



UK: Counter the Threat or Counterproductive? Commentary on Proposed Counterterrorism Measures

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Executive Summary

The British government has announced its intention to introduce a new counterterrorism bill by the end of 2007. The forthcoming draft legislation, if passed by Parliament, will become the sixth major counterterrorism law since 2000. In July 2007 the Home Office published several consultation documents detailing possible measures for inclusion in the bill.

This commentary analyzes some of the key proposals in light of the United Kingdom's international human rights obligations. It also assesses whether the measures are likely to be effective or counterproductive. 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 the security services, and alienate communities whose cooperation is critical in the fight against terrorism.

Successfully confronting terrorism over the long term requires more than security measures. In the words of Prime Minister Gordon Brown, it depends upon winning the "battle of hearts and minds." Efforts to prevent radicalization and recruitment have been a central strand of the UK's counterterrorism strategy since the July 2005 attacks in London. The success of those efforts depends on an approach to counterterrorism that upholds rather than weakens core human rights standards.

Several of the measures being explored by the government are sensible, and do not raise undue human rights concerns. The possible relaxation of the ban on the use of phone tap and other intercept evidence in criminal trials is a notable example. A government-commissioned review of the ban by a committee of senior security-cleared parliamentarians (Privy Counsellors) is expected to publish its findings by the end of October 2007. There is broad consensus, including among Britain's top police officer and top prosecutor, that the ban is a disproportionate response to a genuine concern over disclosure of intelligence sources and methods, and that allowing the use of intercept evidence would facilitate the prosecution of terrorism

suspects. Its use might also lessen the need to rely on measures with serious human rights implications, such as long periods of pre-charge detention.

Broadening police power to question terrorism suspects after they have been charged is also worth consideration. Currently, police questioning post-charge can occur only under very restricted circumstances. Provided safeguards are in place, including the presence of counsel and protection of the right to silence, allowing the police to continue questioning suspects about matters relating to the offense is far preferable to a further extension of pre-charge detention.

The human rights implications of other proposals, including enhanced sentences for ordinary criminal offenses committed for a terrorist purpose and revisions to the definition of terrorism, will depend on precisely what is contained in the draft bill presented to Parliament.

Enhanced sentences for ordinary crimes committed for a terrorism-related purpose are likely to be compatible with international human rights law provided that fair trial standards are respected. Our concerns arise from the fact that under the government's proposals, enhanced sentences trigger requirements for offenders to report their residence and whereabouts to the police following their release from custody. Offenders face up to five years in prison if they fail to comply with such requirements. In our assessment, fair trial standards require that a measure that carries with it the potential for such a severe sanction should only be imposed where there is evidence that establishes beyond a reasonable doubt that the underlying offense was committed for a terrorism-related purpose.

The government's willingness to amend the definition of terrorism contained in the Terrorism Act 2000 is welcome in principle. But the change the government has proposed—which would extend the definition to actions motivated by a racial or ethnic cause—does nothing to address the widespread concern that the definition is overbroad. The proposed change is one of two recommendations that emerged from the review of the definition by Lord Carlile, the independent reviewer of terrorism legislation. It should be accompanied by an amendment reflecting the other recommendation, which would define as terrorism acts aimed at affecting the

government only where they are aimed at intimidating, coercing, or unduly compelling it, rather than the current broad “influencing.”

Human Rights Watch remains deeply concerned about the intention of the government to extend pre-charge detention beyond the current 28-day limit. We opposed the extension of pre-charge detention to 28 days under the Terrorism Act 2006, and consider a further extension would violate human rights law.

Such a serious interference with the right to liberty for those not charged with any crime will violate the UK’s obligations under the European Convention on Human Rights and the International Covenant on Civil and Political Rights. Adopting powers that allow terrorism suspects—many if not most of whom would doubtless be British Muslims—to be detained without charge for months at a time would be deeply damaging to the government’s efforts to win “hearts and minds.” It risks undermining the willingness of Muslim communities to cooperate with the police and security services.

Human Rights Watch is also alarmed that consideration is being given to judicially-supervised pre-charge detention without time-limits. The proposal for judge-managed investigations based on the French examining magistrates’ system, as currently formulated, would effectively introduce pre-charge detention without an upper time-limit. It would amount to the reintroduction of internment, a policy widely acknowledged to have alienated communities in Northern Ireland.

The government admits that the extended detention powers are not currently needed. Even were the government to show in the future that their use was necessary for complex police counterterrorism investigations, there is a raft of current and proposed measures that largely address the government’s stated objectives. Current measures include the offense of acts preparatory to terrorism, and the temporary use of lower charging standards by prosecutors. Proposals to allow post-charge questioning and allow the use of phone tap and other intercept evidence would also assist. The impact of such options should be fully assessed before consideration is given to extending pre-charge detention, a measure that would seriously interfere with human rights and be deeply counterproductive.

If the government is serious about winning hearts and minds, it should abandon its efforts to extend pre-charge detention and should amend its other proposals to make them compatible with human rights law. Bending the rules on human rights will undermine Britain's long-term security.

Recommendations

- Make no further extension of pre-charge detention.
- Improve safeguards for current 28-day pre-charge detention, including:
 - Broadening judicial scrutiny to include whether reasonable grounds exist to believe the detainee has committed a terrorist offense;
 - Requiring the Director of Public Prosecution to approve all applications for detention beyond seven days.
- Reject a model of judge-managed investigations that would allow for unlimited pre-charge detention.
- Relax the ban on using phone tap and other intercept evidence in criminal trials.
- Narrow the current definition of terrorism to ensure acts aimed at influencing the government are criminalized only where their purpose is to coerce or unduly compel it.

Extending Detention without Charge

The current effort to extend the maximum time period terrorism suspects may be held before being charged reflects a long-standing interest of British authorities. The current proposals represent the fourth time in six years that the government has sought to extend pre-charge detention in terrorism investigations. The Terrorism Act 2000 instituted a seven-day period, following extensive parliamentary debate, and a 14-day maximum was secured through a last-minute amendment to what would become the Criminal Justice Act 2003. In 2006 a government effort to extend pre-charge detention to 90 days was the subject of contentious debate in Parliament. A 28-day limit was eventually established in the Terrorism Act 2006.

Twenty-eight day's pre-charge detention is seven times longer than the maximum four days suspects may be held on suspicion of other serious crimes, including murder.

The government has now set out four options for extending pre-charge detention in terrorism investigations.¹ Its stated preference is to legislate now to extend the current limit, and Prime Minister Brown has suggested adding another 28 days, taking the maximum to 56 days.² A second option would involve creating a similar power that would come into force at some future date when deemed necessary and subject to an affirmative resolution in Parliament. The third option is to leave the current limit in place and have recourse to the emergency powers under the Civil Contingencies Act 2004, which provide for 30 days' detention, in addition to the standard 28-day period, in a declared state of emergency. Finally, option four contemplates a revolutionary change in criminal procedures by introducing judge-managed investigations modeled on the examining magistrates' system in civil law countries such as France and Spain. We analyze these four options below.

Damaging Impact on the “Battle for Hearts and Minds”

Human Rights Watch believes that extending pre-charge detention beyond 28 days is not only unnecessary but also deeply misguided.

Soon after taking office as prime minister in June 2007, Gordon Brown acknowledged the importance of winning “the battle of hearts and minds” in the struggle against terrorism. Since the July 2005 attacks in London, preventing radicalization and recruitment (the “prevent” strand) has been at the heart of the UK's counterterrorism strategy.³ The strategy states that one of the key elements of prevention is:

¹ Home Office, “Options for Pre-charge Detention in Terrorism Cases,” July 25, 2006, <http://security.homeoffice.gov.uk/news-publications/publication-search/counter-terrorism-bill-2007/pre-charge-detention.pdf?view=Binary> (accessed August 6, 2007).

² Prime Minister Gordon Brown, “Statement to Parliament on Security,” July 25, 2007, <http://www.number-10.gov.uk/output/Page12675.asp> (accessed August 6, 2007).

³ 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.

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.⁴

Extended pre-charge detention runs directly counter to this goal. It is likely to feed resentment and erode public trust in law enforcement and security forces among communities whose cooperation is critical in the fight against terrorism.

Lord Paul Condon, former Metropolitan Police commissioner, warned in December 2005 that the debate around extended pre-charge detention had already generated fears in law-abiding communities:

If we now go back and make it look as though we are going to challenge yet again the point of 28 days that we have reached, I fear that it will play into the hands of the propagandists, who will encourage young men and women—to all other intents and purposes, they are good people—to be misguided, brainwashed and induced into acts of martyrdom.”⁵

Were detention time-limits further extended, the risk of unjust extended detention is significant. According to Home Office statistics, 669 out of 1,228 individuals arrested as part of terrorism investigations between September 11, 2001, and March 31, 2007, were released without charge.⁶ It is therefore reasonable to expect that the new powers would lead to terrorism suspects—many if not most of whom would doubtless be British Muslims—being detained for months and then released without

⁴ Home Office, “Countering International Terrorism: The United Kingdom’s Strategy,” July 2006, <http://security.homeoffice.gov.uk/newspublications/publication-search/general/Contest-Strategy> (accessed September 25, 2007).

⁵ Lord Condon, House of Lords debate on December 13, 2005, quoted in Andrew Blick, Tufyal Choudhury, and Stuart Weir, “The Rules of the Game: Terrorism, Community and Human Rights,” Essex University Human Rights Centre for the Joseph Rowntree Reform Trust, http://www.jrrt.org/uk/Terrorism_final.pdf (accessed May 18, 2007), pp. 34-35.

⁶ Home Office, “UK police terrorism arrest statistics (excluding Northern Ireland) from 11 September 2001 – 31 March 2007,” <http://www.homeoffice.gov.uk/security/terrorism-and-the-law/> (accessed October 2, 2007).

charge. Terrorism suspects subject to pre-charge detention for more than 14 days are often held at Belmarsh prison, in southeast London.⁷

The prospect of Muslims detained for extended periods at Belmarsh without charge evokes the experience of indefinite detention of foreign Muslim terrorism suspects, mostly at Belmarsh prison, under Part IV of the Anti-Terrorism Crime and Security Act of 2001. Although extended pre-charge detention with an upper limit is of a different quality to indefinite detention without trial, it will affect far more people and risks being viewed as disproportionately targeting Muslims. Moreover, the government's option four would, in essence, allow for unlimited pre-charge detention.

The policy of indefinite detention, ruled unlawful by the House of Lords Judicial Committee in December 2004, is widely accepted to have had an adverse impact on race and community relations in the UK. The Islamic Human Rights Commission suggested in 2004 that detention without trial of Muslims under Part IV fed into the "demonization" of the Muslim community in the UK and cautioned,

Men who are released without charge after months or years in detention may never again trust a law enforcement official... If there are indeed a handful of Muslims who may wish to use violence to resolve grievances, they may be protected by sections of the community unwilling to cooperate with the authorities... A community which perceives itself as under threat from the rest of society may sympathise with such individuals and their aims.⁸

In a major study on the link between community relations and counterterrorism published in December 2006, the think-tank Demos concluded that the "growing sense of grievance, anger and injustice [among British Muslims] inadvertently

⁷ Alan Travis, "New anti-terror jail to replace Paddington Green station," *Guardian*, September 21, 2007, <http://politics.guardian.co.uk/print/0,,330785411-116499,00.html> (accessed September 25, 2007).

⁸ Islamic Human Rights Commission, "Submission to the Home Office in response to Discussion Paper 'Counter-terrorism powers: Reconciling Security and Liberty in an Open Society,'" August 2004, <http://www.ihr.org.uk/file/HomeOfficeSubmissionFinal.pdf> (accessed September 19, 2007), paras. 94, 98.

legitimises the terrorists' aims.”⁹ It is worth noting also that any proposal for unlimited pre-charge detention has strong echoes of the disastrous policy of internment in Northern Ireland, which is widely acknowledged to have alienated communities and promoted support for paramilitarism.

Measures that undermine human rights carry an immediate practical cost. Successful policing, and preventing and prosecuting terrorism, require public cooperation, and in particular tip-offs about suspicious activity. Confidence in the police among Muslims in the UK is already low: a telephone poll in April 2007 for Channel 4 News of 500 Muslim adults found that 55 percent of those questioned said they had no confidence in the police.¹⁰ Lacking confidence that the authorities will act justly, neighbors, acquaintances, and relatives are far less likely to report suspicious behavior. The risk may be even greater if they know that those arrested as a result of their tip may face extended detention without charge. The Home Affairs Committee has acknowledged “the danger, which should not be underestimated, of antagonizing many who currently recognize the need for cooperating with the police.”¹¹

Options 1 and 2: Extending Pre-charge Detention Time-limits

Human Rights Watch is resolutely opposed to a further extension of pre-charge custody time-limits. The current 28-day limit is already significantly longer than the maximum allowed in comparable legal systems, such as in the United States and Canada, and is by far the longest in the European Union.

Whether an extension in the time-limit to 56 days has immediate effect or requires further approval by parliament, the consequences of the power are the same. Detention for eight weeks without charge violates the fundamental right to liberty and security of the person and the associated protections against arbitrary state

⁹ Demos, “Bringing it Home: Community-based approaches to counter-terrorism,” December 2006, <http://www.demos.co.uk/publications/bringingithome> (accessed May 18, 2007), p. 14.

¹⁰ Jane Perlez, “London Police Mised Public, Report Says,” *New York Times*, August 2, 2007.

¹¹ House of Commons Home Affairs Committee, “Terrorism Detention Powers,” Fourth Report of Session 2005-06, Volume I, July 3, 2006, <http://www.publications.parliament.uk/pa/cm200506/cmselect/cmhaff/910/910i.pdf> (accessed August 30, 2007), para. 38.

detention enshrined in international law. The government has failed convincingly to demonstrate that such a serious interference with the right to liberty is necessary, especially in light of existing and proposed measures for improving police investigative capabilities. The additional safeguards the UK government proposes are insufficient to meet the requirements of international law.

Not shown to be necessary

Any interference with the fundamental right to liberty must be shown to be strictly necessary and proportionate. The government has acknowledged that there has yet to be a terrorism investigation where more than 28 days was required. As discussed below, options exist for addressing the stated concern that the complexity of terrorism investigations make it difficult to gather and process evidence within the current time-limit. Accordingly, the government has not shown the extension to be necessary.

Both the European Convention on Human Rights (ECHR, in article 5) and the International Covenant on Civil and Political Rights (ICCPR, in article 9) require that an individual arrested or detained on reasonable suspicion of having committed an offense must be “informed promptly” of the charge against him or her and “brought promptly” before a judge or other office authorized by law to exercise judicial power.¹² While international law does not establish a precise time-limit for preliminary detention, the consensus among human rights authorities is that the requirement of promptness should be interpreted conservatively. The European Court of Human Rights takes the view that “the degree of flexibility to the notion of ‘promptness’ is limited” and that consideration of the special features of any given case, including those involving terrorism investigations, cannot be taken “to the point of impairing the very essence of the right.”¹³

¹² European Convention for the Protection of Human Rights and Fundamental Freedoms, 213 U.N.T.S 222, entered into force September 3, 1953, ratified by the United Kingdom of Great Britain and Northern Ireland on September 3, 1953, as amended by Protocols nos. 3, 5, 8, and 11 which entered into force on September 21, 1970, December 20, 1971, January 1, 1990, and November 1, 1998, respectively, art. 5(2) and (3); International Covenant on Civil and Political Rights, adopted December 16, 1966, G.A. Res 2200A (XXI), 21 U.N. GAOR Supp. (No. 16) at 52, U.N. Doc. A/6316 (1966), 999 U.N.T.S. 171, entered into force March 23, 1976, ratified by the United Kingdom of Great Britain and Northern Ireland on May 20, 1976, art.9(2) and (3).

¹³ European Court of Human Rights, *Brogan and others v. United Kingdom*, Judgment of 29 November 1988, Series A. no. 145-B, available at www.echr.coe.int, para. 59.

The government has not yet provided clear evidence that the current 28-day period is insufficient to allow police investigators to amass enough evidence to bring suitable charges in terrorism cases. In its own discussion paper on pre-charge detention, the Home Office openly acknowledges that “there has been no case in which a suspect was released but a higher limit than 28 days would definitely have led to a charge.”¹⁴ Metropolitan Police Commissioner Sir Ian Blair stated in February 2007 that “there is currently no direct evidence to support an increase in detention without charge beyond 28 days.”¹⁵ In November 2006 then-Attorney General Lord Goldsmith said he had not yet seen evidence to support an increase beyond 28 days.¹⁶

According to government information, the power to detain suspects beyond 14 days has been used in the course of three terrorism investigations since the power went into effect in July 2006.¹⁷ In the 2006 airline plot investigation, 9 of the 24 individuals arrested were detained for over 14 days. Of these, six were charged and three were released without charge. Those three were held for 24 days, 27 days and 16 hours, and 27 days and 20 hours, respectively.¹⁸ A recent report by the parliamentary Joint Committee on Human Rights (JCHR) notes that the fact that these three were released without charge very close to the end of the period “could be said, on the face of it, to raise concerns about whether the power to detain for up to 28 days is being used to detain those against whom there is least evidence.”¹⁹ Eleven of those charged in connection with the airline plot were charged within 12 days.

In the absence of evidence that the 28-day limit either prevented the police from bringing charges at all or forced them to bring lesser charges, the arguments in favor

¹⁴ Home Office, “Options for Pre-charge Detention in Terrorism Cases,” p. 8.

¹⁵ Letter from Sir Ian Blair to the Chair of the Joint Committee on Human Rights (JCHR), undated but received on February 2, 2007, quoted in JCHR, “Counter-Terrorism Policy and Human Rights: 28 days, intercept and post-charge questioning,” Nineteenth Report of Session 2006-07, July 30, 2007, www.publications.parliament.uk/pa/jt200607/jtselect/jtrights/157/157.pdf (accessed August 6, 2007), para. 22.

¹⁶ Joshua Rozenberg, “Goldsmith dashes Blair’s hope of 90-day detention for terror suspects,” Daily Telegraph, November 20, 2006, www.telegraph.co.uk/news/main.jhtml?xml=/news/2006/11/20/nterr120.xml (accessed August 20, 2007).

¹⁷ Home Office, “Options for Pre-charge Detention in Terrorism Cases,” p. 5. Detention beyond 14 days was authorized in the airline plot investigation in August 2006, an operation led by the Greater Manchester police in September 2006, and in Glasgow in July 2007.

¹⁸ JCHR, “Counter-Terrorism Policy and Human Rights: 28 days, intercept and post-charge questioning,” para. 35.

¹⁹ *Ibid.*, para. 39.

are all set in the conditional tense. Prime Minister Brown has said “there *may be* circumstances in which detention beyond 28 days *could be* necessary” while Metropolitan Police Commissioner Blair has argued that “the complexity and scale of the global terrorist challenge, sophisticated use of technology, protracted nature of forensic retrieval and potential for multiple operations *may lead* to circumstances in which 28 days *could become* insufficient.”²⁰ Minister of State for the Home Office Tony McNulty has cautioned against focusing too much on evidence in the “narrow literal sense” as “this issue is as much about looking at where we are going over the next couple of years, in terms of the threat, as it is about assessing where we have come from.”²¹

Human Rights Watch takes the view that measures that seriously impact fundamental human rights should not be introduced on the basis of possible future need. We agree with the Joint Committee on Human Rights that any proposal to extend the current period of pre-charge detention “should ... be justified by clear evidence that the need for such a power already exists, not by precautionary arguments that such a need may arise at some time in the future.”²²

Alternatives exist

Even if the government were to convincingly demonstrate that the current period of pre-charge detention is insufficient, it should pursue human-rights-compliant alternatives before considering a measure with such grave consequences for human rights.

There are a number of options for improving police capacity to obtain and analyze evidence within existing pre-charge detention time-limits. Some of the powers, such as the offense of acts preparatory to terrorism, already exist. The impact of such measures should be fully assessed before any further attempt to interfere with the right to liberty.

²⁰ *Ibid.*, para. 22.

²¹ House of Commons debate on July 10, 2007, www.publications.parliament.co.uk/pa/cm200607/cmhansrd/cm070710/debtext/70710-0007.htm (accessed August 20, 2007), column 1348.

²² JCHR, “Counter-Terrorism Policy and Human Rights: 28 days, intercept and post-charge questioning,” para. 52.

These options include, most notably:

Post-charge questioning

The government has indicated its intention to seek legislation that will authorize investigators to question terrorism suspects after they have been charged.²³ It acknowledges that the power would “reduce pressure on investigators.”²⁴ Under the government proposal, consent of the suspect is not required, and any answers provided may be used as evidence at trial. Questioning must be limited to aspects relating to the terrorism offense with which the person has been charged. If the case goes to trial, in respect of post-charge questioning the jury may be invited to draw adverse inferences only if an individual has refused to answer questions and has failed to mention facts that he or she later relies on in his or her defense, provided the person has been able to consult with a lawyer beforehand. This is already the position for pre-charge questioning. Provided that adverse inferences are limited to those circumstances and a lawyer is present at all times, the proposed change does not unduly compromise the right to silence.

The House of Commons Home Affairs Committee, the Joint Committee on Human Rights, and the nongovernmental organizations (NGOs) Liberty and Justice have endorsed broadening post-charge questioning powers. Appropriate safeguards should be in place, including the presence of legal counsel at all times and a warning that adverse inferences may be drawn from a failure to answer questions.

Greater use of the “Threshold Test”

Normally, prosecutors must be satisfied that the evidence before them discloses a “reasonable prospect of conviction” before charging a suspect with a particular offense. This is referred to as the “Full Code [for Crown Prosecutors] Test.” In cases where there is insufficient evidence to meet this requirement, but authorities are convinced of the need to keep an individual in custody, prosecutors may apply a lower test (known as the “Threshold Test.”) This may be applied when there is

²³ Home Office, “Possible Measures for Inclusion in a Future Counter Terrorism Bill,” July 25, 2007, <http://security.homeoffice.gov.uk/news-publications/publication-search/counter-terrorism-bill-2007/ct-bill-consultation.pdf?view=Binary> (accessed August 6, 2007), p. 12.

²⁴ Home Office, “Options for Pre-charge Detention in Terrorism Cases,” p. 6.

reasonable suspicion, based on evidence admissible in court, that a suspect has committed a crime and there is a reasonable prospect that further evidence will become available.²⁵ The Code for Crown Prosecutors stipulates that the threshold test may be applied for a “limited period” and requires that the Full Code Test be applied “as soon as reasonably practicable.”²⁶ The use of the Threshold Test, for a limited period, could assist in complex investigations while preserving the rights of the defendant. Greater use of the Threshold Test in terrorism cases has been endorsed by the Joint Committee for Human Rights, the House of Commons Home Affairs Committee, and the NGO Justice.²⁷

Use of intercept evidence at criminal trials

Relaxing the ban on the use of phone tap and other intercept evidence would bring two benefits in the context of complex investigations. First, it would make it easier for prosecutors to assemble the evidence necessary to bring charges, since they could rely on intercept materials. Second, it might allow greater use of the Threshold Test since intercept evidence could provide a sufficient evidential basis for a “reasonable suspicion” of wrongdoing in terrorism cases (see below for a more detailed discussion of the intercept ban).

The government contends that the above measures “cannot do more than reduce the risk [that investigation teams will come up against the limit of pre-charge detention] – they cannot eliminate it entirely.”²⁸ It is challenging to think of *any* measure, with the unacceptable exception of unlimited detention, that would eliminate this risk.

²⁵ Crown Prosecution Service, Code for Crown Prosecutors, <http://www.cps.gov.uk/publications/doc/code2005english.pdf> (accessed August 30, 2007), section 6.

²⁶ *Ibid.*

²⁷ JCHR, “Counter-terrorism Policy and Human Rights: Prosecution and Pre-Charge Detention,” Twenty-fourth Report of session 2005-06, August 1, 2006, <http://www.publications.parliament.uk/pa/jt200506/jtselect/jtrights/240/240.pdf> (accessed August 30, 2007), para. 127; House of Commons Home Affairs Committee, “Terrorism Detention Powers,” para. 112; Justice, “Terrorism Detention Powers, House of Commons Home Affairs Committee,” December 2005, <http://www.justice.org.uk/parliamentpress/parliamentarybriefings/index.html> (accessed August 30, 2007), para. 4.

²⁸ Home Office, “Options for Pre-charge Detention in Terrorism Cases,” p. 6.

Inadequate judicial safeguards for pre-charge detention

Judicial control is an essential feature of the requirements of article 5 of the ECHR and article 9 of the ICCPR. This is reflected in the government's proposals to strengthen judicial oversight and parliamentary scrutiny under any further extension of pre-charge detention. In our view, however, neither the scope of judicial oversight currently in place for the 28-day period nor the additional safeguards proposed by the government are adequate to protect against violations of fundamental rights.

Under the current procedure, the police must apply to the District Judge for extensions of detention beyond 48 hours up to 14 days. For extensions beyond 14 days, the Crown Prosecution Service (CPS) must submit an application to a High Court Judge. The detainee is entitled to have a lawyer represent his or her interests before the judge. However, the judge can deny the detainee *and* legal representative the right to be present at any part of the hearing, and the judge can deny the detainee and legal representative access to material used by the CPS to argue for further detention.²⁹ We echo the repeated concern of the Joint Committee on Human Rights that these provisions deny the detainee the right to a full adversarial hearing under fair trial standards.³⁰

Reviewing detention in the absence of the detainee or his/her legal representative does not meet the requirements of adequate judicial supervision. In the case of *Brogan and others v. United Kingdom*, the European Court of Human Rights found that the detention of suspected IRA members for periods ranging from four days and six hours to six days and sixteen hours before an appearance before a judge could not be justified without “an unacceptably wide interpretation of the plain meaning of the word ‘promptly.’”³¹ The United Nations Human Rights Committee has clarified that article 9 of the International Covenant on Civil and Political Rights requires that delays in bringing an arrested individual before a judge “not exceed a few days.”³²

²⁹ These powers are provided in paragraphs 33 and 34 of Schedule 8 of the Terrorism Act 2000.

³⁰ JCHR, “Counter-Terrorism Policy and Human Rights: 28-days, intercept and post-charge questioning,” para. 59.

³¹ *Ibid.*, para. 62.

³² UN Human Rights Committee, General Comment 8, article 9 (Sixteenth session, 1982), Compilation of General Comments and Recommendations Adopted by Human Rights Treaty Bodies, U.N. Doc. HRI/GEN/1/Rev.1 at 8 (1994), para. 2. The HRC said that 72 hours before charging in Uzbekistan was “too long and not in compliance with article 9(2),” in “Consideration of

Article 5(4) of the European Convention guarantees the right to challenge the legality of detention. The judicial review to determine this question should be, according to European Court case-law, “wide enough to bear on those conditions which are essential for the ‘lawful’ detention of a person according to Article 5(1).”³³ The current scope of judicial scrutiny in terrorism cases in the UK does not meet this requirement. In applications for extending pre-charge detention under the Terrorism Act 2000, the judge—either the District Judge or the High Court Judge—is asked to assess two things: first, whether there exist reasonable grounds for believing that continued detention is necessary to obtain, preserve, and adequately analyze evidence; and second, whether the police are showing due diligence and expediency in the conduct of the investigation.³⁴ Effective judicial supervision of pre-charge detention would require a judge to evaluate whether reasonable grounds exist to believe the individual being detained has committed a terrorist offense before renewing any order to detain a person without charge.

The additional safeguards proposed by the government for extensions beyond 28 days neither remedy the existing shortcomings, nor make further extension acceptable. The government proposes that 1) the Director of Public Prosecutions (DPP) approve all requests before applications are made to the High Court judge; 2) the Home Secretary notify parliament each time an extension beyond 28 days is granted, and provide a further statement on the individual case, with parliament having the option to scrutinize and debate; and 3) the Independent Reviewer of terrorism legislation present a report on individual cases of extensions beyond 28 days.

DPP approval of all applications to the High Court adds a welcome filter; indeed, this could usefully be instituted for all extensions beyond seven days. It does not, however, address the key concern about inadequate judicial scrutiny. Similarly, parliamentary scrutiny and independent DPP review are no substitute for a proper judicial review. In particular, Parliament is ill-suited to scrutinizing individual cases.

Reports by States Parties Submitted under Article 40 of the Covenant, Concluding observations of the Human Rights Committee: Uzbekistan,” CCPR/CO/71/UZB, April 26, 2001, para. 12

³³ European Court of Human Rights, *E v. Norway*, Judgment of 29 August 1990, Series A no. 181, available at <http://www.echr.coe.int>, para. 50.

³⁴ This is laid out in paragraph 32 of Schedule 8 to the Terrorism Act 2000, as amended by para. 24 of the Terrorism Act 2006.

By their very nature, these safeguards involve post-facto analysis of CPS decisions and court rulings, likely well after an individual has been detained for a significant amount of time, and in any event with no power to intervene directly to remedy the harm. The most effective way to protect against arbitrary detention is to impose strict, and short, detention time-limits.

Option 3: Reliance on Emergency Powers

The government has included recourse to the emergency powers set out in the Civil Contingencies Act of 2004 as a possible alternative to a further extension to pre-charge detention time-limits. Human Rights Watch acknowledges that genuine emergencies may require exceptional responses, and international human rights law allows for derogations from certain human rights obligations in such situations. Derogations allow states to impose serious restrictions on rights and freedoms, such as the freedom of movement, freedom of association, and the right to liberty. In the UK, the Civil Contingencies Act (CCA) 2004 authorizes the government to enact emergency regulations during “an event or situation that threatens serious damage to human welfare ... or the environment” in the United Kingdom or in the face of “war or terrorism that threatens serious damage to the security of the United Kingdom.”³⁵

Parliament must be seized of the emergency regulations as speedily as possible, and the powers taken will lapse if not approved by parliament within seven days of notification. The broad range of powers arguably includes the ability to detain without charge for the duration of the declared emergency.³⁶ Powers taken under the CCA may last up to 30 days, meaning pre-charge detention under these circumstances could last 58 days (the current 28-days plus 30 days). Because these powers may be renewed at any time, subject to parliamentary approval, pre-charge detention ordered under the CCA could conceivably last much longer.

The use of the powers and mechanisms created under the CCA in the context of the regular law enforcement response to the threat of terrorism would be both

³⁵ Civil Contingencies Act (CCA) 2004, section 19(1).

³⁶ Section 22 of the CCA states that regulations may “prohibit, or enable the prohibition of, movement to or from a specified place; require, or enable the requirement of, movement to or from a specified place.”

disproportionate and unsustainable. We note that these powers, which entered into force in December 2004, were not invoked in response to the July 2005 attacks in London. The availability of these powers is of limited assistance in informing the debate about a proper limit on pre-charge detention under normal circumstances.

Option 4: Judge-managed Detention without Time-limits

As a fourth option, the government has put forward the idea of introducing judge-managed investigations modeled on the French system of specialized terrorism examining magistrates. Under the government's proposal, specialist circuit judges would be assigned to cases after suspects had spent 48 hours in detention, and would oversee the investigation until its conclusion. The Privy Counsellor Review Committee (commonly known as the "Newton Committee"³⁷) first recommended in 2003 importing certain aspects of the inquisitorial approach in terrorism cases, and the idea has since been endorsed and developed upon by Lord Carlile and the House of Commons Home Affairs Committee.³⁸

In the French inquisitorial system the examining magistrate determines whether an official judicial investigation is warranted and then oversees such investigations with a view to protecting both the public interest and the rights of the suspect. Examining magistrates are supposed to be impartial arbiters who seek to establish the truth, and are entrusted with uncovering both incriminating and exculpatory evidence. Since the mid-1980s France has centralized terrorism cases among a specialized cadre of counterterrorism examining magistrates who work in close cooperation with the French domestic intelligence service, the Direction du Surveillance Territoire (DST), as well as with a specialized corps of counterterrorism prosecutors.

The UK government's consultation document does not provide concrete details of how judge-managed investigations might operate with respect to pre-charge detention in the UK. But were the policy to be further developed, it would likely be

³⁷ After its chair, Lord Newton of Braintree.

³⁸ Privy Counsellor Review Committee, "Anti-terrorism, Crime and Security Act 2001 Review: Report," December 2003, paras. 26(c) and 224-235; Lord Carlile of Berriew QC, "Proposals by Her Majesty's Government for changes to the laws against terrorism," October 6, 2005, paras. 55-69; and House of Commons Home Affairs Committee, "Terrorism Detention Powers," paras. 125-132.

informed by the proposal developed by Lord Carlile in 2005 during the debate leading up to the adoption of the Terrorism Act 2006.³⁹ At that time, Lord Carlile recommended that detention beyond 14 days be overseen by an examining judge drawn from “a small group of security-cleared designated senior circuit judges.”⁴⁰ On the basis of full access to all details of the investigation, the judge would determine on a weekly basis whether further detention is warranted. The defense would be given “suitable opportunity” to contest extended detention, though the judge would have the discretion as to whether to hold oral hearings; appeals against extended detention would be decided by the High Court. As in the traditional inquisitorial system, the senior circuit judge in charge of the case would have the power to order specific investigations.⁴¹

Grafted onto the adversarial system in the UK, judge-managed investigations under these terms would essentially introduce unlimited pre-charge detention. In July 2007 Lord Carlile called the debate on the maximum number of days of pre-charge detention “sterile” and repeated his recommendation that judges determine the length of pre-charge detention in each individual case “on an evidence basis.”⁴² His comments came shortly after the president of the Association of Chief Police Officers (ACPO), Ken Jones, advocated “judicially supervised detention for as long as it takes.”⁴³

The French and UK systems cannot be easily compared. In France, police custody in terrorism cases may last up to six days, during which time suspects have severely limited access to counsel and may be interrogated at will. By the end of the maximum prescribed length of police custody, the suspect must be brought before

³⁹ An accompanying document on the French examining magistrates system focuses primarily on the treatment of sensitive intelligence material, with a view to determining whether such a system could be employed in the UK to allow intercept material to be adduced in criminal proceedings. Interestingly, the document concludes that “if we were to try and emulate the examining magistrate system here, we would need to import the system in its entirety rather than borrow and graft certain elements.” Home Office, “Terrorist Investigations and the French Examining Magistrates System,” July 2007, <http://security.homeoffice.gov.uk/news-publications/publication-search/counter-terrorism-bill-2007/examining-magistrates.pdf?view=Binary> (accessed August 6, 2007), p. 12.

⁴⁰ Lord Carlile, “Proposals by Her Majesty’s Government,” para. 67.

⁴¹ *Ibid.*

⁴² “Today Programme,” BBC Radio 4, July 16, 2007.

⁴³ “Police defend longer terror limit,” BBC News Online, July 16, 2007, http://news.bbc.co.uk/2/hi/uk_news/6899363.stm (accessed August 23, 2007).

the examining magistrate for an interrogation at which he or she is represented by a lawyer. At this stage, the examining magistrate must decide whether there is sufficient evidence, based on the entire case file including the prosecutor's preliminary findings (*réquisitoire introductif*), to warrant placing the suspect under official investigation (*mettre en examen*). Whereas traditionally it was the examining magistrate who determined whether to remand the suspect into pretrial detention, since January 2001 this responsibility is in the hands of a "liberty and detention judge" (*juge des libertés et de la détention*). Months and in some cases years may go by before the examining magistrate concludes the investigation, the prosecution draws up the official indictment (*requisitoire définitif*), and the case file is passed to the trial chamber.

In our view, it is the opening of the official investigation in France, after a maximum of six days in police custody—and not the indictment—that is most analogous to the determination of the charge in the UK. The standard applied by the examining magistrate at this stage is comparable to the Threshold Test for charging available to crown prosecutors (see above): a reasonable suspicion that a specific offense has been committed based on available evidence and a reasonable expectation that further evidence will become available in the course of the investigation.⁴⁴ And it is at this stage in both systems that the suspect is removed from police custody and placed in appropriate facilities for those awaiting trial.⁴⁵

Human Rights Watch has serious concerns about criminal procedures in terrorism investigations in France.⁴⁶ The proposal for judge-managed investigations in the UK, however, appears to do away with even the most basic safeguards built into the French system. Whereas in France there is a clear limit on the length of police custody (six days) and it is a special "liberty and detention judge" who makes decisions with respect to pretrial detention, judge-managed investigations in the UK

⁴⁴ Code for Crown Prosecutors, para. 3.3. The standard for the Full Code Test in charging is the much higher "reasonable prospect for conviction."

⁴⁵ In the UK, terrorism suspects held beyond 14 days should normally be transferred to a designated prison as soon as practicable, though they may continue to be detained at a police station for a variety of reasons. Code of Practice H: detention, treatment and questioning by police officers under section 41 of, and Schedule 8 to, the Terrorism Act 2000.

⁴⁶ See Human Rights Watch, "More Safeguards Needed in Anti-Terrorism Bill," letter to French Senators, December 9, 2005, <http://hrw.org/english/docs/2005/12/09/france12182.htm>.

would apparently involve unlimited pre-charge detention authorized by the same examining judge supervising and directing the investigation.

Human Rights Watch is opposed to the introduction of a wholly exceptional criminal procedure in terrorism cases. There is a very real danger that such an approach in the UK would quickly give rise to a system of preventive detention. Preventive detention—where the purpose is to prevent and disrupt criminal activity rather than investigate activity with a view to prosecution—is an abuse of state power in direct violation of article 5 of the European Convention. The House of Commons Home Affairs Committee concluded in 2006 that arrests under the Terrorism Act 2000 are being used, in its view appropriately, as a kind of preventive detention to disrupt terrorist conspiracies. The committee recommended that this preventive purpose be given “explicit recognition” and new forms of judicial oversight implemented “to enable proper independent consideration to be given where an arrest is to be made for its disruptive and preventive value.”⁴⁷ It is worth noting that the committee looked to Lord Carlile’s suggestion of judge-managed investigations as a sensible approach in these cases.

The government rightly rejected in 2006 the suggestion that “prevention” be included as a statutory ground for detention, on the grounds that it would run foul of international human rights law.⁴⁸ It must remain steadfast in this position and reject any option that would effectively introduce preventive detention powers.

Enhanced Sentencing and Notification Requirements

The government has proposed enhanced sentences for those convicted of general criminal offenses where terrorism is involved.⁴⁹ This would apply in cases where an individual is convicted of an ordinary offense—such as forgery, fraud, or robbery—committed for a terrorism-related purpose. Under the government’s proposal, as

⁴⁷ House of Commons Home Affairs Committee, “Terrorism Detention Powers,” paras. 94, 129.

⁴⁸ The Government Reply to the Twenty-fourth Report from the Joint Committee on Human Rights of Session 2005-06, “Counter-terrorism Policy and Human Rights: Prosecution and Pre-charge Detention,” September 2006, <http://www.officialdocuments.gov.uk/document/cm69/6920/6920.pdf> (accessed August 29, 2007), p. 7.

⁴⁹ Home Office, “Possible Measures for Inclusion in a Future Counter Terrorism Bill,” p. 13.

briefly outlined in the consultation document, the court would determine whether the offense was terrorism-related, and all parties would have the right to appeal against such a determination.

It is our understanding that a judge would make this determination upon conviction, and take this into account when sentencing. The maximum sentence for the offense would remain unchanged, but a finding by the judge that the crime was committed with a terrorist intent would suggest a sentence on the higher end of the scale. We understand that the provisions in the Criminal Justice Act 2003 that allow for enhanced sentences for ordinary offenses aggravated by racial or religious motivation provide a model for the proposal.⁵⁰

Our concerns arise from the fact that the determination would trigger notification requirements the government wishes to institute for terrorism offenders. Under the government's proposal, anyone convicted of a terrorism offense or ordinary terrorism-related offense and sentenced to 12 months or more in prison would be required to register his or her name and address at the local police station, and inform police of any other address used for five days or more and any foreign travel that will last for more than three days. A breach of the notification requirement would be a criminal offense punishable by up to five years in prison.

It is unclear from the government's proposal whether the criminal standard of proof would apply to the judge's determination that an ordinary crime was committed with a terrorist purpose. In our assessment, fair trial standards require that a measure that carries with it the potential for such a severe sanction, as the notification requirement does, should only be imposed where there is evidence that establishes beyond a reasonable doubt that the underlying offense was committed for a terrorism-related purpose.

⁵⁰ Criminal Justice Act 2003, sections 145 and 146.

Intercept Evidence

Human Rights Watch welcomes the government's decision to initiate a Privy Counsellor review of the ban on admissibility of intercept evidence at trial. The UK is the only Western country that prohibits the use in court of evidence from the monitoring of electronic communications. There is 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. Indeed, Director of Public Prosecutions Sir Ken Macdonald QC has called the ban "one of the main obstacles" to prosecuting terrorism suspects.⁵¹

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 former 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 NGOs Liberty and Justice. In April 2007 the House of Lords approved an amendment to the Serious Crimes Bill introduced by Lord Lloyd that would allow for the use of intercept evidence.⁵²

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.⁵³ 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. Moreover, timely reviews and legislative amendments can address rapid changes in communications technology to ensure

⁵¹ "CPS chief warns MPs over terror threat to human rights," Guardian Unlimited, January 23, 2007, <http://www.guardian.co.uk/terrorism/story/0,,1997090,00.html> (accessed October 15, 2007).

⁵² The amendment was removed when the bill returned to the House of Commons. At this writing, the draft legislation remained before the House of Commons.

⁵³ Justice, "Intercept Evidence: Lifting the Ban," October 2006, <http://www.justice.org.uk> (accessed May 15, 2007).

that interceptions are carried out lawfully and usefully for the purposes of prosecution.

Definition of Terrorism

The government proposes to amend the Terrorism Act 2000 so that acts made for the purposes of advancing a racial or ethnic cause are included explicitly in the definition of terrorism.

Under the Act, terrorism is currently defined as “the use or threat [of action] designed to influence the government or to intimidate the public or a section of the public, and the use or threat is made for the purposes of advancing a political, religious or ideological cause.”⁵⁴

The definition of terrorism under the Terrorism Act forms the basis for a number of criminal offenses, including the encouragement of terrorism, and triggers wide-ranging powers, including: the designation and proscription of terrorist organizations; and police powers to stop and search without suspicion, to arrest a terrorism suspect without a warrant and, notably, to detain terrorism suspects without charge for 28 days.

The definition has been the subject of significant criticism as overly broad and lacking in legal precision.⁵⁵ International human rights law requires that any law creating a criminal offense must be clear and precise enough for people to understand what conduct is prohibited and to regulate their behavior accordingly.⁵⁶ Carefully crafted laws narrow the scope for overreaching judicial interpretation. The organization Justice concluded that the definition leaves “broad scope for interference with fundamental rights” and recommended specific amendments to

⁵⁴ Terrorism Act 2000, section 1(1). Serious violence against a person, serious damage to property, endangerment of a person’s life (other than that of the person committing the action), creation of a serious risk to the health or safety of the public or a section of the public, and interference or serious disruption of an electronic system are listed as actions falling within the definition.

⁵⁵ See for example, Amnesty International, “United Kingdom: Human rights: a broken promise,” February 23, 2006, p. 10.

⁵⁶ ECHR, art. 7.

clarify and narrow the acts falling within the definition.⁵⁷ The Joint Committee on Human Rights expressed its concerns about the “breadth” of the definition in relation to a number of offenses and police powers on which it is based.⁵⁸

We have already seen instances in the UK in which authorities have relied on the definition to justify the application of counterterrorism powers to non-violent protestors whose actions fall outside any common sense definition of the term “terrorism.” The use of stop and search and arrest powers under the Terrorism Act 2000 during the protests against Heathrow airport expansion in mid-August 2007 is a recent example.

The government-proposed change is one of two amendments recommended by Lord Carlile in order to “cement into the law clarity that terrorism includes campaigns of terrorist violence motivated by racism.”⁵⁹

Lord Carlile conducted an assessment of the definition of terrorism during 2006 and 2007. In his report on the subject, published in March 2007, he concluded that the UK definition is “consistent with international comparators and treaties, and is useful and broadly fit for purpose.”⁶⁰ He proposed only two amendments to the definition. In addition to including racism as a motivating cause of terrorism, Lord Carlile recommended amending the language so that only actions or the threat of action designed *to intimidate* the government, instead of the much broader *influence*, fall within the definition.

57 Justice, “The Definition of ‘Terrorism’ in UK Law. Justice’s Submission to the Review by Lord Carlile of Berriew QC,” March 2006, <http://www.justice.org.uk/parliamentpress/parliamentarybriefings/index.html> (accessed August 30, 2007). In particular, Justice recommended drawing a clearer distinction between actions involving violence against persons and attacks on property or disruption of an electronic system: “In our view, actions which do not involve direct threats to physical integrity should not be considered terrorist acts unless they involve some major threat to human welfare” (para. 63).

58 JCHR, “Counter-terrorism Policy and Human Rights: Terrorism Bill and related matters,” Third Report of Session 2005-06, December 5, 2005, <http://www.publications.parliament.uk/pa/jt200506/jtselect/jtrights/75/75i.pdf> (accessed August 30, 2007), para. 13.

59 Lord Carlile, “The Definition of Terrorism,” March 2007, <http://www.homeoffice.gov.uk/documents/carlile-terrorism-definition?view=Binary> (accessed September 25, 2007), para. 66.

60 *Ibid.*, para. 86(4).

We understand that there are concerns that the use of the verb “to intimidate” in the definition may cause difficulties when applied to a government but we do not believe this should be an obstacle to narrowing the definition in line with Lord Carlile’s suggestion. Alternatives used in international treaties include *to coerce*, *to unduly compel*, and *to subvert*. We note that the European Union Framework Decision of 2002 and the Council of Europe Convention on the Prevention of Terrorism of 2005 use the formula *to unduly compel* a government to do or abstain from doing any act.

Human Rights Watch believes the definition of terrorism must be crafted narrowly and interpreted conservatively to limit the scope for arbitrary and discriminatory enforcement. The UN special rapporteur on human rights and terrorism, Martin Scheinin, having reviewed the approach of the United Nations Security Council and state practice, argues for a cumulative characterization of terrorism with reference to agreed-upon offenses in existing counterterrorism conventions when committed “with the intention of causing death or serious bodily injury, or the taking of hostages; and for the purpose of provoking a state of terror, intimidating a population, or compelling a Government or international organization to do or abstain from doing any act.”⁶¹ This is based on the language in Security Council Resolution 1566 (2004) calling on states to prevent and punish such acts.⁶²

The current definition of terrorism in the UK is at odds with this formulation, because it includes actions other than those taken with intent to cause death or serious injury and hostage taking. Human Rights Watch considers that, at a minimum, the government should adopt Lord Carlile’s recommendation to tighten the language with respect to the purpose of a terrorist act, so as to limit its potential misapplication against peaceful protesters.

⁶¹ UN Commission on Human Rights, Report of the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism, Martin Scheinin, E/CN.4/2006/98, December 28, 2005, <http://www.icj.org/IMG/Scheininreport.pdf> (accessed October 2, 2007), para. 42.

⁶² UN Security Council, Resolution 1566 (2004), S/RES/1566/2004, <http://daccessdds.un.org/doc/UNDOC/GEN/NO4/542/82/PDF/NO545282.pdf?OpenElement> (accessed October 2, 2007), para. 3.