



# Hearts and Minds

## Putting Human Rights at the Center of United Kingdom Counterterrorism Policy

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## **Executive Summary**

The coming into office of Gordon Brown as Prime Minister is a natural moment to assess Britain's approach to counterterrorism. From 2001, the United Kingdom (UK) government pursued a series of counterterrorism policies that violated human rights. Whatever their short-term security benefits might be, these policies have come at a very high price. In addition to their harmful impact on human rights, they have undermined the rule of law, damaged community relations and trust among British Muslims, and squandered the UK's international reputation as a champion of human rights. It is time for a new approach.

Following the September 2001 attacks in the United States, the UK government introduced a series of counterterrorism measures that flout international human rights norms. The indefinite detention without charge of foreign nationals suspected of involvement in terrorism, the reliance on control orders in lieu of pursuing prosecution, and efforts to weaken the global ban on torture and cruel, inhuman or degrading treatment or punishment, are concrete illustrations of the government's willingness to abandon well-established principles in UK and international law in the name of the fight against terrorism.

Human Rights Watch believes that such an approach is deeply misguided. Counterterrorism measures that violate human rights are not only illegal under international law but are also counterproductive. They run counter to the government's efforts to prevent radicalization and recruitment, a central strand of the government's counterterrorism strategy since the July 2005 attacks in London.

Counterterrorism measures that violate human rights undermine the UK's moral legitimacy at home and abroad, damaging its ability to win the battle of ideas that is central to long-term success in countering terrorism. They erode public trust in law enforcement and security services, and alienate communities whose cooperation is critical in the fight against terrorism.

The UK government has a duty to protect the population against terrorist attacks, and an obligation to respect human rights. In recent years, British officials have argued that human rights are an impediment to national security. In fact, upholding human rights and the rule of law is essential if the terrorism is to be effectively addressed in the long-term. The success of the government's "prevent" agenda in particular depends on an approach to counterterrorism that upholds rather than undermines core human rights standards.

Prime Minister Brown should set the UK on a new course. New terrorism legislation is expected later in 2007. Bringing the nation's counterterrorism law and policy back into line with European and international standards and long-standing British values will help ensure that its approach supports rather than undermines its efforts to prevent radicalization and recruitment. It will bring the UK back towards the path of providing leadership on human rights.

## **Recommendations**

### *Uphold the absolute prohibition on torture and prohibited ill-treatment*

- Cease using "diplomatic assurances" from countries with established records of torture and ill-treatment as means of removing foreign terrorism suspects at risk of such treatment on return, regardless of whether or not these unenforceable pledges are formalized in Memorandums of Understanding.
- Discontinue the UK's intervention in the *Ramzy v. The Netherlands* case before the European Court of Human Rights which is aimed at reversing past precedent and permitting courts to weigh national security against the risk an individual will be ill-treated upon return.
- Protect the rights of individuals who may be at risk of being transferred to countries that torture by enacting legislation that creates a permission system for "rendition" flights carrying terrorism suspects through UK territory or airspace.
- Sign and ratify the International Convention for the Protection of All Persons from Enforced Disappearances.

- Multiply efforts to increase ratification and improve implementation of international instruments against torture, including the Optional Protocol to the Convention against Torture.

*Demonstrate commitment to prosecution as a means of countering terrorism*

- Relax the ban on using intercept (phone tap) evidence in criminal trials.
- Provide for automatic and periodic Crown Prosecution Service (CPS) review of cases where control orders have been imposed on persons suspected of terrorist activity.

*Ensure procedural safeguards for restrictions on liberty*

- Do not extend pre-charge detention beyond the current 28 day maximum;
- Improve safeguards for the imposition of control orders.
- Do not derogate from the right to liberty contained in article 5 of the European Convention on Human Rights in order to institute “house arrest” control orders or otherwise to circumvent reasonable legal limits on the state’s power to detain individuals in a democratic society.

*Protect freedom of expression*

- Repeal the offense of “encouragement of terrorism.”

## **Introduction**

We cannot win this militarily or by policing or intelligence alone. We will need to engage people so that we can win the battle of hearts and minds.

—Gordon Brown, speaking at a Labour Party meeting on June 3, 2007<sup>1</sup>

The United Kingdom has long been a champion of human rights around the world. It played a leading role in the development of international human rights law,

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<sup>1</sup> Tania Branigan, “Brown sets out tougher plans in anti-terror battle,” *The Guardian*, June 4, 2007, <http://www.guardian.co.uk/frontpage/story/0,,2094823,00.html> (accessed June 8, 2007).

including the Universal Declaration of Human Rights and the European Convention on Human Rights (ECHR). Britain actively supported the adoption of the 1984 Convention against Torture and was one of the first countries to ratify that convention's Optional Protocol, adopted in 2003. It has since actively lobbied other governments to do the same.

Since the September 11, 2001, attacks, however, the UK has introduced a series of counterterrorism measures that flout international human rights norms. These include: indefinite detention without charge of foreign nationals suspected of involvement in terrorism; control orders that impose what amount to criminal sanctions without trial; and efforts to circumvent, indeed loosen, the global ban on torture and cruel, inhuman or degrading treatment or punishment. All are concrete illustrations of the UK's government's willingness to abandon well-established principles in UK and international law in the name of the fight against terrorism.

Human Rights Watch believes that such an approach is deeply misguided. Counterterrorism measures that violate human rights are not only illegal under international law but are also counterproductive.

Since the July 2005 attacks, preventing radicalization and recruitment (the "prevent" strand) has been at the heart of the UK's counter-terrorism strategy.<sup>2</sup> The strategy states that one of the key elements of prevention is:

Engaging in the battle of ideas – challenging the ideologies that extremists believe can justify the use of violence, primarily by helping Muslims who wish to dispute these ideas to do so.<sup>3</sup>

Counterterrorism measures that violate human rights may deliver short term benefits in disrupting terrorist networks but they undermine the UK's moral legitimacy at

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<sup>2</sup> The strategy was first developed in 2003. It contains four elements: Prevent (tackling the radicalization of individuals), Pursue (disrupting terrorists and their operations), Protect (reducing the vulnerability of the UK to a terrorist attack) and Prepare (preparedness for the consequences of a terrorist attack). The current iteration of the strategy dates from July 2006.

<sup>3</sup> Countering International Terrorism: The United Kingdom's Strategy, July 2006, <http://security.homeoffice.gov.uk/news-publications/publication-search/general/Contest-Strategy> (accessed May 18, 2007).

home and abroad, damaging its ability to win the battle of ideas that is central to long-term success in countering terrorism.<sup>4</sup>

The “Preventing Extremism Together” working groups, composed of prominent British Muslims, and established by the British government following the July 7, 2005 attacks, expressed concern that UK counterterrorism measures have eroded the nation’s international standing. They recommended that the UK “must lead on and not unilaterally derogate from international principles and standards of human rights.”<sup>5</sup>

Measures that undermine human rights and depart from the UK’s core values, especially those that are seen as targeting particular communities, also carry an immediate practical cost. Successful policing, and preventing and prosecuting terrorism, require public cooperation, and in particular tip-offs about suspicious activity. Abusive measures erode public trust in law enforcement and security services, and alienate communities whose cooperation is critical in the fight against terrorism.

In December 2006, the think-tank Demos published a major study on the link between community relations and terrorism in the UK, based on 200 interviews, most of them with British Muslims. The report concluded:

“[T]he UK government’s response to terrorism is alienating the very communities it needs to engage, and that their growing sense of grievance, anger and injustice inadvertently legitimises the terrorists’ aims...”<sup>6</sup>

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<sup>4</sup> Government authorities have indicated publicly and privately that measures such as deportation, indefinite detention, and extended pre-charge detention have been useful in disrupting terrorist networks. Home Secretary John Reid has said, for example, that the full 28-day pre-charge detention period had been necessary in the investigation of the plot to bomb airplanes in the summer of 2006. See “Reid to revisit terror detentions,” BBC, February 1, 2007.

<sup>5</sup> Home Office, “Preventing Extremism Together Working Groups, August-October 2005,” November 10, 2005, [http://www.communities.gov.uk/pub/16/PreventingExtremismTogetherworkinggroupreportAugOct2005\\_id1502016.pdf](http://www.communities.gov.uk/pub/16/PreventingExtremismTogetherworkinggroupreportAugOct2005_id1502016.pdf) (accessed May 18, 2007). The Home Office unit responsible for follow-up and implementation of the Working Groups’ recommendations was transferred to the Department for Communities and Local Government in May 2006.

<sup>6</sup> Demos, “Bringing it Home: Community-based approaches to counter-terrorism,” December 2006, <http://www.demos.co.uk/files/Bringing%20it%20Home%20-%20web.pdf> (accessed May 18, 2007).

Another major study on the same subject, carried out by the Essex University Human Rights Centre for the Joseph Rowntree Trust, and published in November 2006, reached a similar conclusion:

“[UK counterterrorism policies] are having a disproportionate effect on the Muslim communities in the UK and so are prejudicing the ability of the government and security forces to gain the very trust and cooperation from individuals in those communities that they require to combat terrorism.”<sup>7</sup>

The July 2005 attacks in London underscored the home-grown threat of terrorism in the UK. The success of the government’s “prevent” agenda is critically important to its ability to tackle that threat. But that depends in turn on a new approach that upholds rather than undermines core human rights standards.

The government signaled on June 7, 2007, with the publication of a “discussion document,” that it intends to introduce further counterterrorism legislation later in the year. The proposals in the document include a renewed effort to extend pre-charge detention beyond 28 days, broader police powers to question suspects after they have been charged with a crime, and a review of the ban on the use of intercept evidence in terrorism prosecutions.<sup>8</sup>

## **Uphold the Prohibition on Torture and Ill-Treatment**

Despite its longstanding support for international norms and efforts to ban torture, over the past five years the UK has pursued policies that effectively undermine the absolute prohibition of torture. This dangerous ambivalence damages the UK’s standing at home and abroad. In order to recover its stature as an international leader in the struggle to eradicate torture, the British government must abandon its policy of seeking diplomatic assurances, desist in its efforts to rewrite European

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<sup>7</sup> Joseph Rowntree Trust, “The Rules of the Game: Terrorism, Community and Human Rights,” [http://www.jrrt.org.uk/Terrorism\\_final.pdf](http://www.jrrt.org.uk/Terrorism_final.pdf) (accessed May 18, 2007).

<sup>8</sup> Home Office, “Government Discussion Document Ahead of Proposed Counter Terror Bill 2007,” June 7, 2007, <http://www.homeoffice.gov.uk/documents/ct-discussion-doc.pdf?view=Binary> (accessed June 8, 2007).



standards on returns where there is a risk of torture and ill-treatment, and multiply its efforts to promote broad ratification and implementation of relevant international instruments.

### **Abandon the policy of deportation with assurances**

The UK was among the first countries to seek diplomatic assurances against torture as a means of deporting foreign terrorism suspects to countries where they faced the risk of such treatment. The Law Lords ruled in December 2004 that the indefinite detention of foreign terrorism suspects violated the UK's international human rights obligations.<sup>9</sup> From that point on, the use of deportation with assurances became a central plank of Britain's counterterrorism strategy.

The British government has agreed "memorandums of understanding" with Jordan, Libya, and Lebanon to permit the deportation of terrorism suspects based on assurances of humane treatment upon return, and sought to negotiate similar agreements with Algeria and other North African and Middle Eastern governments. All of these countries have a known pattern of torture, particularly for those suspected of involvement in terrorism or radical Islamism.<sup>10</sup> The memos include arrangements for post-return monitoring, which the UK government wrongly claims provides an added measure of protection.

The key deficiency with monitoring an isolated detainee is the lack of confidentiality and consequent risk of reprisals. If monitors have universal access to all detainees in a facility, and are able to speak with a large number of detainees privately, any given detainee can report an abuse to them without fear that he or she will be identified by the authorities, and subject to reprisals. The International Committee of the Red Cross makes such access a condition of its monitoring for precisely that reason. Such confidentiality cannot be provided when only one detainee or small group is being monitored. If allegations of ill-treatment were communicated, the prison or detention facility authorities and staff would know directly where the

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<sup>9</sup> A (FC) and others (FC) (Appellants) v. Secretary of State for the Home Department (Respondent) , [2005] UKHL 71, <http://www.publications.parliament.uk/pa/ld200506/ldjudgmt/jdo51208/aand-1.htm> (accessed June 8, 2007).

<sup>10</sup> See, for example, Human Rights Watch and Liberty, "UK: Empty promises can't protect people from torture, a joint letter to Tony Blair," June 23, 2005, <http://hrw.org/english/docs/2005/06/23/uk11219.htm>.

information came from. Such easy identification is a strong disincentive for the detainee to report any abuse. A detainee would justifiably fear reprisals targeting him or his family members by prison staff or other government actors.

Experience shows that diplomatic assurances from governments that routinely practice torture are entirely worthless. The most notorious example involves Sweden, which sent two Egyptian terrorism suspects to Cairo in December 2001 in the hands of the CIA, based on promises of humane treatment from the Egyptian government. Both were tortured on their return, despite visits from Swedish diplomats. Two UN bodies – the Committee Against Torture and the Human Rights Committee – have since ruled that Sweden’s actions in the case violated the international ban on returning people to a place where they are at risk of torture.<sup>11</sup>

In October 2002, the U.S. government transferred Maher Arar, a dual Canadian-Syrian citizen, from New York via Jordan to Syria based on diplomatic assurances of humane treatment. An independent fact-finder appointed by an official Canadian Commission of Inquiry into Arar’s treatment concluded in October 2005 that Arar had been tortured in Syrian custody, despite Syrian assurances to the contrary and several visits from Canadian consular officials. In September 2006, the Commission of Inquiry itself concluded that Arar’s torture in Syria is “a concrete example” of the problems inherent in relying on diplomatic assurances.<sup>12</sup>

The U.S. government transferred a Russian man, Rasul Kudayev, from Guantanamo Bay to Russia in 2004, based on assurances from the Russian authorities that he would be treated humanely in accordance with Russia’s domestic law and international obligations.<sup>13</sup> In October 2005, Kudayev was unlawfully arrested and

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<sup>11</sup> UN Committee Against Torture, Decision: *Agiza v. Sweden*, CAT/C/34/D/233/2003, May 20, 2005, <http://www1.umn.edu/humanrts/cat/decisions/233-2003.html> (accessed January 1, 2007); UN Human Rights Committee, Decision Decision: *Alzery v. Sweden*, CCPR/C/88/D/1416/2005, November 10, 2006, <http://www.unhcr.ch/tbs/doc.nsf/0ac7e03e4fe8f2bdc125698a0053bf66/13fac9ce4f35d66dc12572220049e394?OpenDocument> (accessed January 1, 2007).

<sup>12</sup> Commission of Inquiry into the Actions of Canadian Officials in Relation to Maher Arar, “Report of the Events Relating to Maher Arar: Analysis and Recommendations,” [http://www.ararcommission.ca/eng/AR\\_English.pdf](http://www.ararcommission.ca/eng/AR_English.pdf), p. 176 (accessed May 22, 2007).

<sup>13</sup> See Human Rights Watch, *The Stamp of Guantanamo: The Story of Seven Men Betrayed by Russia’s Diplomatic Assurances to the United States*, vol. 19, no. 2 (D), March 2007, <http://www.hrw.org/reports/2007/russia0307/>.

detained, severely beaten and denied necessary medical care, and had his lawyer arbitrarily removed from his case when she complained about his ill-treatment.

The British Parliamentary Joint Committee for Human Rights, the UN Human Rights Commissioner, the UN Special Rapporteur on Torture, the EU Network of Independent Experts, and the Council of Europe Commissioner for Human Rights have all concluded that diplomatic assurances are no safeguard against torture.<sup>14</sup>

The Special Immigration Appeals Commission (SIAC) upheld this view when it ruled in April 2007 that two terrorism suspects, known only as DD and AS, would be at risk of torture and a “complete” denial of a fair trial if returned to Libya. The court determined that Libyan assurances contained in a 2005 MoU with the UK were not reliable. This positive affirmation of the prohibition on return to torture and ill-treatment stands in contrast to the February 2007 decision by the same court allowing the UK to deport Omar Othman (also known as Abu Qatada) to Jordan under the terms of an MoU brokered in 2005. At the time of writing, both decisions are the subject of pending appeals to the Court of Appeal.

In May 2006, Human Rights Watch submitted an expert statement to the SIAC in the Othman case arguing that there is no basis upon which to trust unenforceable diplomatic assurances from the Jordanian authorities. In addition, Human Rights Watch provided a witness statement in the Libyan case about reliance on Qadhafi Foundation for Development as the monitoring organization under the UK-Libya MoU.

There is already ample evidence that assurances do not protect detainees against abuse and that such returns violate international law. Apart from the loss of moral legitimacy, the use of assurances signals a willingness to collaborate with the governments whose abusive methods have fanned support for extremism and terrorism. This may help to act as a recruiting sergeant for the terrorists’ cause and ultimately make the UK less safe. The UK government should abandon its efforts to

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<sup>14</sup> For detailed discussions of diplomatic assurances, see Human Rights Watch, *Empty Promises : Diplomatic Assurances No Safeguard Against Torture*, vol. 16, no. 4(D), April 2004; *Still at Risk: Diplomatic Assurances No Safeguard Against Torture*, vol. 17, no. 4(D), April 2005; and *Diplomatic Assurances: Questions and Answers*, November 2006. These and other documents related to Human Rights Watch’s work on diplomatic assurances are available at <http://www.hrw.org/doc/?t=da>.

deport such suspects and instead concentrate its efforts on prosecuting those who threaten the UK, including British nationals who cannot be deported.

Resettlement to safe third-countries can also be explored. But it is important to note that extended immigration detention while suitable countries are identified would violate the ECHR unless authorities were able to show due diligence in deportation proceedings.<sup>15</sup> Where possible, such arrangements should be based on the informed consent of the individuals concerned.

### **Abandon efforts to weaken European standards on torture and ill-treatment**

The British government's intervention in the case of *Ramzy v. The Netherlands* is a manifest effort to weaken the prohibition of torture and ill-treatment contained in article 3 of the ECHR. Mohammed Ramzy, an Algerian suspected of involvement in terrorism, is challenging deportation from The Netherlands before the European Court of Human Rights on the grounds he would be at risk of torture if returned to Algeria.<sup>16</sup>

The UK government has taken the rare step of intervening in the case, an otherwise relatively straightforward dispute about risk upon return, in an effort to overturn the landmark 1996 judgment in the case of *Chahal v. UK*, in which the European Court of Human Rights reaffirmed the absolute prohibition on sending people back to the risk of torture and ill-treatment. The Court ruled in that case that the return to India of Karamjit Singh Chahal, a Sikh activist suspected of involvement with terrorism, would violate the UK's obligations under the ECHR.

The *Chahal* judgment makes clear that “[t]he prohibition provided by Article 3 against ill-treatment is equally absolute in expulsion cases.... In these circumstances,

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<sup>15</sup> Immigration detention is only lawful under the ECHR “where action is being taken with a view to deportation or extradition” (article 5 (1)(f)). The jurisprudence of the European Court of Human Rights requires that the detaining state demonstrate due diligence in its efforts to deport or extradite the detainee (See, *Chahal v. The United Kingdom*, Application No. 2214/93, November 15, 1996 (1997) 23 EHRR 299, para. 113).

<sup>16</sup> The case has since been joined to another case involving a Libyan facing removal from the Netherlands on national security grounds.

the activities of the individual in question, however undesirable or dangerous, cannot be a material consideration.”<sup>17</sup>

The UK government now wants to convince the justices of the European Court to allow a national security exception to article 3 ECHR that would permit the risk of ill-treatment to be balanced against the alleged threat posed by the person subject to removal. Britain persuaded four other governments to join its intervention in the *Ramzy* case.<sup>18</sup> Although the ban on returns to risk of torture would remain intact under international law, in particular under the UN Convention against Torture, a European Court of Human Rights ruling in favor of the UK would have a corrosive effect, and put persons subject to removal at risk of ill-treatment. A group of human rights organizations, including Human Rights Watch, have also intervened in the *Ramzy* case to highlight the fundamental importance of upholding the ban on returns to ill-treatment to the torture prohibition as a whole.<sup>19</sup>

The UK government should withdraw its intervention in the *Ramzy* case, and state publicly its unequivocal commitment to the absolute prohibition on return to risk of torture and ill-treatment under article 3 of the ECHR.

## **Reinforce the international ban on torture**

Given the recent concerns about the potential complicity of European States in illegal US renditions and secret detentions, it is critically important that the UK takes positive measures to create safeguards against such illegal practices whether in the UK or elsewhere.<sup>20</sup>

Implementing the recent proposal by the All Party Parliamentary Group (APPG) on Extraordinary Renditions to introduce safeguards for individuals subject to rendition

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<sup>17</sup> *Chahal v. The United Kingdom*, Application No 22414/93, November 15, 1996, (1997) 23 EHRR 399, para. 80.

<sup>18</sup> Italy, Lithuania, Portugal, and Slovakia. Italy subsequently withdrew from the intervention.

<sup>19</sup> Human Rights Watch has intervened in the case jointly with Interights, Amnesty International, the Association for the Prevention of Torture, the International Commission of Jurists, Open Society Justice Initiative, and REDRESS.

<sup>20</sup> The issue was the subject of extensive investigations by the European Parliament Temporary Committee on the alleged use of European countries by the CIA for the transport and illegal detention of prisoners (TDIP) and the Council of Europe Committee on Legal Affairs and Human Rights.

through the UK would be an important start. Human Rights Watch wrote to the Minister for Transport on May 15, 2007 expressing our support for the proposal.

The APPG's proposed measure involves the creation of a permission system in UK law requiring states seeking to transfer a detained person through UK territory or airspace to request written permission from the UK government. The transferring state would have to provide information on: a) the destination state; b) the purpose of the transfer and applicable legal regime; c) the legal safeguards in the destination state; d) and the procedures to which the individual being transferred had access to challenge his or her transfer prior to removal on the basis of a fear of torture, ill-treatment, enforced disappearance or any other reason. Under the proposed measure, the government would have to deny permission to transit unless it is satisfied that the transit would not violate its obligations under international human rights law. This system would increase accountability of both the UK and the requesting state, as well as contribute to the protection of the rights of those being transferred. To maximize transparency, its operation should be subject to scrutiny by Parliament.

The UK should support efforts within the Council of Europe and/or European Union to adopt common measures to safeguard the rights of suspects being transported through member states.

The UK government should as a matter of priority sign and ratify the International Convention for the Protection of All Persons from Enforced Disappearances (2006).<sup>21</sup> By requiring states to prohibit secret detention and unofficial places of detention, and ensure that every detained person has access to legal remedies, the Convention will play a significant role in reducing the risk of torture in detention, and ensuring that counter-terrorism measures with respect to state custody of terrorism suspects are consistent with international human rights law.

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<sup>21</sup> As of April 19, 2007, the Convention had 59 signatories. It will enter into force when it is ratified by 20 states parties. Office of the High Commissioner for Human Rights, Ratifications and Reservations, International Convention for the Protection of All Persons from Enforced Disappearance, <http://www.ohchr.org/english/countries/ratification/16.htm> (accessed June 8, 2007).

The UK government should also continue its positive efforts to persuade governments to sign and ratify the UN Optional Protocol to the Convention against Torture (2003), which strengthens protection against torture by establishing in each state party a system of regular visits by independent international and national bodies to places where people are deprived of their liberty.

## **Prosecution as a Core Counterterrorism Strategy**

Human Rights Watch is convinced that effective use of the criminal justice system is the best way to fight terrorism. While the government has said that prosecution is the “preferred approach,” in practice it has often relied on administrative measures that lack the safeguards of the criminal justice system.

Most of the men subject to indefinite detention under Part 4 of the Anti-terrorism Crime and Security Act 2001 were never questioned by the police or security services during their detention under those powers.<sup>22</sup> The failure to pursue prosecution and to rely instead on administrative measures has drawn criticism from the courts, the independent reviewer of terrorism legislation Lord Carlile QC, and the Parliamentary Joint Committee on Human Rights.

The British government should demonstrate a genuine commitment to prosecution by relaxing the ban on intercept evidence, and providing for an automatic, periodic, and transparent Crown Prosecution Service review of all cases in which terrorism suspects are subject to administrative measures.

### **Relax the ban on intercept evidence**

The UK should move swiftly to remove what Director of Public Prosecutions Sir Ken Macdonald QC called “one of the main obstacles” to prosecuting terrorism suspects: the ban on the admissibility of intercept evidence. We welcome the announcement

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<sup>22</sup> Of the 11 persons in indefinite detention under the Act at the time of the Law Lords ruling in December 2004, none had been questioned by the police or security services. James Cusick, “Terror suspects jailed for three years have never been questioned,” *The Sunday Herald (UK)*, December 19, 2004. See also, Amnesty International, “United Kingdom - Human rights: a broken promise,” February 23, 2006, p.37, [http://web.amnesty.org/library/pdf/EUR450042006ENGLISH/\\$File/EUR4500406.pdf](http://web.amnesty.org/library/pdf/EUR450042006ENGLISH/$File/EUR4500406.pdf) (accessed May 31, 2007).

highlighted in the June 7 “discussion document” that a committee of privy counsellors will review the intercept ban.<sup>23</sup> The UK is the only western country that prohibits the use of evidence from the monitoring of electronic communications in court. The government has long argued that use of intercept evidence would compromise intercept capabilities by disclosing, either directly or indirectly, to the suspects themselves the methods used to intercept communications. There is a broad consensus that this archaic ban is a disproportionate response to a genuine concern over disclosure of intelligence sources and methods, and that removal of the ban would facilitate prosecution of terrorism suspects.

The proposal was first advanced by Lord Lloyd in his 1996 review of terrorism legislation, and has since been endorsed by Lord Carlile, in parliament by the Privy Counsellor Review Committee (“Newton Committee”), and the Joint Committee on Human Rights. It has drawn support from a wide spectrum of opinion, including the Attorney-General Lord Goldsmith, Metropolitan Police Commissioner Sir Ian Blair, the Bar Council and the Law Society (the governing bodies of Britain’s two legal professions), and the non-governmental organizations Liberty and Justice. In April 2007, the House of Lords approved an amendment introduced by Lord Lloyd to the Serious Crimes Bill that would allow for the use of intercept evidence.<sup>24</sup>

A 2006 study by Justice on the use of intercept evidence in other common law jurisdictions (including the United States, Canada and Australia) demonstrated that the fear that intercept capabilities would be compromised by lifting the ban is unfounded.<sup>25</sup> Reasonable protocols, similar to the public interest immunity safeguards that already exist in the UK, have been used in other jurisdictions to protect methods, sources and informants. The procedures vary from country to country, but all essentially allow the court to adopt measures, upon application by the prosecution, to prevent the unnecessary disclosure of sensitive intelligence material. For example, the court may allow the prosecutor to delete any material that

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<sup>23</sup> Home Office, “Discussion Document,” paras 17 and 18. The Privy Council is a government body composed of approximately 300 members, including all past and present cabinet members, the leaders of all major political parties, senior judges and other senior public officials.

<sup>24</sup> BBC News Online, Lords back phone-taps in trials, April 25, 2007, [http://news.bbc.co.uk/2/hi/uk\\_news/politics/6593517.stm](http://news.bbc.co.uk/2/hi/uk_news/politics/6593517.stm) (accessed May 18, 2007).

<sup>25</sup> Justice, “Intercept evidence: Lifting the Ban,” October 2006, <http://www.justice.org.uk> (accessed May 15, 2007).



would compromise the identity of confidential informants or intelligence officers or negatively affect ongoing investigations (Canada), or allow the use of summaries in lieu of actual documents provided that the summaries give the defendant substantially the same ability to make his or her defense (United States).<sup>26</sup> Moreover, timely reviews and legislative amendments can address rapid changes in communications technology to ensure that interceptions are carried out lawfully and usefully for the purposes of prosecution.

## **Demonstrate efforts to prosecute**

In his second annual review of Terrorism Act 2005, published in February 2007, Lord Carlile noted the lack of efforts to prosecute individuals currently under control orders (See section below for a detailed discussion of control orders).<sup>27</sup> The Terrorism Act 2005 requires the police to certify that there is no realistic prospect for prosecution before a control order is imposed, and to keep under review the possibility of an investigation with a view to prosecute. Lord Carlile noted that that the evidence of a “thorough and continuing examination of whether a prosecution could be brought...remains unconvincing in some cases.”<sup>28</sup> In its February 2007 decision in the case of *E. v. Secretary of State for Home Department*, the High Court found that authorities had failed to continuously review the prospects for prosecution, even in the face of new material.<sup>29</sup> Although the Court of Appeal reversed the High Court’s decision in the case (rejecting its finding that the control order amounted to a deprivation of liberty), it agreed with the High Court that the Home Secretary had breached “his duty to keep the question of possible prosecution under review.”<sup>30</sup>

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<sup>26</sup> Ibid. See discussion on the Canadian Criminal Code, pp. 51-53, and the United States Classified Information Procedures Act, p. 67.

<sup>27</sup> Lord Carlile of Berriew QC, Second Report of the Independent Reviewer Pursuant to Section 14(3) of the Prevention of Terrorism Act 2005, February 19, 2007, <http://security.homeoffice.gov.uk/news-publications/publication-search/independent-reviews/lord-carlile-ann-report.pdf?view=Binary> (accessed March 1, 2007).

<sup>28</sup> Ibid., para. 57.

<sup>29</sup> High Court, *E v. Secretary of State for the Home Department* [2007] EWHC 233 (Admin).

<sup>30</sup> Court of Appeal, *E v. Secretary of State for the Home Department* [2007] EWCA Civ 459, para. 97.

Lord Carlile recommended that the Crown Prosecution Service, police, security services and the Home Office undertake a detailed and documented review of every case on the basis of all available evidence and intelligence.

Human Rights Watch believes these reviews should be systematic, periodic, and that the determinations should be made public. Greater transparency will help restore public confidence that the government is indeed doing everything possible to bring terrorism suspects to trial.

### **No Further Extension of Pre-charge Detention**

Human Rights Watch is deeply dismayed over renewed interest in extending pre-charge detention in terrorism cases. The “discussion document” presented to Parliament on June 7 indicates that the government intends to seek a further extension, while acknowledging the need for judicial and parliamentary oversight.

Human Rights Watch strongly opposed the provision of Terrorism Act 2006 increasing pre-charge detention from fourteen days to the current twenty-eight days on the grounds that it risked creating a form of arbitrary detention in violation of the fundamental right to liberty and security of person under article 5 of the ECHR and article 9 of the International Covenant of Civil and Political Rights.<sup>31</sup> In our view, the case for further extending the time that terrorism suspects may be held without charge—the third such extension in as many years—has not been made.

The twenty-eight day detention period has been used only once since the provision went into effect, and Home Secretary John Reid conceded that it has not yet been the case that twenty-eight days have proven an inadequate amount of time.<sup>32</sup> Moreover, the police did not make significant use of the previous fourteen-day limit: in the twenty months between January 2004, when the fourteen-day maximum period went

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<sup>31</sup> For a detailed discussion, see Human Rights Watch, *Briefing on the Terrorism Bill 2005, Second Reading in the House of Lords*, November 2005, <http://www.hrw.org/backgrounder/eca/uk1105/>.

<sup>32</sup> “Fresh bid to extend detention period for terror suspects,” *Press Association*, February 1, 2007.

into effect, and September 2005, only 3% of those arrested on suspicion of terrorism were held the full fourteen days.<sup>33</sup>

Human Rights Watch acknowledges that the investigation of some cases may require significant time and expertise. If the government can convincingly demonstrate that the current period of pre-charge detention is insufficient, it should actively explore or increase recourse to other options. There is no shortage of ideas from parliamentary committees, nongovernmental organizations and law enforcement experts on how to facilitate investigations and prosecutions in a manner that comports with international human rights law.

The broadening of the police power to question suspects in terrorism cases after they have been charged with a crime is a possible alternative. At present post-charge questioning is only permitted to clarify new statements, where public safety is at risk, or where new evidence comes to light and the suspect agrees to be questioned.<sup>34</sup> The government's June 7 "discussion document" proposes expanded post-charge questioning powers.<sup>35</sup> The House of Commons Home Affairs Committee and the Joint Committee on Human Rights have previously endorsed broader post-charge questioning powers.<sup>36</sup>

If the scope of post-charge questioning is to be broadened, it is important to ensure that there are adequate safeguards to protect the rights of the accused, including the presence of legal counsel at all times and a very narrow limit on the adverse inferences that may be drawn at trial from the refusal to answer questions. It may be reasonable to allow adverse inferences to be drawn from the failure of the suspect to

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<sup>33</sup> Statistics on arrests under the Terrorism Act 2000 seen by Human Rights Watch [unpublished].

<sup>34</sup> Home Office, "Discussion Document," para. 7.

<sup>35</sup> *Ibid.*

<sup>36</sup> House of Commons Home Affairs Committee, "Terrorism Detention Powers," Fourth Report of Session 2005-06, Volume I, July 3, 2006, paras. 104-109, <http://www.publications.parliament.uk/pa/cm200506/cmselect/cmhaff/910/91002.htm>; Joint Committee on Human Rights, "Counter-Terrorism Policy and Human Rights: Prosecution and Pre-Charge Detention," Twenty-Fourth Report of Session 2005-06, August 1, 2006, paras. 132-135, <http://www.publications.parliament.uk/pa/jt200506/jtselect/jtrights/240/240.pdf>.

mention key facts later relied on in his or her defense. Anything broader would compromise the right to silence.<sup>37</sup>

## **Improve Safeguards for Control Orders**

Human Rights Watch expressed grave reservations about the current system of control orders when the Prevention of Terrorism Act 2005 was still under debate.<sup>38</sup> In our view, the serious restrictions on an individual's human rights that can be imposed through control orders make them functionally equivalent to the imposition of punishment upon the determination of a criminal charge. This view is reinforced by the fact that breach of a control order is a criminal offense punishable upon conviction by up to five years imprisonment and/or a fine.

Under the Act, the executive branch has the authority to impose conditions that may seriously restrict the enjoyment of rights guaranteed under the ECHR, including freedom of movement, freedom of association, freedom of expression, and the right to privacy and family life for an indefinite period of time on the basis of a low standard of proof and secret evidence.

Human Rights Watch considers that the following safeguards are necessary to bring the control order regime into line with human rights law: First, restrictions should be imposed by a court and only through a process in which credible evidence of their necessity is provided to the court and the person subject to the order. Second, the criminal standard of proof ("beyond a reasonable doubt") should be applied. Third, there must be appropriate access to meaningful appeal and review. Finally, restrictions should be time limited and open to rescission and amendment of conditions on the presentation of new evidence.

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<sup>37</sup> The government's June 7 "discussion paper" suggests that it is considering such an approach. The section on post-charge questioning states: "Where a subject refuses to answer questions but then later relies on something they had the opportunity to mention previously, for an example an alibi, then adverse inferences could be drawn from this where it is reasonable to do so."

<sup>38</sup> For a detailed exposition of our concerns, see Human Rights Watch, Commentary on Prevention of Terrorism Bill 2005, March 2005, <http://hrw.org/backgrounder/eca/uko305/>.

Parliament renewed control order powers earlier this year for another twelve months amid continuing concerns about due process and the extent of the restrictions imposed. Although the Court of Appeal has taken the view that the procedure for application and review of control orders does not violate fair trial standards under article 6 of the ECHR,<sup>39</sup> we remain deeply concerned that the current system undermines the right to an effective defense, the principle of equality of arms, and the presumption of innocence.

The courts have quashed eight out of the 19 control orders thus far imposed because the conditions and restrictions taken as a whole were tantamount to deprivation of liberty in contravention of article 5 of the ECHR.<sup>40</sup> The Joint Committee for Human Rights expressed concern that the government has been operating a “de facto derogation from article 5.”<sup>41</sup>

On May 24, 2007, the outgoing Home Secretary signaled that the government was considering a derogation from article 5, the effect of which would be to permit the use of “house arrest” control orders.<sup>42</sup> The Home Secretary’s comment came in response to news that three persons subject to control orders had absconded. The power to impose control orders amounting to house arrest was created by the PTA 2005, but its use would require a derogation from the ECHR.<sup>43</sup> The previous derogation from article 5 linked to indefinite detention was struck down by the Law Lords in December 2004.

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39 *MB v. Secretary of State for the Home Department* [2006] EWCA Civ 1140. At this writing, the Court of Appeal ruling is under appeal to the House of Lords Judicial Committee (Law Lords).

40 See High Court decision in *JJ and others v. Secretary of State for the Home Department* [2006] EWHC 1623 (Admin), upheld by the Court of Appeal in its ruling [2006] ECCA Civ 1141; and High Court decision in *E v. Secretary of State for the Home Department* [2007] EWHC 233 (Admin), reversed by the Court of Appeal in [2007] EWCA Civ 459. As a result of the High Court rulings, the Home Secretary modified the control orders. At this writing, appeals to the House of Lords are pending in both cases. See also *Secretary of State for the Home Department v. Mahmoud Abu Rideh* [2007] EWHC 804 (admin).

41 Joint Committee on Human Rights, “Counter-terrorism Policy and Human Rights: Draft Prevention of Terrorism Act 2005 (Continuance in force of sections 1 to 9) Order 2007, Eighth Report of Session 2006-2007, March 4, 2007, <http://www.publications.parliament.uk/pa/jt200607/jtselect/jtrights/60/60.pdf> (accessed March 6, 2007).

42 Fred Attewill and agencies, “Reid promises tough measures after trio vanish,” *Guardian Unlimited*, May 24, 2007, <http://www.guardian.co.uk/terrorism/story/0,,2086945,00.html> (accessed May 31, 2007).

43 Prevention of Terrorism Act 2005, section 3.

A fresh derogation from article 5 ECHR would be a very grave step, which would run counter to the advice of the Preventing Extremism Together working groups, and would be likely to undermine the “prevent” strand of the government’s counterterrorism strategy. In a speech defending the current control order regime, Lord Carlile described the proposal as “barely practicable and probably extremely unwise”<sup>44</sup>

In his February 2007 review of the PTA 2005, Lord Carlile set out his conclusion that control orders are necessary, but he cautioned that they cannot be maintained indefinitely and called finding a strategy for ending the control orders in respect to each person subject to control orders, either on a case-by-case basis or through new legislation, “a matter of urgency.”<sup>45</sup>

## **Protect Freedom of Expression**

Human Rights Watch remains concerned about the criminal offense of “encouragement of terrorism” introduced by the Terrorism Act of 2006.<sup>46</sup> In the debates leading to the Act’s adoption, the government failed to convincingly demonstrate that this measure is necessary given the array of offenses already at the disposal of crown prosecutors.

Recent prosecutions based on long-standing criminal offenses demonstrate that ordinary criminal law is capable of sanctioning speech that is said to incite violence. In separate trials, two men were convicted of inciting racial hatred and two others to soliciting murder (one of them was also found guilty of inciting racial hatred) for statements made during a February 2006 protest outside the Danish Embassy in London against the “Danish cartoons.”<sup>47</sup>

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<sup>44</sup> Claire Dyer, “Judges asked to rethink control order rulings after suspects abscond,” *The Guardian*, May 30, 2007, <http://www.guardian.co.uk/terrorism/story/0,,2091112,00.html> (accessed May 31, 2007).

<sup>45</sup> Lord Carlile, Second report, para. 43.

<sup>46</sup> For a more detailed discussion of our concerns, see Human Rights Watch, *Briefing on the Terrorism Bill 2005*, Second Reading in the House of Lords, November 2005, <http://www.hrw.org/backgrounder/eca/uk1105/>.

<sup>47</sup> Mizanur Rahman and Abdul Saleem were found guilty of inciting racial hatred on November 9, 2006, and February 1, 2007, respectively (Rahman was acquitted of charges of soliciting murder); Umran Javed was convicted of inciting racial hatred and soliciting murder on January 5, 2007; and Abdul Muhid was found guilty of two counts of soliciting murder on March 7, 2007.

Human Rights Watch understands that to date two people have been charged with encouragement of terrorism. Attila Ahmet (also known as Abu Abdullah) was charged in September 2006 while Abu Izzadeen was charged in February 2007. They have not yet been tried.

The definition of the encouragement of terrorism offense is overly broad, raising serious concerns about undue infringement on free speech. The offense covers statements “likely to be understood...as a direct or indirect encouragement or other inducement to...the commission, preparation or instigation of acts of terrorism,” including any statement that “glorifies the commission or preparation (whether in the past, the future or generally) of such acts.”<sup>48</sup> The right to freedom of expression is a fundamental right understood to ensure the freedom to hold opinions and to receive and impart information without interference. While recognizing that this right may be limited under certain circumstances, the European Court of Human Rights has repeatedly asserted that freedom of expression “constitutes one of the essential foundations of a democratic society”.<sup>49</sup>

According to the case law of the European Court of Human Rights, governments must convincingly demonstrate that a measure that interferes with free speech is both necessary and proportionate. But the breadth of the speech covered by the offense and the imprecision with which it is drafted, mean that it is likely to fail the test for legitimate interference with the fundamental right to free expression as applied by the European Court of Human Rights.

The vague definition of the offense of encouragement of terrorism violates the principle of legal certainty enshrined in article 7 of the ECHR requiring that laws must be of such precision that people are able to regulate their conduct to avoid infringement. The fact that a speaker may commit the offense not only when he or she intends the speech to encourage terrorism but also when he or she is “reckless” as to the impact of the speech underscores the lack of legal certainty. A final concern is that the Terrorism Act 2006 requires no causal link between the offending speech and actual encouragement – it suffices that members of the public, anywhere in the

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<sup>48</sup> Terrorism Act 2006, article 1 (1) and (3).

<sup>49</sup> See for example, *Handyside v. the United Kingdom*, Judgment of 7 December 1976, Series A no. 24, paragraph 49.

world, are likely to understand the speech as encouragement or glorification of terrorism.

There is little or no evidence that criminalizing such speech will deter terrorism, while there is very strong evidence that it will deter free expression through a chilling effect that provokes self-censorship and inhibits political discourse, including criticism of the government. The special offense of encouragement to terrorism should be repealed.

## **Conclusion**

The change of leadership in the United Kingdom offers an opportunity to review Britain's approach to countering terrorism. Five years of counterterrorism measures that violate human rights law have been damaging to the UK's image at home and abroad, and deeply counterproductive. Prime Minister Brown should set the country on a new course, by bringing UK counterterrorism law and policy back into line with European and International standards and long-standing British values, thereby ensuring that its approach supports rather than undermines its efforts to prevent radicalization and recruitment, and reviving the UK's leadership on human rights.