravating feature (like an offender's previous convictions or the fact that an offence was committed while the offender was on bail), the existing maximum sentences would still limit the impact of this reform. We note that the Counter-Terrorism and Border Security Bill 2018 answers this point in part, proposing to raise maximum sentences for four terrorism offences, from 7 years or 10 years to 15 years.⁵⁴ The offences are: collection of information useful to a terrorist, publishing information about members of the security services, encouragement of terrorism, and dissemination of terrorist publications. The Bill would also end the practice of automatically releasing offenders who have served half their sentence and make provision for extended license of up to eight years after release, during which period offenders could be recalled to prison⁵⁵

There is good reason to consider introducing a distinct criminal offence for citizens engaging in hostile state activity, in the sense outlined in the 2018 Bill. This activity may include actions that are outright betrayals of the duty that each citizen owes his or her compatriots by acting to undermine the UK's national security. There is good reason to mark such actions out in particular and we propose below a new offence that would achieve this end. But it ought in any case to be a serious wrong for a citizen to help enable a foreign state to threaten the UK's economic well-being or to undertake criminal actions, including of course using force, especially lethal force, against persons within the UK, even if such uses of force are best understood as violations of UK sovereignty rather than attacks on the UK.

The most important legal change that ought to be made, however, is the enactment of a new criminal offence, which would restore – and make salient once again – the duty of non-betrayal once upheld by the law of treason and recognised still, in different forms, in other common law countries. That is, Parliament should act to restore the law of treason. The Law Commission in 1977 was right to recommend enactment of a workable offence of aiding the enemy in wartime. The simplicity of their proposal, like the Treachery Act in 1940, turned on it being taken for granted that the enemy would be a sovereign state with which the UK was engaged in international armed conflict. The 1940 and 1977 provisions were too simple insofar as they would have failed to catch actions undertaken before war broke out but which were intended to aid a sovereign state in going to war with the UK. This is no criticism of the 1940 Act, which was enacted after war with Nazi Germany had begun,⁵⁶ but is a criticism of the 1977 proposal which was

⁵⁴ Clause 6

⁵⁵ Clauses 7-10

to have been of more general application. The offence of betraying one's country in wartime should not be limited to international armed conflict but ought to apply also to aiding the UK's foes in non-international armed conflict. There is thus a strong case for Parliament to enact a new offence modelled on Australian or New Zealand precedent.

The duty of non-betrayal is breached, we argue, when citizens help states attack the UK, even if those attacks fall short of international armed conflict. The duty is also breached when citizens help groups that aim to carry out attacks on the UK. In each case the citizen betrays his or her compatriots by helping their enemies attack them and the country they share. Thus, we propose that Parliament enact an offence, perhaps as an amendment to the Counter-Terrorism and Border Security Bill, which would address the atrophy of the law of treason and give proper force to the duty of non-betrayal.

The offence might be framed in the following way:

Treason: aiding a hostile state or organisation

- (1) A person commits an offence if, with intent to aid–
 - (a) an attack on the UK by any state or organisation, or
 - (b) any state or organisation that intends to attack the UK or is engaged in a process of planning or preparing for an attack on the UK, or
 - (c) any state or organisation with whom the UK is engaged in armed conflict, he engages in conduct falling within subsection (2)
- (2) A person engages in conduct falling within this subsection if he does any act that is designed to–
 - (a) help carry out an attack or facilitate the carrying out of an attack on the UK, or
 - (b) help the planning of or preparation for an attack on the UK, or
 - (c) aid the military or intelligence operations of a state or organisation falling within subsection (1), or
 - (d) impede the operations of Her Majesty's forces, or
 - (e) prejudice the security and defence of the UK, or
 - (f) endanger life.
- (3) A person guilty of this offence shall be sentenced to imprisonment for life unless, given the circumstances of the offence and the offender, a sentence of imprisonment for life would be manifestly unjust.

The core of the offence is betraying one's compatriots by helping a state or organisation prepare for or carry out attacks on the UK or by helping a state or organisation that the UK is fighting. Acting in order to help such a

56 Although before war with Imperial Japan had begun.

state or organisation is inconsistent with the duty of loyalty (non-betrayal) one owes one's country. This duty – the duty of allegiance – and thus this offence applies to British subjects (citizens) and to some non-citizens. We consider in section X below various questions about when and where it applies to citizens and, especially, to different types of non-citizen.

The offence criminalises acts that assist states or organisations in attacking the UK, or in preparing for or planning such attacks, as well as acts of support for states or organisations which the UK is fighting, whether in an international or non-international armed conflict or otherwise. We term states and organisations that fall within the scope of the offence “hostile states and organisations”. Like section 5 of the Terrorism Act 2006, the offence would not require any specific attack to be in contemplation – the offence should extend to a type of attack or to attacks in general – and neither should it be necessary for a decision to have been made to carry out an attack. Likewise the offence could be committed with an intention to aid one attack, but an action that helped carry out or prepare to carry out some other attack.

The offence requires knowledge of the relevant facts at the time at which one acts. Thus, one could not commit the offence without knowing at the time one acts that one was aiding a state or organisation that was planning or carrying out an attack on the UK or that was engaged in armed conflict with UK forces. It is irrelevant why one intends to aid a hostile state or organisation. The reason might be greed, hatred of the UK, or religious or ideological conviction. The offence is committed by acting with the specified intent, regardless of further intentions (motives).⁵⁷

Recast in this way, a reinvigorated law of treason would also recognise that states may attack the UK, or prepare to attack the UK, without necessarily initiating an international armed conflict. No person enjoying the protection of the Crown ought to help such a hostile state. In particular, no person owing a duty of allegiance to the Crown ought to help that state prepare for or carry out an attack on the UK or help a state that one knows intends to attack the UK, or is in the process of planning, or preparing to carry out, an attack on the UK. Most obviously, one should not participate in the carrying out of an attack or in the planning of an attack, but one should also not take actions intended to facilitate that attack or that preparation, including actions that endanger life or otherwise prejudice the UK's defence or security. More generally, one should not take any action that is designed to aid the military or intelligence operations of a state that one knows is planning attacks on the UK.

The new offence would also recognise that the UK faces the threat of attacks from organisations other than states and that UK forces are often deployed in armed conflicts where an organisation is an adversary. The proposed offence would apply when the UK is engaged in non-international armed conflict, but may extend more widely to any case in which the UK's armed forces are fighting a non-state group. The merits of deploying the armed forces will often of course be fiercely contested. It is not in the least treasonous for deployment to be opposed or for a British subject (citizen)

⁵⁷ The Law Commission in 1977 recommended that duress be a defence; New Zealand legislation does not permit duress to be a defence to treason. We incline towards the New Zealand practice.

to think some military action is unlawful or unjust or even to argue that UK forces deserve to be defeated.⁵⁸ What the law must condemn is giving aid to an organisation which UK forces are fighting or, conversely, acting in order to impede UK forces in their operations against that organisation. Once UK forces are engaged, and insofar as this is known by the person in question, it must be wrong for him or her to assist the organisation, which at that point, for good or for ill, has become our country's enemy.

It will not always be clear whether the UK is engaged in armed conflict with a state or organisation. The law should empower the Government by statutory instrument to specify that a particular state or organisation falls within the scope of the offence, viz. that some state or organisation is definitively to be taken to be in the process of preparing for an attack on the UK or whether the UK is in an armed conflict with that state or organisation.⁵⁹ This is a proper task to entrust the Government, which should be able conclusively to determine the foreign policy question of whether a state or organisation is hostile.⁶⁰ The significance of a statutory instrument to this effect would be that it would dispense with the need for proof that a state or organisation fell within the scope of the offence. In any prosecution for treason, the Crown would need to establish that the accused acted with intention to aid a state or organisation, knowing that it was a hostile state or organisation. The accused could be convicted even if no statutory instrument had been made, provided his intention is proved. The significance of a statutory instrument is that it would make it a matter of public notice that the relevant state or organisation is hostile and would establish a rebuttable presumption, which could be beaten back by proof to the contrary, that the accused knew that the state or organisation was in fact hostile. This would signal clearly in advance, in a way that is fair to the accused, which states or organisations it would be treasonous to aid.

The Australian law of treason adopts a broadly similar approach. As noted above, the law as it stood until 29 June 2018 made it a condition of the offence of materially assisting an enemy at war with the Commonwealth of Australia that the enemy is specified by Proclamation. However, the offence of materially assisting a country or organisation to engage in armed hostilities against the Australian Defence Force (ADF) was not subject to this condition. The law since 30 June 2018 combines the two limbs of the old offence into a single offence of materially assisting a party (the enemy) engaged in armed conflict involving the Commonwealth or the ADF but makes it a condition of the offence that the enemy is declared by Proclamation to be an enemy engaged in armed conflict involving the Commonwealth or the ADF. This change thus limits liability for treason to cases in which a Proclamation has been made. Specifying that some state or organisation is hostile rightly puts citizens (and relevant non-citizens) on notice that they may not aid that state or organisation without betraying their country. But betrayal may take place without any such notice provided that the citizen in question knows that the state or organisation is hostile.⁶¹ Therefore, our proposal is that liability attaches to persons who act intending to help a state or organisation they know to be hostile (in

⁵⁸ Nothing turns, for our purposes, on whether one's opposition to military action is civil or vicious. In January 2010, Islam4UK announced plans to hold a protest march through Wootton Bassett, site of military funeral repatriations, ostensibly in memory of Muslim civilians "murdered" by coalition forces but with the clear intention also of mocking and abusing families of fallen soldiers. The plan was rightly condemned (including by many British Muslims) as disgusting and vile (and Islam4UK was subsequently proscribed). However, planning or carrying out the protest would not have constituted a breach of the offence we propose.

⁵⁹ Compare section 2 of the Trading with the Enemy Act 1939, which in subsection (1) defines an "enemy" for the purposes of the Act and then, in subsection (2), empowers the Secretary of State by order to direct that any specified person is to be deemed to be an enemy for the purposes of the Act.

⁶⁰ It may be that no Government would ever exercise this power in relation to a hostile state and that the power ought to be limited to organisations. This power would be distinct from the power to proscribe an organisation as connected with terrorism: the latter is very general and may be distant from UK interests, whereas the former is intimately connected with UK security and foreign policy.

⁶¹ In some cases, only the citizen will know – or at least, the UK authorities will not (yet) know – that some state or organisation is hostile.

the relevant sense). Specification by way of statutory instrument may help establish this knowledge, by putting citizens on notice, but should not be necessary for conviction.

The focus of the offence, insofar as it goes beyond sovereign states, is on foreign organisations, especially those capable of participating in armed conflict. However, it is certainly possible that the offence could also extend to domestic organisations if they attack or plan to attack the UK or are engaged in armed conflict with UK forces. In the immediate term, it is likely that most organisations (not states) meeting this description will be Islamist terrorist groups. This might imply that there is an asymmetry in the handling of Islamist terrorism as opposed to other terrorism, including atrocities committed by neo-Nazis or others of a similar ilk. There would be no asymmetry insofar as the latter has not yet involved British subjects aiding organisations that intend to attack the UK. If this were to change, if other forms of terrorism developed in this way, which is a real risk,⁶² persons aiding these groups would likewise be committing treason and should be prosecuted accordingly.

The idea of a hostile organisation, which is central to our proposed offence, overlaps in part with the concept of a Proscribed Terrorist Organisation (PTO) in the Terrorism Acts. However, there is good reason to make particular provision for hostile organisations for the purposes of the law of treason, and not simply to track the list of PTOs. First, it should be an offence to aid an organisation that intends to attack the UK regardless of whether it has been proscribed. And often only those associated with the group will know that it plans to attack the UK. Second, not all PTOs intend to attack the UK – the statutory regime for proscription sweeps much more broadly than this and does not differentiate between different types of terrorism or terrorist group. The offence we propose, and the provision for specifying particular hostile organisations, is warranted because there is a difference in kind between a PTO, which meets the very broad definition of terrorism in the Terrorism Act 2000, and a group that intends to attack the UK. Aiding the former is wrong and will often breach terrorism legislation. But aiding the latter is to commit oneself to attacks on the UK or to armed conflict with UK forces, which is to commit the distinct wrong of betraying one's country.

The 1940 Act made it unlawful to give assistance to the “naval, military or air operations” of the enemy with intent to aid the enemy. Our proposed offence makes it an offence to act with intent to aid a hostile state or organisation by helping it carry out, plan or prepare for an attack, by giving assistance to its “military or intelligence operations”, or by other acts that are designed to prejudice the security and defence of the UK or endanger life. The 1940 Act’s focus on “naval, military or air operations” has been overtaken by developments in the nature of warfare, including the rise of cyberwarfare.⁶³ We use the term “attack” rather than “armed attack” to avoid any implication that an attack must either be of such scale and intensity as to justify self-defence under the UN Charter or must involve regular troops or symmetrical warfare. At its simplest, an

⁶² Mark Rowley, “Extremism and Terrorism: The need for a whole society response”, the Colin Cramphorn Memorial Lecture, Policy Exchange, 26 February 2018

⁶³ Although of course, one might argue that these simply are (new) military operations.

“attack” is an operation that results in, or is intended to result in, death or injury of persons or destruction or damage of property. An “attack” should include a cyberattack, which is “a cyber operation, whether offensive or defensive, that is reasonably expected to cause injury or death to persons or damage or destruction to objects”.⁶⁴ We note that there is a risk of overbreadth here – hacking is not treason – and it might be that for this offence cyberattacks should be ancillary to some other more direct attack or must aim to compromise the UK’s national security.⁶⁵

Attacks must be on or against the UK. By contrast, as explored earlier in this paper, terrorism offences are much broader and include actions designed to influence the UK Government or any other government or to intimidate the UK public, or part of the public, or the public of some other country, in order to advance a political, religious or ideological cause. The offence we propose may overlap at times with terrorism law but is designed to focus on the distinct wrong in which one betrays one’s country by participating in attacks on it. An attack on UK forces or military bases or on diplomatic personnel or embassies abroad will clearly be an attack on the UK. Attacks on civilians within the UK, or British citizens abroad, will also constitute attacks on the UK if they are targeted in order to attack the UK as such. Acts that endanger life may themselves constitute an attack or an attempted attack or may be a means, successful or not, to aid a hostile state or organisation, and acts that impede UK forces may be the means that constitute an offender’s attempts, successful or not, to assist a hostile state or organisation.

Note that the proposed offence does not require one in fact to help a hostile state or organisation or to help an attack. The question instead is whether one acts with the intention of helping a hostile state or organisation. Liability for treason should not turn on whether one’s efforts to help the enemy are effective. Conversely, there seems to us no need for any exception for humanitarian relief.⁶⁶ What would otherwise be lawful humanitarian relief or peaceful protest should be unlawful if, but only if, it is an act designed to aid the hostile state or organisation and intended to help that state or organisation’s military operations or (planning for) attacks on the UK. However, there are reasons to limit liability, as the Law Commission recommended in 1977, in cases where there is a lawful excuse for giving help, as for example with prisoners of war who are required to work.⁶⁷

The bare intention to aid an attack or to aid a hostile state or organisation is not itself an offence, for there is no treasonous act.⁶⁸ Treasonous acts are acts that are designed to help carry out, or to facilitate, an attack on the UK or planning and preparation for an attack, or to prejudice the security and defence of the UK, or endanger life, or to aid the military or intelligence operations of a hostile state or organisation, or to impede the operations of UK forces. One may thus commit the offence in various ways, including by recruiting others to the cause of the hostile state or organisation, by serving in it (including swearing allegiance to it and agreeing to stand ready to serve when called),⁶⁹ supporting it financially, gathering intelligence, enabling its communications, helping build morale, or undertaking

⁶⁴ *Tallinn Manual on the International Law Applicable to Cyber Warfare* (Cambridge, Cambridge University Press, 2013), Rule 30

⁶⁵ Consider Junaid Hussain, a British citizen, who served as an ISIS hacker until his death in 2015.

⁶⁶ Cf. section 80.1AA(4) of the Criminal Code 1995 (Australia)

⁶⁷ Geneva Convention relative to the Treatment of Prisoners of War (Geneva, 12 August 1949; TS 39 (1958); Crnd 550) Sch 3, art 49

⁶⁸ An overt act has long been required to prove treason; see further Law Commission (1977) paras 30-32.

⁶⁹ Becoming a naturalised citizen of a state with whom the UK is at war is itself treason and attempting to renounce one’s British citizenship in this way does not succeed in evading liability for treason for subsequently aiding that enemy state: *R v Lynch* [1903] 1 K.B. 444. By analogy, swearing allegiance to a group with whom the UK is engaged in armed conflict should be recognised itself to be a treasonous act.

propaganda in its support. Joining the state or organisation's armed forces, or other personnel (or otherwise becoming a member), would clearly constitute treason, for one has acted in a way that is designed or is likely to aid the operations of that hostile state or organisation.⁷⁰ This would apply to persons in the UK who join ISIS but also to many of the 850 UK-linked persons known to have gone to Syria and Iraq in recent years. Some 400 of these persons have returned to the UK, of whom only about 40 have been prosecuted, usually by way of section 5 of the Terrorism Act 2006. If these persons have fought for ISIS, or otherwise provided support for it, and have known that ISIS intends to attack the UK and is engaged in conflict with UK forces, then they would have breached the offence we propose. Doubtless the difficulty in mounting prosecutions is often one of adequacy of evidence; still, if Parliament were to enact the proposed offence, the authorities should strive to prosecute for treason those British subjects who have fought abroad. This new offence would also provide a suitable ground on which to prosecute Alexandra Kotey and El Shafee Elsheikh, the most high profile British subjects to have joined ISIS and two of the so called 'Beatles', whom, surprisingly, it seems our authorities do not otherwise intend to prosecute.⁷¹

Taking up arms with a group that UK forces are fighting should be a very clear instance of treason. However, the offence does not require that one's actions are directed by the hostile state or organisation or even that one is recognised by (or even known to) it. One can commit treason without any coordination with the hostile state or organisation provided one acts to aid it. Active coordination would certainly help establish that treason had been committed. One finds coordination of this kind in the 21 July 2005 bombing attack and 2006 transatlantic liquid bomb plot, both of which were directed by Al Qaeda. Slightly more distantly, the Birmingham rucksack bombing plot in 2011 was "blessed" by Al Qaeda, as the sentencing judge put it, and was carried out in order to advance the aims of Al Qaeda. These were clear instances of persons betraying the duty they owe their country by aiding attacks on it. So too were actions by members of al-Muhajiroun, including the murder of Lee Rigby in 2013 (both Michael Adebolajo and Michael Adbowale were associated with al-Muhajiroun; Adebolajo, had been recruited first by Omar Bakri Mohammed and later by Anjem Choudary), the copycat plot in 2015 to behead another soldier, and the attacks planned by the so-called "three musketeers" in 2017, who were also inspired by ISIS.

The offence we propose would be an intelligent response to the shortcomings of the UK's existing legal regime, which fail to recognise and denounce the wrong of betrayal. Reform of the law requires further specification of where this offence applies, to whom it applies, and when it applies. We turn to these supplementary questions in section X of the paper, but first consider how treason should be punished and then, in section IX, address some important objections to reforming the law of treason at all.

⁷⁰ Cf. the criminal offence in US law of providing "material support" to a terrorist organisation, where that support may consist in offering oneself as personnel: 18 U.S. Code s.2339A.

⁷¹ "UK Government does not want captured Isis 'Beatles' returned to Britain for trial, says Gavin Williamson" (*Independent*, 14 February 2015); "Javid tells US: We won't block death penalty for Isil 'Beatles'" (*Telegraph*, 22 July 2018)

VIII. How Treason Should Be Punished

The proper punishment for treason is life imprisonment. Treason has always been amongst the most serious crimes on the statute book and modern UK law punishes the most serious crimes with life imprisonment. Until 1988, the punishment was death, with section 36 of the Crime and Disorder Act 1988 substituting instead liability to imprisonment for life. In Australia, the law provides for a maximum sentence of life imprisonment for treason; Canada and New Zealand make a sentence of life imprisonment not merely available but mandatory, with Canadian law requiring in addition that a minimum non-parole period of at least twenty-five years be imposed.

We recommend that Parliament requires judges to sentence those convicted of treason to life imprisonment, subject to discretion on the part of the sentencing court not to impose such a sentence if the circumstances of the offence and the offender would make that sentence manifestly unjust. We explain this caveat below. In most cases, a sentence of life imprisonment will be entirely justified. This is the severe punishment that the act of betraying one's country warrants. The offender – the traitor – deserves to be punished in this way, just as any person who commits murder deserves life imprisonment. Punishing treason properly is important to signal clearly that our community condemns betrayal. The secondary advantages of sentencing persons convicted of treason to life imprisonment are first that it will protect the country by incapacitating a class of offenders who have chosen to aid the UK's enemies and are thus a standing risk to peace and our common defence and second that it will help deter others from betraying our country.

The choice to betray one's country warrants severe punishment. Likewise, the choice to commit murder warrants a mandatory life sentence. But we readily accept that just as not every murder is of equal culpability, so too not every betrayal is of the same gravity. Some persons who choose to aid the enemy will be relatively unsophisticated or hapless and the actions they undertake to aid the enemy will not result in the defeat of UK forces or loss of innocent life. Others will be much more sophisticated and calculating and will act in ways that put our collective defence in peril or which help our enemies kill and injure many UK soldiers or civilians. Life imprisonment is warranted in both types of case because of the wrongfulness of choosing to aid the enemy. Judges would still be able to recognise the relative gravity of various instances of treason by calibrating the minimum non-parole period or, in the most serious cases, imposing

a whole-life sentence. The risk of excessive punishment in any particular case is answered, we argue, by authorising judges not to impose a sentence of life imprisonment if the circumstances of the offence and the offender would make such a sentence manifestly unjust. This would be the case, for example, if an offender aids the enemy in ways that do not significantly advance its operations or do not badly compromise national security, and if the offender thereafter repents of his betrayal, turns himself in to the authorities, and then cooperates with them against the relevant hostile state or organisation at risk to his own life.

Some traitors will be detained on the battlefield, serving with enemy forces, while others will be surrendered to UK authorities by our allies in the field. It would be a mistake to think that such persons are entitled to be treated as enemy combatants, such that their liability to imprisonment is limited to the duration of conflict between the UK and the hostile state or organisation. The person who betrays his or her country commits a very serious crime and a sentence of life imprisonment is the proper punishment for this crime, regardless of whether, say, the Taliban are subsequently defeated or agree to peace terms. On the cessation of hostilities, one releases prisoners of war and enemy aliens who may have been detained; one does not release traitors, for they are and remain members of our political community, members who have done us wrong.

Sentencing traitors to life imprisonment would recognise the gravity of the wrong they have committed and would help protect the public. This sentencing provision may be contrasted with the new regime for sentencing terrorism offences, introduced with effect from April this year. The contrast helps make clear the difference that restoring the law of treason would make in those cases where treasonous acts may also constitute a breach of terrorism legislation.

The new Sentencing Guidelines outline a sentencing range for each of the major types of terrorism offence, distinguishing different levels of culpability and harm and devising a matrix based on the combination of the two, with each point on the matrix marking out a starting point for sentencing. The sentencing judge is to move up or down from that starting point, within the range identified, based on the presence or absence of mitigating or aggravating factors. In distinguishing different types of harm, the guidelines routinely distinguish between acts of terrorism that are (very) likely to endanger human life and acts that are likely to cause some other type of damage.

Preparation of terrorist acts

In relation to preparation of terrorist acts, the guidelines outline a very wide sentencing range that runs from 3 years' imprisonment to life imprisonment with a minimum term of 40 years.⁷² The guidelines distinguish four levels of culpability, which turn on how central the offender was to the preparations (acting alone or in a leading role, or in a significant role, or in a lesser role) and on how advanced the preparations were (complete, or, but for apprehension, very likely to be carried out, or only likely to be carried out,

72 Terrorism Offences: Definitive Guidelines, pp.5-7

or not far advanced, or very limited indeed). The guidelines also mark out three levels of harm. The most serious type involves “multiple deaths risked and very likely to be caused”; the intermediate type involves multiple deaths risked but not very likely to be caused or any death risked and very likely to be caused; the least serious type involves any death risked but not very likely to be caused or any other risk of damage.

The conjunction of the highest level of culpability (leading role, advanced preparations) with the highest level of harm (risk of multiple deaths very likely to be caused) will almost inevitably result in a sentence of life imprisonment. However, the starting point for sentencing a person who plays a less significant (non-leading) role in relation to acts that risk multiple deaths is 15 years’ imprisonment. The same is true for a person who has a leading role or who acts alone (which the guidelines assume to be more serious than acting with others) when preparations are at an early stage. Likewise, the starting point for a person who takes a leading role in preparations that are not far advanced (or a significant but not leading role in preparations that are advanced) and which risk multiple deaths or are very likely to cause a single death is 15 years’ imprisonment. A person who has taken very limited preparations, or has a lesser role in more advanced preparations, in relation to acts that risk multiple deaths or are very likely to cause a single death is likely to receive 8 years’ imprisonment. In relation to the least serious type of harm, the sentencing range is from 4-16 years’ imprisonment, depending on how advanced preparations were and how involved the offender was therein.

This scheme rightly imposes very lengthy terms of imprisonment in the most serious cases, where preparations for mass murder (which is what “multiple deaths risked” means) are well advanced. However, it fails to punish adequately what may otherwise seem to be less serious cases to the extent that those cases involve an intention to aid the UK’s enemies. If one prepares to carry out operations to kill, injure or destroy with the intention of aiding a hostile state or organisation then one should be sentenced to life imprisonment regardless of one’s relative seniority in the organisation or one’s operational freedom or how far preparations have advanced or the likelihood one’s efforts will in fact kill many persons (or only one person) or will succeed in destroying property, which would include military equipment or other defence infrastructure. Sentences of between 4 and 16 years’ imprisonment are not sufficient to punish the wrong of aiding the UK’s enemies by planning to carry out attacks on UK civilians or soldiers or to impede the operations of UK forces in order to help our enemies obtain victory. It is true that the guidelines note that preparing to fight UK forces is an aggravating factor.⁷³ Welcome as this recognition is, the significance of intending to fight UK forces is that it is a betrayal of our country. One betrays our country just as much by aiding the enemy whom UK forces are fighting as one does by intending oneself to fight those forces; also, intending to attack the UK by way of its civilian population is just as much a betrayal as is fighting UK forces. Preparing for terrorist acts in order to aid a hostile state or organisation warrants life imprisonment.

73 Terrorism Offences: Definitive Guidelines, p.8

Encouragement of terrorism

In relation to the offences of encouraging terrorism and disseminating terrorist publications, the guidelines outline a sentencing range that runs from high level community order to 6 years' imprisonment.⁷⁴ The guidelines distinguish three levels of culpability, the most serious of which is intending to encourage others, or intending to provide assistance to others, to commit terrorist acts. Less culpable are cases where the offender is reckless about whether material he or she publishes will encourage others. The level of harm turns on whether others have in fact been encouraged to carry out activities that endanger life or on whether materials that one distributes provide specific instructions concerning how to carry out terrorist acts. Where one has the highest level of culpability, the starting points for sentencing range between 3 and 5 years' imprisonment; for less serious cases, they run from 1-4 years. Many acts of encouragement will be intended to aid the UK's enemies by spurring others, including often those who also owe a duty of allegiance, to serve in the forces of the UK's enemies or to attack UK forces or civilians. Recruiting officers or propagandists for ISIS, or the Taliban, should be punished much more severely than the existing regime permits.

Membership or support

In relation to the offence of being a member of a Proscribed Terrorist Organisation (PTO), the guidelines distinguish three levels of culpability – a prominent member, an active but not prominent member, and any other member.⁷⁵ Unusually, the guidelines do not distinguish different degrees of harm, because “[m]embership of any organisation which is concerned in terrorism either through the commission, participation, preparation, promotion or encouragement of terrorism is inherently harmful.” The starting point for sentencing a prominent member is 7 years' imprisonment, for an active member 5 years and for any other member it is 2 years. Again, this offence fails entirely to recognise the difference in kind that is membership of an organisation like ISIS or the Taliban or Al Qaeda that intends to attack the UK or against whom UK forces are engaged. In all but the most exceptional cases, membership of those groups should be punished by life imprisonment.

In relation to the offence of inviting support for a PTO (including by arranging or addressing a meeting to support a PTO or otherwise advance its activities), the guidelines distinguish three levels of culpability.⁷⁶ The most culpable are those who abuse a position of trust, authority or influence, who make persistent efforts to encourage widespread support for the PTO, and who encourage activities intended to endanger life. Less culpable are those who arrange a meeting, whose efforts to encourage widespread support are less persistent, or who encourage terrorist activities that do not endanger life. The most harmful instances are those where the offender's actions are likely to have secured significant support for the PTO or to have encouraged others to commit terrorist acts endangering life; less harmful instances are those that encourage others to commit acts

⁷⁴ Terrorism Offences: Definitive Guidelines, pp.17-19

⁷⁵ Terrorism Offences: Definitive Guidelines, pp.23-24

⁷⁶ Terrorism Offences: Definitive Guidelines, pp.27-29

that do not endanger life. The starting points for sentencing range from 1-7 years' imprisonment and for the most culpable offenders from 5-7 years. Again, this is plainly inadequate when the PTO is a group like ISIS, which intends to attack the UK, and where the offender serves in effect as a recruiting officer for that group (whether the offender is or is not a member of ISIS), encouraging others to attack the UK or to travel abroad to serve in its armed forces, against whom UK forces are engaged. Any person who invites support for a hostile organisation – who encourages others to take up arms in its service – betrays his or her country and should be sentenced to life imprisonment.

Funding

In relation to the cluster of offences concerning funding terrorism, the guidelines outline a sentencing range that runs from high level community orders to 13 years' imprisonment.⁷⁷ The difference in culpability turns on the extent to which the offender has a significant role in the offending (or coerces or co-opts others in the offending), or abuses a position of trust or influence, or carries out offending over a long period of time with much sophistication and planning. The difference in harm turns on whether the funding made a significant, or only minor, contribution to terrorism, and in particular whether the funds were used to enable activities endangering life or only other forms of damage. The starting point for sentencing the most culpable offenders, whose work contributes to funding of the most serious terrorist attacks, is 12 years' imprisonment. The starting point for the least culpable offenders, who have limited involvement in an operation directed by another, where the offending only makes a minor contribution to terrorist activities, is 2 years' imprisonment. Again, these sentences may be fitting where the activities one funds are not related to the UK or where one's involvement in the funding operation does not involve an intention to aid a hostile organisation. But when one acts intending to advance the activities of, say ISIS or the Taliban, by raising funds to support their operations, one betrays one's country and should be sentenced to life imprisonment.

Possession for terrorist purposes

In relation to the offence of possessing an article for terrorist purposes, the guidelines outline a sentencing range that runs from one year to 14 years' imprisonment.⁷⁸ Culpability turns on whether possession indicates that preparations for terrorist activity are complete or almost complete or that the offender is a significant participant in commissioning, preparing or instigating an act of terrorism. The least culpable cases are those where possession indicates the offender has engaged only in limited preparation or has only provided limited assistance or encouragement to others. The harmfulness of the offending turns on its potential to facilitate an offence endangering life and the likelihood that loss of life, or other types of harm, will in fact be caused. The starting point for the most serious type of the offence is 12 years' imprisonment; for the least serious, it is 2 years. Where the substance of the offending is assisting or encouraging others to

⁷⁷ *Terrorism Offences: Definitive Guidelines*, pp.33-35

⁷⁸ *Terrorism Offences: Definitive Guidelines*, pp.45-47

carry out attacks on the UK, or where the terrorist activity for which one prepares is itself an attack on the UK (whether intended to kill people or to damage defence infrastructure or otherwise impede military operations), these sentences are inadequate. Insofar as possession of articles for terrorist purposes manifests an intention to aid a hostile state or organisation by helping plan or prepare for an attack on the UK or by helping prejudice the security and defence of the UK or the operations of UK forces, the offender should be convicted of treason and sentenced to life imprisonment.

Collection of terrorist information

In relation to the offence of possessing an article for terrorist purposes, the guidelines outline a sentencing range that runs from high level community order to 9 years' imprisonment.⁷⁹ The most culpable offenders are those who collect, make a record of, or are in possession of information for use in a specific terrorist act. Less culpable are those who either (a) repeatedly access extremist information or (b) who have terrorist connections or motivations and who collect, record or possess information likely to be useful to a person committing or preparing an act of terrorism. The least culpable are those who collect, record or possess information likely to be useful but who do not have terrorist connections or motivations (one might reasonably ask whether this last class of persons ought to be convicted of terrorism offences at all). The variation in terms of harm turns on whether the material in question provides instruction for specific terrorist acts that endanger life where the harm is very likely to be caused. Material that provides specific instruction but where harm is not likely to be caused is taken to be less harmful, as is material that only risks serious property damage. The starting point for the most culpable offenders is 5-7 years' imprisonment. However, the guidelines clearly entail that the starting point for an offender with terrorist motivations and connections who collects material likely to be useful in planning attacks on the UK, including disabling critical defence infrastructure or military equipment, is as little as 18 months' imprisonment. If the offender's motivations and connections extend to an intention to aid a hostile state or organisation, such as ISIS, then gathering information which might be useful to ISIS in attacking the UK ought to be punished much more severely. The person who chooses to aid the UK's enemies by gathering information that will aid our enemies – state or non-state – should be sentenced to life imprisonment.

Risks and future developments

This sentencing regime will change if the Counter-Terrorism and Border Security Bill is enacted, for it will raise the maximum sentences for the offences of: collection of information useful to a terrorist, encouragement of terrorism, and dissemination of terrorist publications. The pressure to raise maximum sentences may follow from the status quo's failure to deal adequately with the risks posed by those who aid hostile organisations. The relatively short sentences of imprisonment imposed on members of ISIS – on its propagandists, recruiters and some of its fighters – exposes the UK to

⁷⁹ *Terrorism Offences: Definitive Guidelines*, pp.51-53

the risk of further attacks. Between 2006 and 2017, some 193 persons were sentenced to imprisonment for terrorism offences, 80 of whose sentences are due to expire by the end of this year.⁸⁰ This understates the number of convicted terrorists due to be released in the near future, for prisoners are eligible for release once they have served half their sentence (the 2018 Bill proposes to change this default). Not all of these offenders will have betrayed their country by aiding a hostile organisation such as Al Qaeda, the Taliban or ISIS – but many will have. Had that subset of offenders been convicted for treason and imprisoned for life, the UK would be considerably safer. Restoring treason would reduce the pressure to increase all terrorism sentences in order to target that subset of persons who are working with hostile organisations to attack the UK or to fight UK forces.

The proper punishment for treason is life imprisonment. The focus of this paper is on the legal framework for conviction and sentence for treason rather than on the further question of how and where traitors ought to be imprisoned by Her Majesty's Prison Service. Still, we note that Government policy is to imprison prisoners who are involved in planning terrorism or are otherwise considered to pose a risk to national security in separate units within particular prisons when this is judged necessary to minimise the risk of other prisoners being radicalised.⁸¹ To date, very few convicted terrorists have been separated in this way (Anjem Choudary is one of only seven), reportedly because of the Prison Service's apprehension about human rights litigation.⁸² There would be a strong case for any person convicted of treason to be separated from other prisoners insofar as in most cases the traitor is likely to pose a serious risk of subverting other prisoners, encouraging them to go on to commit the serious crime of betraying their country.

⁸⁰ "Police facing surge in extremists released from jail, analysis finds" (*The Guardian*, 3 June 2018)

⁸¹ Ministry of Justice, "Dangerous extremists to be separated from mainstream prison population" (Press Release, 21 April 2017)

⁸² Richard Kerbaj, "Jihadists' separation jail cells left empty for fear of lawsuits" (*Sunday Times*, June 3 2018)

IX. Answering Objections to Reform of the Law of Treason

The present law of treason is unworkable and other types of offence do not compensate adequately for its effective demise. However, proposals to make the law of treason workable, of the kind outlined in this paper, are likely to encounter fierce criticism, as can be seen from the response to suggestions that greater use should be made of the existing (ancient) law of treason.

In 2005, shortly after the July 7 bombings, the Attorney-General (Lord Goldsmith) and the Director of Public Prosecutions (Ken Macdonald) met to discuss the possibility of bringing treason charges against supporters of attacks on the UK, especially Omar Bakri Mohammed, Abu Izzadeen and Abu Uzair. Bakri had praised the suicide bombers, as well as saying publicly that he would not tell police if he knew that Muslims were planning a bomb attack on a train in Britain and saying also that he supported Muslims who attacked British troops in Afghanistan and Iraq. Abu Izzadeen said in an interview that the July 7 bombers were pursuing “mujahideen activity” which would make people “wake up and smell the coffee”. Abu Uzair said that after the July 7 attacks “the banner has been raised for jihad inside the UK”. He said that Muslims had abandoned a “covenant of security”, which had held they should not resort to violence in Britain because they were not under threat. Others were said to have been attempting to persuade British Muslims that it was their duty to be terrorists and that the July 7 victims were not innocent because they did not follow Islamic law.

Treason charges were never brought, perhaps for reasons advanced by Lord Carlile, then the Independent Reviewer of Anti-Terror Legislation, who said that the proposal to invoke the ancient law of treason was not “very practical or sensible”. Lord Carlile said that he would be “very surprised if treason was used. It is remotely possible but treason law is very specific. I suspect that there are far more appropriate crimes already on the statute book.” He rightly noted that “It is very important in a criminal prosecution to place before the jury the acts which have been committed in a context that refers to them in the form of a charge. I doubt if treason is the appropriate charge”. He continued “I don’t think there is a lawyer still alive and working who has ever appeared in any part of a treason case and I think we should tread in that historic territory very carefully. Treason tends to apply to war between nations.” These cautionary notes were well made: as noted above, we agree that the historic law of treason is not a secure basis on which to bring prosecutions.

In an editorial decrying the Government’s consideration of charges of

treason,⁸³ the *Guardian* quoted Lord Carlie's sensible cautionary remarks but then went on to say:

"Indeed, at a time when ministers insist they are intent on reassuring apprehensive Muslim communities, they could not have selected a more emotive law. It would also be counterproductive, given that the most famous offenders under the 18th-century treason laws are current-day heroes: the American revolutionaries who drew up the declaration of independence. The use of such laws now should be squashed as promptly as possible."

This is an interesting analysis. The worry about how the public, especially British Muslims, would receive treason prosecutions is important. It would be counter-productive to bring charges if it drove people into the arms of terrorist recruiters. But why think that is likely? Better to reason that prosecuting those who aid attacks on our country is an important way to affirm the bonds of citizenship, to which the overwhelming majority of British Muslims are committed.⁸⁴ The reference to history's verdict on the American revolutionaries is perverse: is the suggestion really that one cannot denounce the betrayal of those who conspire with Al Qaeda or ISIS because in several centuries their cause may have triumphed and our successors may hail them as heroes? The UK should have the confidence to recognise and denounce betrayal of our country by aiding its enemies.

It would be foolish for the UK, or any other state, to refrain from punishing treason due to a crisis of confidence in its right to be free from armed attack. Whether any of the three "hate preachers" noted above would in fact have been liable under our proposed new offence turns on whether he acted intending to aid organisations that had attacked or were in the process of planning attacks on the UK, or organisations that UK forces were fighting abroad. If he had this intention, which is at least plausible, then his acts would be treasonous if designed to help the operations of the enemy, including by recruiting others to its cause or to prompt further attacks on the UK.

In 2014, the Foreign Secretary speculated publicly, including in answer to questions in the House of Commons, about the prospect of treason prosecutions for some of the British citizens fighting in Syria. The spur for this idea was the emergence of videos of the men in question swearing allegiance to ISIS.⁸⁵ The proposal was never taken further but did generate some brief discussion in the public arena, including criticism from Lord Macdonald, former Director of Public Prosecutions, and others. And the idea has resurfaced after other terrorist atrocities, including the murder of Lee Rigby in 2013 and the attacks in Manchester and London in 2017.

Lord MacDonald's objection was that prosecution for treason would glorify terrorism, encouraging further "martyrs" and would thus be unwise. The *Guardian* adopted Lord MacDonald's critique and asserted further that prosecution for treason would be "reactionary".⁸⁶ This latter charge is unwarranted. It is wrong to betray one's country and to give aid to its enemies, especially by literally serving in the combat forces which

⁸³ An editorial entitled "Use existing laws" (*The Guardian*, 9 August 2015); that the proposal was precisely to employ the existing, ancient law of treason seemed to have escaped the editors.

⁸⁴ Martyn Frampton, David Goodhart and Khalid Mahmood MP, *Unsettled Belonging: A survey of Britain's Muslim communities* (Policy Exchange, 2016)

⁸⁵ The law should take swearing allegiance to a hostile organisation to be treason: see n69 above.

⁸⁶ Editorial "The *Guardian* view on fighting Isis: medieval treason laws are the wrong weapon" (*The Guardian*, 19 October 2014)

UK forces are seeking to defeat on the battlefield. One might assert that there is a difference in kind between international armed conflict and non-international armed conflict, or with other conflicts falling short of a non-international armed conflict, but this is an unpersuasive analysis. The difference is at most one of degree and in all cases citizens should refrain from aiding attacks on their country or its armed forces. This point is recognised by the law of Australia and New Zealand, as noted earlier in this paper. Likewise, our law should make clear that the wrong of treason is not limited to international armed conflict.

The *Guardian*'s jibe is more instinctive recoil rather than reasoned critique. It is true that the history of high treason features many abuses and injustices and it is right to think carefully about how any new law might be used. However, it does not follow that loyalty and betrayal are suspect categories. Rather, the UK has a long and chequered political history and it is vital that any change in the law is carefully made. It is for this reason that we stress the narrowness of the duty not to betray one's country by aiding its enemies in their attacks – rather than any broad duty to love one's country – and stress also the importance of intentional treasonous action. The new offence we propose is not an instrument to enforce ideological conformity or to coerce dissent; rather it addresses the specific, limited wrong of aiding our enemies in their attacks on our country. Parliament could clarify that nothing in the Act is intended to limit free speech, lawful assembly, or provision of humanitarian relief, although in our view there is sufficient protection in the specification of the types of forbidden action and the requirement that offenders intend to aid a hostile state or organisation.

The reform of the law of treason is not reactionary but perhaps its use would be counter-productive. Lord MacDonald's claim about "glorification" is an objection to the prudence of treason prosecutions rather than to their justice. This is a serious point and one should ask whether "treason" might be a badge that some citizens might embrace, such that other criminal offences, including terrorism offences, might be a more effective deterrent, making provision for punishment and incapacitation without risk of perversely incentivising others to commit the crime. However, one should also be careful not to abandon the truth that betrayal is a grave wrong simply because some offenders are willing to defy or abandon their duty of allegiance. Also, it is scarcely clear that all or even most offenders will eagerly embrace liability for the serious crime of treason. Many charged with terrorism offences, especially in relation to support for PTOs, have taken considerable care to avoid the risk of charges, and their defence is often that their statements are private opinion rather than public support. The point is that at least some would-be offenders, and maybe most, may be anxious not to be convicted and will view treason charges not as an occasion for glory but as a risk to avoid.

More important still is the way in which the new offence, and prosecution for its breach, would be received by the wider public. Would prosecution reinforce or erode the bonds of citizenship? Would it tend to encourage other members of the community to refrain from aiding

hostile states or organisations or would it drive some who are wavering into their arms? Perhaps if prosecution were perceived to be persecution, to be an unjust indictment of innocent actions, of lawful dissent from majority opinion, then this reaction would be likely. This point is answered by stressing the proposed offence's limitation to cases of aiding the enemy and the difference between such cases and lawful dissent. If decisions to prosecute are responsibly made and focus on cases in which British subjects are reasonably suspected of having aided states and organisations that plan to attack the UK or against whom UK forces are engaged then the public is likely to think – rightly – that the law is just, whether or not any particular prosecution results in conviction. Enacting a new, workable law of treason, and standing ready to prosecute its breach, would help to highlight, and over time to reinforce, the duty each of us has to refrain from betraying our country. It would signal that our political community takes seriously the obligations that we owe each other.

X. Supplementary Questions and Consequential Amendments

Reforming the law of treason requires not only recasting the core of the offence, so as to specify the wrong in question and to mark out what is not to be done, but also answering a series of supplementary questions about where, to whom and when the offence applies, as well as how it intersects with existing legal powers to strip citizenship from some British citizens. This section outlines these questions and proposes answers to each of them.

The territorial reach of the offence is important. The ancient law of treason was ambiguous on this point. British subjects ought not to betray their country by aiding its enemies and there is no morally relevant distinction whether aid is provided within the realm or outside it. Thus, whether one is helping a hostile state or organisation in attacking the UK or serving (with) it abroad should be irrelevant, provided one is acting with the proscribed intent. The reformed law should be extra-territorial in application, such that any forbidden act of assistance anywhere is treason.

The position is not so simple in relation to non-citizens, which raises again the question of to whom the offence ought to apply in the first place. The ancient law, like its modern equivalents elsewhere in the common law world, applies to anyone who owes a duty of allegiance to the Sovereign. This of course applies to all subjects (citizens), whether they live in the UK or elsewhere and regardless of whether they are also citizens of some other state. However, under the doctrine of local allegiance,⁸⁷ it also applies to aliens (non-citizens) who enjoy the protection of the Sovereign by living in the UK. For so long as aliens are in the UK they are conditional subjects and have a duty of non-betrayal. Subject to one proviso, the law as it stands is that the alien's duty not to aid the Sovereign's enemies applies only within the realm and does not extend extra-territorially. The alien may leave the UK and give aid to the UK's enemies abroad without committing treason. The proviso is that an alien who leaves his "family and effects" under the Crown's protection continues to owe allegiance when he goes abroad. The scope of this rule is uncertain,⁸⁸ and we propose that it should not be continued.

The distinction between subject and alien is an important one, but finer distinctions are possible, including between permanent resident, temporary visa-holder, refugee, or asylum-seeker, and including persons with no lawful right to remain who may be liable to deportation. The scope of the duty of temporary allegiance may thus be uncertain. British subjects clearly have a far-reaching, fundamental duty not to betray our

⁸⁷ "Constitutional Law and Human Rights" *Halsbury's Laws of England* Vol. 8(2) (4th edition, London, Lexis Nexis, 2011), para 31

⁸⁸ *Joyce v DPP* [1946] A.C. 347 at 368

country by aiding the UK's enemies. The duty of non-citizens may be less deep but insofar as they enjoy the UK's protection they should not aid attacks on it. The law should distinguish between non-citizens who are settled in the UK and other non-citizens who are voluntarily in the UK but are not settled. Settlement is a term of art in our immigration law and the criminal law makes settlement a ground on which to determine the extra-territorial application of certain sexual offences.⁸⁹ There is good reason to require non-citizens settled in the UK to honour the same duty of allegiance that governs citizens, such that the offence of treason applies to their actions anywhere. This duty and this liability reflect the social reality of their membership of the community and of the obligations that come with an enduring connection to the UK. Of course, the non-citizen may cease to be settled if he permanently leaves the UK, and when or if his immigration status were to change and he was no longer resident in the UK, the duty of allegiance would fall away. For non-citizens who are not settled in the UK, who may be temporary visa-holders, refugees or asylum-seekers, or unlawful over-stayers, the duty of allegiance would remain local, which would mean the offence of treason would apply only in relation to actions undertaken within the UK. Thus, the law of treason should apply to the actions of subjects (citizens) and settled non-citizens anywhere in the world and to actions of non-citizens who are voluntarily in the UK, including enemy aliens but excluding foreign diplomats or members of an invading and occupying force, only within the UK itself.

In April this year, Rabar Mala, an Iraqi national who had remained in the UK unlawfully after his visa expired in 2008, became the first person to be convicted for possession of property for the purposes of terrorism. Mala activated some 360 sim cards for fighters in Iraq and Syria and coordinated ISIS communications. He was also planning possible attacks in the UK, inviting funds and personnel to be sent to enable an attack on a major civilian target. Being neither British nor a settled non-citizen, had Mala served ISIS outside the UK he would not have breached the offence we propose. However, while voluntarily living amongst us, he owed a duty of allegiance to the UK, which he betrayed by serving ISIS, aiding its military and intelligence operations in Iraq and Syria and planning attacks on the UK. The offence of which he was convicted and the sentence of 8 years' imprisonment he received fails manifestly to recognise the true nature of his wrongdoing or to punish it properly.

There is a strong case for a revised law of treason to apply to acts whenever committed. There are very good reasons in general to avoid retrospective application of the law, but in this case the problem we confront is that the ancient law of treason has for some time been unworkable. Thus, while the law has formally put subjects on notice that they ought not to levy war on the Sovereign or adhere to the Sovereign's enemies, this law has been uncertain in important respects and has not been relied upon to sanction those who betray the UK in these ways. The revised offence we propose is continuous with the ancient law insofar as it clarifies who the Sovereign's enemies are and what constitutes adhering to the enemy. It breaks new

89 Sexual Offences Act 2003; Female Genital Mutilation Act 2003

ground by making clear that treason is not limited to international armed conflict and by specifying (clarifying) that aiding hostile organisations as well as states is forbidden. However, both changes reflect the obvious social, political and moral reality that some organisations have intended to attack the UK and have been engaged with UK forces in armed conflict, and that it has always been wrong for British subjects to act intending to aid these organisations or to assist states in attacking the UK or its forces.

The risk that aiding the enemy would give rise to prosecution has clearly always been present, as the public discussions in 2005 and 2014 confirm. There would be no unfairness in judging now, or after any new law is enacted, that the actions of some British subjects in recent years have amounted to treason.⁹⁰ This would not be a retrospective change in the law in the sense where a truly new law is applied to old cases. Here, the new law restates the essence of the old law in improved form, putting it on more stable ground and imposing criminal sanction on actions that have always been wrongful. Retrospective application of this kind should be held to be consistent with the European Convention on Human Rights, which in Article 7(1) rightly proscribes retrospective criminal punishment but, in Article 7(2), makes an exception for trial and prosecution of acts that at the time they were committed were criminal according to the general principles of law recognised by civilized nations. The treasonous acts which our proposed offence proscribes meet this test.

Interestingly, in 2005 Anjem Choudary objected to the Government's consideration of treason charges thus: "On the one hand the government says you have freedom of expression, but on the other it wants to backdate things that people have said so they could face criminal charges, which is a betrayal in itself".⁹¹ The point is a serious one, notwithstanding that it was literally the excuse of a traitor. The answer is that if the person speaking intended to aid a state or organisation attacking the UK by enjoining others to fight the UK then their speech has always been wrongful, has at best been of doubtful legality, and is not protected by any sound principle of free speech.

Like any other offence, one should be liable for aiding and abetting treason, before or after the fact, and for conspiracies and attempts to commit treason, which includes action in preparation for its commission. There is good reason to punish these ancillary acts less severely than the principal offence, as equivalent New Zealand law provides.⁹² The common law makes misprision of treason an offence, which means that one commits an offence – less serious than treason itself – by failing to inform the authorities that another intends or is likely to commit the offence. This common law offence should be put on a statutory footing. To be clear, failing to inform the authorities of a likely attack on the UK would not itself be treason, for the citizen has not acted to help carry out an attack with the intention of aiding a hostile state or organisation. Treason is of course a very serious charge and, as with other offences against the state, no prosecution should be possible without the consent of the Attorney-General, which would effectively and rightly rule out private prosecutions.

Citizens may escape their duty of allegiance only by ceasing to be

⁹⁰ It might be prudent to adopt a limitation period, say 20yrs, to avoid risks of evidence going stale.

⁹¹ "Terror treason charge considered", 8 August 2005 http://news.bbc.co.uk/1/hi/uk_politics/4130454.stm

⁹² Crimes Act 1961 (NZ), s.76 'Punishment for being party to treason'

citizens. Section 12 of the British Nationality Act 1981 requires the Government to register declarations of renunciation of British citizenship. Registration brings citizenship to an end, which brings the duty of allegiance to an end (if the person lives outside the UK) and thus changes the former citizen's liability to the law of treason. The Secretary of State is not free to register declarations unless satisfied that the citizen will not thereby become stateless and if the citizen does not take up some other citizenship or nationality within six months from the declaration he or she is deemed to have remained a citizen. This may be an unsatisfactory provision in view of its connection to liability for treason and it may be that the Government ought to put citizens on notice that in some cases a declaration of renunciation of citizenship may be ineffective. The Secretary of State has discretion to withhold registration of a declaration if it is made during wartime. Parliament should extend this discretion in order to permit registration to be withheld if there is reason to think the citizen intends to aid the enemy.

The Government also has power to strip suspected terrorists of their British citizenship,⁹³ if this would not leave them stateless, which in practice means the power may be exercised only in relation to those who have dual nationality. If one is stripped of British citizenship then this will bear on one's liability for treason. It may mean that at the time one acts (outside the UK) one has no duty of allegiance to the Crown and actions that would otherwise have been treasonous for a citizen are no longer a breach of our criminal law. However, if the person in question was a citizen at the time of the relevant actions, then stripping his citizenship after he acted would not remove his liability to prosecution for treason, for the offence would have been committed at the time he acted. Still, at a minimum the revival of a workable law of treason warrants caution in the use of citizen-stripping powers insofar as it may frustrate later treason charges. It may be better to convict and punish a traitor than to expel him or her, just as it would certainly be better to charge him or her with treason than to incapacitate him or her by way of lethal force or to yield jurisdiction to an international tribunal. It would be open to the Government to strip a person accused of treason of his or her citizenship, subject to the procedures of the relevant legislation (including that the person not be rendered stateless), and this might be a prudent measure to protect the public. However, there is at least an apparent discordance between the two legal measures, and the use of a reformed law of treason for which this paper argues militates against wider use of citizen-stripping powers.

⁹³ British Nationality Act 1981, section 40

XI. Conclusions

The foundation of democratic government and decent social life is the trust that citizens, and non-citizens who live amongst us, have in one another, trust that is put in peril by betrayal. Aiding the enemy is a grave moral wrong, as our law has long recognised. The law of treason should affirm and make salient to all members of the community the continuing importance of the duty of non-betrayal. The UK's ancient law is unworkable and needs to be restored. Other common law jurisdictions are better situated, with Australian and New Zealand law in particular better recognising the realities of modern warfare. Recent changes to Australian law are noteworthy, not because the UK should necessarily adopt them, but because they confirm the importance of revising the law to ensure it states clearly the duties we all have not to aid our country's enemies.

The offence that this paper recommends Parliament enact would restore the law of treason, recognising the distinctive wrong of choosing to betray our country by aiding states or organisations that attack or intend to attack the UK or against which UK forces are engaged. The offence would mark out treasonous acts and make provision for their justifiably severe punishment, thus helping maintain trust, deter other offenders, and incapacitate those who threaten our country. In an age of rising great power competition, in which states like Russia are ever more likely to attack the UK in ways falling short of outright armed conflict, it is vital that our law prevents citizens from assisting hostile states in their (preparations for) attacks. This is necessary for the defence of the realm. Likewise, many British citizens continue to aid groups like ISIS, groups that intend to carry out attacks on the UK or against which UK forces are deployed abroad. The choice to betray our country in this way should be condemned and those who make it should be incapacitated.

It would be wrong to say that our law fails to take terrorism seriously. Judges rightly hand down severe sentences on some convicted terrorists, including many whose actions are treasonous. We note the sentence of life imprisonment, with a minimum term of 25 years, imposed on 13 July on Husnain Rashid, an ISIS supporter, for multiple terrorism convictions, including encouraging others to murder Prince George. However, the UK's law largely fails to recognise the wrong of betrayal or to perceive the particular risks posed by those who choose to aid our enemies. This means that our law does not adequately punish many treasonous acts, especially acts that seem less serious when one ignores the element of betrayal and complicity with hostile organisations, as the relatively short sentences imposed on Anjem Choudary, the Luton gang, and Rabar Mala confirm.

Overlooking the wrong of betrayal disposes authorities not to take measures that otherwise should be taken. Every British citizen who returns from abroad and who may have served with ISIS should be investigated with a view to prosecution for treason and, on conviction, should be imprisoned for life. Likewise, British citizens who have served with ISIS and are now detained by allied forces in Iraq and Syria ought to be repatriated and prosecuted for treason. The authorities ought not to have to wait for a returning traitor to commit a more serious offence, as they seem to have done with Khalid Ali, a British citizen who spent five years serving with the Taliban in Afghanistan before returning to the UK in late 2016. Apprehended in Whitehall with knives in his possession, he was sentenced, on 20 July, to life imprisonment, for preparing acts of terrorism. But he ought to have been prosecuted for treason as soon as his activities in Afghanistan came to light.

The atrophy of the law of treason has long been a matter of indifference to many in our public life. This is not the approach taken in Australia; it ought not to be the approach in the UK. The absence of a workable law of treason has distorted the way in which our law has dealt with British citizens (and relevant non-citizens) who have aided terrorist groups in attacking the UK, exposing the UK to unnecessary risks. In the face of continuing threats from such groups, as well as the prospect of attacks from hostile states, it is past time for Parliament to restore the law of treason.

“I strongly welcome this impressive and timely Policy Exchange study – it represents an important contribution to the debate about how we keep our country safe. As a former Home Secretary, I appreciate the threats we face as a nation – the time has come for us to consider additional measures, such as those set out in this report, that we need to deal with those who betray this country.”

Rt Hon Amber Rudd MP, former Home Secretary

“There is nothing anachronistic about the idea of ‘allegiance’. As these authors show, it is a fundamental condition of life in any properly functioning state. And yet, in a vitally important area of our legal system, this concept has somehow been allowed to wither away; as a result, we are ill-equipped to deal with some of the most serious threats to our society. The change in our laws for which this study argues so compellingly will be beneficial to all of us, and is long overdue.”

Sir Noel Malcolm FRSL FBA, Senior Research Fellow, All Soul’s College, Oxford

“The fabric of our parliamentary democracy is under threat in a way not seen since the Second World War, with British nationals targeting and attacking our royal family, our armed forces, MPs and ordinary civilians. Existing terrorism legislation is adequate for most crimes, but, as this excellent paper makes clear, the law should be changed to allow for a charge of treason in cases like that of Anjem Choudary, and terrorist foreign fighters such as Imran Khawaja, and the “Beatles” who have fought for ISIS. As the officer overseeing the investigation into the killing of Drummer Lee Rigby, I thought at the time that a charge of murder was not adequate for the crime; a charge of treason would have been more appropriate in my view.”

Richard Walton, former Commander at New Scotland Yard and Head of the Counter Terrorism Command (SO15) between 2011 and 2016

“A timely and balanced report that draws attention to the need to update an ancient crime that has a modern resonance.”

Lord Evans of Weardale, former Director General of the Security Service

“This paper is a timely and well-argued discussion of whether and how the law of the United Kingdom should recognise and define the fundamental loyalty owed by the individual to the State. The United Kingdom’s definition of ‘treason’ still relies on a 14th century statute originally penned in Norman French. The authors have made an excellent, careful, and detailed case for replacing that historical curiosity with a more modern formulation.”

Sir Stephen Laws KCB QC, former First Parliamentary Counsel

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