House of Lords
House of Commons

Joint Committee on
Human Rights

Counter-Terrorism Policy and Human Rights: Terrorism Bill and related matters

Third Report of Session 2005-06

Volume II

Oral and Written Evidence

Ordered by The House of Lords to be printed 28 November 2005
Ordered by The House of Commons to be printed 28 November 2005

HL Paper 75-II
HC 561-II
Published on 5 December 2005 by authority of the House of Lords and the House of Commons London: The Stationery Office Limited
£18.50

Joint Committee on Human Rights

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Counter-Terrorism Policy and Human Rights: Terrorism Bill and related matters

Oral Evidence

Monday 24 October 2005

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Mr Peter Clarke CVO QPM, Deputy Assistant Commissioner, Head of the Metropolitan Police Anti-Terrorist Branch and National Co-ordinator of Terrorist Investigations and
Mr Ken Jones QPM, Chief Constable of Sussex Police, Head of Business Area for Terrorism and Allied Matters, Association of Chief Police Officers **Ev 15**

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Mr Livio Zilli, UK Researcher, Amnesty International
Dr Eric Metcalfe, Director of Human Rights Policy, Justice
Mr Gareth Crossman, Director of Policy, **Mr James Welch**, Legal Director, Liberty
Ms Alexandra Marks, Chair, Reform Board, The Law Society **Ev 22**

Counter-Terrorism Policy and Human Rights: Terrorism Bill and related matters

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Oral evidence

Taken before the Joint Committee on Human Rights

on Monday 24 October 2005

Members present:

Mr Andrew Dismore, in the Chair

Campbell of Alloway, L.	Mr Douglas Carswell
Judd, L.	Mary Creagh
Lester of Herne Hill, L.	Dr Evan Harris
Plant of Highfield, L.	Dan Norris
Stern, B.	Mr Richard Shepherd

Witness: **Rt Hon Charles Clarke,** a Member of the House of Commons, Secretary of State for the Home Department, examined.

Q1 Chairman: Good afternoon, ladies and gentlemen and thank you for coming to meet with us, Home Secretary. This is the first of two evidence sessions in the initial phase of our inquiry into counter-terrorism policy and human rights. We are examining the human rights implications of the legislative and non-legislative measures proposed by the government since the bombings of 7 July and the attempted bombings of 21 July in London. We are not investigating the events of those days or the shooting of Mr de Menezes the following day, 22 July. Nevertheless, for the avoidance of doubt, I should make clear at the outset to our witnesses and to the press and public that discussion of those events is in any event prevented by the *sub judice* rules of both Houses. These rules prevent discussion in Parliament of cases which are actually before the courts, including the Coroner's courts. The aim of the rules is to safeguard the right to a fair trial or a fair consideration of events at an inquest. It is also important that Parliament and the courts give mutual recognition to their respective roles and do not interfere in each other's affairs. In addition to the matters I have already mentioned, the *sub judice* rules apply to the actual case studies set out in the briefing note submitted by Assistant Commissioner Hayman to the Home Secretary on 6 October and other active criminal or civil proceedings. It follows that there should be no discussion of those cases and I will intervene if necessary to ensure the *sub judice* rules are not broken. I hope everybody understands why we cannot get into the detail of some of the things that have been particularly in the news. Perhaps I could start, Home Secretary, by asking you a general question and put the general point that we very clearly recognise that the state is under various positive obligations to take effective measures to protect the safety and security of people within the jurisdiction against the threat of terrorist attack and to bring the perpetrators to justice. We also welcome your statements that in taking such measures the government intends to comply with all of its international human rights obligations. Can we also proceed on the basis that you are in complete agreement with the declaration of the UN Security Council, echoed by the Committee of Ministers at the Council of Europe, that states must ensure that any measure taken to combat terrorism complies with all their obligations under international law, in particular, international human rights, refugee and humanitarian law?
Mr Clarke: Yes. I very much appreciate being invited to give evidence before the Committee and before your chairmanship. We have had a number of very good sessions and I am looking forward to continuing that in this session of Parliament. I think the role of the Committee is very important as we try and address these very difficult questions. The short answer to your question is yes. I think it is important that any legislation that we propose is consistent with both the European Convention of Human Rights and also human rights law in general. In terms of the United Nations, the declaration of the Security Council in September of this year on terrorism I think was a very powerful and important document which I subsequently discussed with Kofi Annan, the Secretary General of the United Nations, about how we could work to take it forward. I think the best way to protect our human rights in this country is by ensuring we take measures of the type that I am putting before Parliament.

Q2 Chairman: Can I go on to refer to your speech to the European Parliament when you made a number of proposals for countering the terrorist threat? You accepted it was incumbent on the government, because we are advocating change, to make the case that measures will in fact make a practical difference. Do you accept that the same onus rests on the government to demonstrate to the Parliament here that the necessity for the measures it is proposing, for example in relation to the creation of new criminal offences, by identifying the gaps in the law which exist and providing evidence to demonstrate that the law's protection against terrorism is inadequate?
Mr Clarke: I do accept that. In fact, much of the current law that is proposed and has had its first reading and will be debated in the Commons next Wednesday of this week is designed to make our law

compliant with the Council of Europe proposals in relation to terrorism. The arguments, for example, are clearly that if we are going to get to prosecution of cases then offences such as acts preparatory to terrorism need to be brought within the remit of the law. I very much accept what you say. There is however quite an important qualification to put into that, which is that we are working all the time to prevent acts of terrorism and acts of terrorism succeeding, proving that a particular legislative measure or a particular clause in a Bill or a particular power is the single thing which has prevented a particular event or proposed attack taking place. It is not always easy and I do argue that there is a range of measures which are needed to make it more difficult for terrorists and more easy for us to protect our society. The basic test ought to be necessity, as you implied in your question. I should say in candour that proving necessity, which is a very strong word, in relation to any particular measure is never easy.

Q3 Chairman: Can I ask you what assessment you have made of the risk of tougher measures being counterproductive in terms of perhaps pushing people towards those who would evilly wish to recruit people for terrorist activities?

Mr Clarke: We have made a great deal of assessment of that particular question. We have worked closely with the Muslim community in particular in this context but more generally the faith communities in order to try and ensure that, in so far as we can achieve it, the measures that we propose could not lead to any generalised counter reaction. I believe that is true of the measures that we are proposing, that they do not lead to a counter reaction of any type which would make it more difficult for us to protect ourselves against terrorists and extremists who by definition are a very small minority within a wider community. The same applies when one is talking about a particular event or a particular situation. I answered the question first with reference to the generality of proposed legislation but of course, when you come to a specific measure as well, it is very important to have in mind precisely the balance of considerations that you have just stated. I have discussed in length with the police that particular qualification and both they and the prosecutors and others are exactly of the view that the balance that you set out in your question is something that has to be in mind at the time that any particular measure is proposed under this proposed legislation or indeed under current legislation as well.

Q4 Chairman: Earlier this month there was some speculation in the press that the government would consider departing from the Human Rights Act, either through an amendment to the Act or derogating, if it was found that the new proposals were not compliant. Would you like to comment on whether in fact that is what the government's intention is?

Mr Clarke: It is not what the government's intention is. What we are doing—I said this in the speech to the European Parliament which you referred to a second ago as well—is seeking to inquire whether the jurisprudence which has emerged, in particular the *Chahal* case, in the European Court, is the jurisprudence which reflects the modern situation in the best possible way. To that event, we have joined a case which is taking place between an Algerian and the Dutch Government in front of the European Court, with the agreement of the Dutch Government, to ask the European Court to look again at the *Chahal* judgment and how it would operate—I emphasise not to withdraw from the Convention or to amend the Convention or any other legal step of that kind, but to ask the Court to reconsider its view on the *Chahal* judgment in the light of the current circumstances. I am delighted to say that a number of other European governments have also joined that case to make the same request so I hope that in the reasonably near future the European Court will consider whether the jurisprudence which took place and concluded with the *Chahal* judgment, you will recall by I think a 12:7 vote in the Court at that time on that particular case, should be relooked at in the current circumstances. I think that is the best way to proceed as far as the European Court is concerned. It is also the case that we are pursuing memoranda of understanding with a number of governments with a view to providing a secure return to a particular country without threat of violating Article 3 of the European Human Rights Convention. I think agreements have already been concluded. I hope more will be concluded. I hope the courts in this country and ultimately the European Court will give due weight to such agreements when they are made in looking at any particular case, but of course the judges must independently make their own decision in relation to that. The only generalised observation I would make is that it seems to me important that when everybody, whether it is politicians, lawyers, the media, whoever, looks at these appalling cases and decisions that have to be made they also look at it taking regard of the strong commitment of citizens throughout this country that human rights apply also to the person travelling on the underground to work, as they do to a person charged in relation to a legal process. All those rights need to be taken into account. I believe that the courts understand that very well and will operate accordingly.

Q5 Lord Campbell of Alloway: I wholly approve, if I may say so, and accept what you said about the attitude of government to the European Court. It does not seem to me that there is very much alternative to that if one is going to have an effective development of the law but I wanted on that to try and ask you a very simple question which is: what is the essence of the gap which the clauses in this Bill are proposed to deal with? Leave aside internet evidence. Leave aside evidence obtained by torture which other Members of the Committee will no doubt speak about. What is the essence of the need,

on the assumption that the measures taken are broadly compliant with the human rights requirements?

Mr Clarke: The core of the Bill from the point of view at which you ask the question is in clauses five to eight, those dealing with preparation of terrorist acts, training for terrorism, powers of forfeiture, attendance at places for terrorist training. Those are the kind of measures which we have not had explicitly in the law before that allow us to address the circumstances which we face in certain other regards. In addition, the proposed offences around encouragement of terrorism, effectively clauses one and two of the Bill, make it an offence essentially to incite terrorism in a variety of different circumstances. The reason for carrying that through is again to protect human rights rather than to attack them, I would maintain. I may not have understood your question precisely but that would be the answer as I understood the question. Did I miss the point that you were trying to make?

Q6 Lord Campbell of Alloway: No, that is fair enough, Secretary of State, and I understand what you are saying. In what way is our extant law deficient in that regard? Is it seriously deficient?

Mr Clarke: We are in a difficulty of judgment here and it is this: it does not take very many people working together or very many plots, if I can put it like that, to create a very real threat for all of us, so we need where there is a plot or a plan to commit a terrorist act to have whatever plans we can to deal with that particular threat when it comes. There have been occasions before 7 July and indeed after where there have been potential attacks being prepared which we have been able to stop, I am glad to say. It is not an enormous number of such attacks but even a small number of such attacks is a very material threat to our whole civilisation, as we saw on 7 July and, to a lesser extent, 21 July. I do not wish to imply that there is an enormous number of such cases, but I do wish to imply that that such cases exist and we need to strengthen our law to deal with them. We are not attacking the human rights, if this is your question, of a very large number of people; we are talking about a very small number of cases. The evidence we have demonstrated, for example, on the controversial aspect of the 14 days before charge, is of a very small number of cases being involved at that point.

Q7 Lord Campbell of Alloway: What I find it difficult to identify is where the extant law is deficient and would be substantially improved by the proposals in this Bill. We have a conspiracy law. I will not go through the panoply of the laws but the extant law broadly speaking, properly applied, is said to be—it seems to me to be so—broadly satisfactory, apart from the concessions I have made.

Mr Clarke: I understand the concessions you have made. I have tried to answer. I obviously have not answered to your satisfaction. When we talk about preparing terrorist acts, that is quite explicitly an offence which we name, which is not included in the current legislation. Training for terrorism, clause six of the Bill: a person commits an offence if he provides instruction or training in any of the skills mentioned in subsection (3) and so on. There is a whole set of issues. These are things which are not in the current law which we are proposing be included in the current law. I may not have understood you completely correctly. If you then ask is this a substantial group of people caught in this—let us give another example—attendance at a place used for terrorist training. If somebody goes to a place used for terrorist training, at the moment that is not of itself a breach of the law of this country. We are proposing that it should be a breach of the law of this country.

Q8 Lord Lester of Herne Hill: I want to cover some specifics on the glorifying of terrorism. I think we quite understand what you have said about the parts dealing with acts preparatory to terrorism and the need for new offences. I appreciate that you have improved the position since the draft Bill by making glorification of terrorism dependent upon direct or indirect incitement to terrorism. I think the Committee still has some concerns, first of all, about the necessity for Clause 1 and the related clauses about proscription. So far as the existing criminal offences are concerned, they seem to us to be very wide. I will not go through them now. It may be not convenient for you to answer my question right now but perhaps you could write to us. We cannot see exactly what the gap is on glorification that needs to be filled by the new offences.

Mr Clarke: I am happy to write if my answer is not satisfactory to the question you put, but my understanding is very clear. It is that at the moment the law outlaws incitement to commit a particular terrorist act. If you say, "Please will you go and blow up a tube train on 7 July in London?" I believe the current law deals with that particular situation. If however the law simply says, "We think blowing up tube trains is a good thing" for the sake of argument, or, "We encourage everybody to go and blow up tube trains" or, "We encourage a particular group of people to go and blow up tube trains", that is not of itself currently incitement in terms of the current legislation, as I understand it. The purpose of Clause 1 of the Bill is to outlaw and make illegal that generalised incitement to terrorist acts of that type. I think that is a very reasonable thing to do. Why? Because I think that there are forces that exist who seek to draw people, like some of the people who committed those acts on 7 July, into their web, as it were, by inciting or glorifying terrorism in general rather than by inciting people to commit a particular act. It is that difference between the general incitement and/or glorification rather than the specific act which I believe this clause of the Bill is designed to address.

Q9 Lord Lester of Herne Hill: Could I then ask how on earth we can secure reasonable legal certainty in the definition? The definition at the moment is, I am sure you will agree, extraordinarily broad because it talks about glorifying the commission or preparation, whether in the past, in the future or

generally, of the offences and then glorification includes any form of praise or celebration. If you take the old ANC problem, for example, if I were to make a speech publicly saying, "I admire the ANC for the armed struggle during apartheid and I would now say that there are other situations in the world where democracy has completely failed and where the only alternative is the armed struggle", as I read it, I would be committing a serious criminal offence punishable by seven years' imprisonment. How do we enable the citizen to know with reasonable certainty what statements of that kind are or are not criminal?
Mr Clarke: It was put to me by somebody the other day that arguing for change was of itself a breach of the legislation. I do not think that can possibly be the case. There is no intention that that should be the case. I do not believe the current wording allows that to be the case in any respect whatsoever. You then come to what are the means of change which are advanced. I will not bore the Committee with this now but I have a view about how the world has developed in these situations over the past 30 years which means that we can talk about this in a slightly different way than we could 30 years ago, simply because democracy is so much more widespread around the world and because most of the democratic changes which have taken place have taken place as a result of political action rather than any kind of "military" action. If one were to say to me, "Is blowing up a tube train, a bus or whatever in order to achieve this change, whatever it might be, something that is acceptable to advocate?" I would say no.

Q10 Lord Lester of Herne Hill: I am sure we would all agree with that but my question really is narrower than that. Would you agree with me that with serious criminal offences there needs to be reasonable legal certainty about what acts do or do not constitute crimes? Is it not important therefore, if you do agree, to have a definition in Clause 1 read with the other bits of the Bill that gives reasonable legal certainty?
Mr Clarke: In principle I certainly agree with you. I do not mean this in a cavilling or a debating way but there are a very wide number of legal opinions even in these Houses of Parliament on what would or would not be a particular offence in a whole variety of types of circumstance. There are a whole range of legal arguments which comes in on all sides of that argument. Would I would acknowledge to you, Lord Lester, is that if the argument is that we can achieve greater legal certainty by amending the legislation in a way which took us towards greater certainty I would look at any proposals of that type. The argument that says we somehow should not bother ourselves if people are inciting terrorism in general and it is not really a matter which we can define clearly enough in law; therefore we had better leave it alone I could not associate myself with. I think it is necessary to try and address that.

Q11 Lord Lester of Herne Hill: Can I finally ask a question which is related to this? We are also talking about proscribing organisations for glorifying terrorism. Are there really quite serious free speech implications when you close down an organisation which has a political mission that may include an armed struggle in an evil and unspeakable country? I do not mean bombing civilians but let us say killing members of the military using their own guerrillas to do so, whether in Latin America or Iran.
Mr Clarke: If the argument were to be that it is acceptable somehow to blow up a bus in Tehran or blow up a military post in Tehran, for the sake of argument, I simply do not accept that. I do not think that is the way in which change comes. If you look at a wide range of different circumstances I can substantiate that in reality. If it is argued that glorification or incitement to terror is a necessary concomitant of the ability of somebody to speak freely about the process of political change in a given part of the world, I would need that to be proved because I do not think it is the case. I think it is perfectly possible to argue for change in Iran without saying that terrorist acts are the way to do it.

Q12 Baroness Stern: Can I ask you about the definition of terrorism in the Terrorism Act 2000 which is very wide ranging? Any violence, including damage to property, designed to influence the policy of any government anywhere in the world. That being the definition, is it your view that anybody who advocates political violence in any state, no matter how brutal or repressive, will be committing the offence of encouraging terrorism? For example, if somebody in Uzbekistan said, "Let's go and pull down the posters of the repressive president" that is presumably damage to property. In your view, is that advocating political violence?
Mr Clarke: No. I do not think pulling down posters is political violence. Blowing up a bus, to give that example again, is political violence. I agree with you—this is where I concede a point to Lord Lester in the question he asked—that the question of where on this spectrum between tearing down a poster and blowing up a bus a particular act falls can in some circumstances be difficult. I do not think it is as difficult as it seems. To suggest that tearing down a poster is terrorism simply would not be substantiated by anybody in any circumstances. To suggest that blowing up a bus is not terrorism, on the other hand, would also be very difficult to argue. Though I agree it is possible in this great range of potential acts that one could conceivably describe to say there are some in the middle of this range where there could be an area of difficulty of judgment, I do not think most acts would have any difficulty of definition at all.

Q13 Baroness Stern: Do you consider that the broadness of this offence—it may not be tearing down posters but suppose it is breaking the windows in the Ministry of the Interior—is going to stop people discussing and debating what to do about trying to restore democracy in oppressive regimes?

Mr Clarke: In most cases it is a question of establishing rather than restoring democracy in the world at the moment because the striking feature of the world over my lifetime has been that, over whole swathes of the world, eastern and central Europe, southern Europe, South Africa, southern Africa, Latin America, central America, a democratic regime is now far more commonplace than was the case 35 years ago. I certainly think it is perfectly reasonable to have discussions about the right way to make change in any given circumstance but then you say to me what is my attitude to inciting changes in terrorist methods and my attitude is against it. I think the law should be against it.

Q14 Lord Judd: You have an onerous responsibility to protect the people of Britain against terrorism and that is a human rights obligation. In doing that you must not inadvertently, it seems to me, aggravate the danger. If there is somebody in Britain saying that the daily experience of people in Chechnya for example is harassment, torture, brutality, disappearances, there is plenty of evidence that this is done by state agents—you can say acting without authority but who knows?—and who will in that situation say, "Look, there really is no alternative; we have to be able to do something to combat what is happening to our people", is not the dividing line here a bit difficult?

Mr Clarke: We always find ourselves in very difficult language about this. The language you used in your question just now was, "do something to combat" the evils that you describe by hypothesis and perhaps in reality in Chechnya. There is absolutely nothing in this legislation of any description which says that people should not do something to combat an ill of that kind. If however you then say that it is not just doing something to combat; it is blowing up a school in Chechnya, for example, which is not so far from reality; do I think that is an acceptable way for people to advocate change in relation to Chechnya, no, I do not. I do not think blowing up that school Bezna, whatever you say about the Russian relationship with Chechnya, was an acceptable way for people to proceed. I think that advocating terrorism in those circumstances, killing children and so on, is not an acceptable way to proceed and I think it should be outlawed.

Q15 Lord Judd: We would all agree that to blow up a school is despicable, heinous and also politically misguided because it is totally counterproductive in terms of the cause which people may claim justifies it; but there are lots of other things that people in desperation may feel they have to do against, for example, organs of the state because of what the organs of the state are doing to them. This is where it seems to me you have to be very careful that you are not actually aggravating frustration, aggravating the desperation of these people into situations in which they can be manipulated by extremists.

Mr Clarke: I 100 per cent agree with that and that is why I answered Mr Dismore's question in the first tranche of questions in the way that I did. Extreme care has to be taken using the proposed powers in this legislation both in general—ie, the passage of legislation itself, the way it is passed and the way it is discussed—and also in particular when it comes to any particular proposition I agree with you very much indeed. One of the most damaging things would be to have any growth of frustration, alienation or whatever word one cares to use, as a result of the application of the legislation. I just want to make one further point, perhaps particularly for you, Lord Judd, with your distinguished record of fighting for democracy over many years in relation to many parts of the globe. I do think we are dealing with a terrorism here that is qualitatively different from the anticolonial, the freedom struggles, which were in a sense the characteristic of the 20th century and were the children of enlightenment thinking; compared to the kind of terrorism we are now trying to address, for example, on 7/7 and elsewhere which is not about some kind of liberation struggle, where there has been an argument about what the appropriate tactic might be, but is actually about the destruction of every part of our democracy and to destroy all the advances since the enlightenment. It is to destroy a free Parliament, a free economy, a free society and so on.

Q16 Lord Judd: This legislation is about action anywhere in the world.

Mr Clarke: Indeed. I simply give the context that I think we should bear in mind the particular form of terrorism which we are particularly trying to address at this time.

Q17 Lord Plant of Highfield: I would like to ask you a couple of rather specific questions about the draft Bill. The first is to do with the role of intention and the second is to do with the idea of danger. You have said in the House of Commons on 20 July that you wanted to create an offence of indirect incitement to terrorism which will enable the UK to ratify the Council of Europe Convention on the Prevention of Terrorism. That seems to be your aim. You also said in the same statement on 20 July, "Indirect incitement, when it is done with the intention of inciting others to commit acts of terrorism—that is an important qualification—will become a criminal offence." Given that you want to sign the Convention and your own initial statement about the Bill that you were planning to introduce did insist on the idea of intention—as you said yourself, it was an important qualification—I am now rather puzzled why in Clause 1 of the Bill there is no specific reference to intention. As it is presently defined, the state of mind which must be proved by the prosecution is knowledge or belief that members of the public are likely to understand the statement as a direct or indirect encouragement or other inducement to an act of terrorism; but that falls far short of a requirement of a specific intention to incite the commission of a terrorist offence. I wonder if you could tell us exactly why this strong insistence on intention in your 20 July statement seems to have evaporated somewhat in the Bill. Perhaps it might be useful if I outline the second question. In the Council

of Europe Convention there is a reference to not only intention to incite but also "causes a danger that one or more such terrorist offences might be committed." There is a problem I think in the sense that the idea of danger has also ebbed away in the Bill. I wonder, firstly, why this is so in both the intention and the danger case and, secondly, what implications those circumstances will have for signing the Council of Europe Convention.

Mr Clarke: That is a very interesting pair of questions. Our assessment is that we have drawn up the clauses in a way which enables us to implement the Convention correctly. It is a qualification I always make and will do so in the House as well: if there is a better wording either in the Commons or Lords which makes this point, we are certainly happy to look at it. There is no intent to use that word on my part to shift the ground between 20 July when I made that statement in the Commons to which you refer and the publication of the Bill. As far as the requirement to show intent, our analysis is that an absolute requirement for intent could render the encouragement or glorification offence virtually useless, since proving that somebody has intent, if he or she denied it, would be almost impossible. The efficacy of the clause in those circumstances would be very difficult. That is why we have set out the requirement that the person publishing the statement or causing another to publish it knows or believes or has reasonable grounds for believing that the statement is likely to be understood as encouraging terrorism. If there were a concern and if you are articulating a concern that the way we have done it leads to a doubt as to whether we could sign the Convention, I would be concerned about that but our view is that that is not the case. I am sure that is one of the matters we will discuss; similarly in the case of the danger issue. It is exactly the same issue. If the court takes the view that this test is met—that, is that the public to whom it is addressed reasonably could have understood as an encouragement that acknowledges that the statement has contributed to creating a climate where such acts may be considered as legitimate to carry out and therefore has caused a danger to the public—in those circumstances, the question of whether or not the statements have actually encouraged others to commit, prepare or instigate a specific act is not relevant. It may be that distinguished lawyers might say we have not framed this in the right way to meet the signing of the Convention but there is absolutely no intention to do that. The intention is to try and create a law which can be enacted and which is consistent with the European Convention.

Q18 Lord Plant of Highfield: It is a jolly good thing in life generally to change your mind when you think you are wrong. Would it be fair to say that your 20 July statement saying that intention was an important qualification was an error in a sense and that your thinking has evolved since then; or do you think Clause 1 somehow embodies what you said on 20 July?

Mr Clarke: In the light of your question I shall certainly re-examine the wording of what I said on that occasion. As I speak now, I do not feel inclined to acknowledge any change in line because I do not think there has been but I will certainly look at my wording carefully to see if that interpretation could legitimately be made.

Q19 Dr Harris: Returning to Baroness Stern's question about the breadth of the offence, given that the definition of terrorism includes serious damage to property and indeed the threat of such, is it the case in your view that the sort of domestic terrorism or actions that we see from animal rights extremists would very firmly come under the ambit of this Bill and indeed that definition?

Mr Clarke: It is not targeted specifically at that type of terrorism but I certainly think animal rights terrorism is something that has to be attacked. I do think it was a terrorist act to burn down the buildings in Oxford which the animal rights organisations did, if that is what you are referring to. In the case of "domestic terrorism" the blowing up of the Nat West Tower in London was a terrorist act against property.

Q20 Dr Harris: I think I am agreeing with you. We should not have any qualms about using the term "terrorism" where it meets those definitions, even if it is not international.

Mr Clarke: Not in my opinion, no.

Q21 Dr Harris: On that basis, would you say that those who have I believe in the past sought to condone the actions of animal rights terrorists by saying that violence begets violence and therefore violence against persons or buildings is justified by violence against animals would very much fall under the ambit of this Bill; is it intended to and they should know that?

Mr Clarke: I would put it slightly the other way round. I would say that those who argue that committing violent acts or terrorist acts to promote the cause of "animal rights" and justify it by reference to a phrase such as "violence begets violence" are illegitimate and would be excluded by this legislation, as I understand it.

Q22 Lord Lester of Herne Hill: I am sure you know that the Bill makes a rather serious departure from the general rule which is that, where there is a series of events, it is a necessary part of the prosecution case to prove intention. The Bill as it stands not only does not do that but has reasonable grounds for believing instead with an offence punishable by seven years' imprisonment, but does not even say, as for example the Racial and Religious Incitement Bill does, that the defendant may disprove intent and that will be a complete defence. I just wonder why you think that what you said in July about the need for intention no longer obtains, because it seems to me what you are doing here is a pretty great departure from what any criminal justice system would normally require.

Mr Clarke: I have tried to set out earlier the reason why I think that an absolute requirement of intent as such would render these clauses virtually useless. I will go back and check my own language as politicians should do as a matter of course, in terms of 20 July, but there certainly has been no desire on my part to shift significantly over that period. In fact, you putting the points to me today is the first time that particular point has been put to me in that way, but I will double check it as a result of what Lord Plant has asked me. The reasons why we have not gone down the course of an absolute requirement for intent are those which I set out earlier, which I think are completely sustainable.

Q23 Mr Shepherd: I am not quite clear, from what you say what is the distinction between an act of war and an act of terrorism. You are not happy with the concept of terrorism in the modern world if you say that most advances towards democracy have been made by internal measures that do not go over that line. I think of the Partigianni, initially, trying to overthrow a government that was lawfully constituted and recognised. I think of the free French or the free Italians in London trying to restore what they saw as legitimate government but which the world, in the case of Mussolini, recognised as legitimate government. This worries me in the context of the ground statement that the rules of the game have changed. I am familiar with offences in terms of soliciting an offence which is clear in English law. Our brief gives us the case of *R v Most* 1881, where it says, "The largest words possible have been used, 'solicit' that is defined to be to importune, to entreat, to implore, to ask, to attempt to try to obtain; 'encourage', which is to intimidate, to incite to anything, to give courage to, to inspirit, to embolden, to raise confidence, to make confident; 'persuade' which is to bring any particular opinion, to influence by argument or expostulation, to inculcate by argument; 'endeavour' and then, as if there might be some class of cases that would not come within those words, the remarkable words are used 'or shall propose to'." That looks to me almost like a catch all bag. It comes back to the very first questions that were asked on Clause 1. Why is it that these words—incitement to murder in some form or another—are not caught by existing law?

Mr Clarke: I have obviously failed, at least to your satisfaction Mr Shepherd, to answer the question satisfactorily but I do not think I have a lot to add to what I said earlier. Let me make, first of all, an historical point. If one goes back to the Second World War and to the time even before the Second World War, where you had a relatively small number of democracies fighting great totalitarian regimes of a variety of different descriptions, to the period where we are now—I have just come immediately now from a service at St Paul's on the 60th anniversary of the United Nations; you were there as well, which has been about, over the whole of that time, spreading democracy and trying to weaken dictatorship and totalitarianism—there is a massive change of circumstances from the middle of the Second World War to now. One can say that our law should pay no account to that process but I do not think that is right. I think our law has to deal with the circumstance that we face today. In the circumstance that we face today we face a particular form of threat or series of threats from terrorism which we have to find our best possible means of defending ourselves against. It can be argued that we do not need Clause 1 to help us do that. I argue that the clause that deals with encouragement of terrorism, with all the issues around glorification and so on is an absolutely critical necessity in a world where there are people trying to draw young men in particular into acts of the kind we have seen in London just this year, which we have to do our very best to stop, in my opinion. Why do I think that is? Because we have to try and protect our security against people who behave in that way. The counter argument that argues that Clause 1, for example, is not necessary simply states that people who encourage terrorism, who incite it, who operate in that way are people to whom the law should pay no account.

Q24 Mr Shepherd: That was not the point I was trying to establish. In existing English law they are caught. That was the point I was trying to make. I gave you what we were cited here, which is murder, *R v Most*, 1881, and there was the definition given by the Law Lords. Within that context I was trying to ascertain why it is necessary for this line to be drawn.

Mr Clarke: I will look at the particular 1881 reference that you have given me.

Q25 Mr Shepherd: *R v El-Faisal*, for instance.

Mr Clarke: I will obviously look at it now that you have given it to me. I will write to you on it if you wish me to do so. There are distinguished lawyers in the room here but I do not think the view that says there is no need for change in the law in this area is one that would be substantiated by most lawyers.

Q26 Mr Shepherd: The rules of the game have changed. What does that mean?

Mr Clarke: The reason the Prime Minister used that phrase was because he was arguing quite clearly that we had for the first time in this country an example of suicide bombers prepared to blow up tube trains and public transport in the way that we know that they did, not for any motive other than one of destruction of every aspect of our democracy that we live in. They were prepared to come to these acts, they committed these acts and they killed people and we therefore need to pay account to that.

Q27 Lord Campbell of Alloway: Yes, but then we go straight back to the fundamental question, surely, where we started. What happened on those tube trains and the bus could have been dealt with perfectly well under extant law. Why is it necessary to spell out examples of where the extant law would apply? We have a law of conspiracy. We have a law of murder. We have all sorts of other aspects which I would not dream of boring you with. You probably know more about them than I. The issue is why is it necessary? I am with Richard Shepherd on this,

probably for slightly different reasons, but in principle I cannot see the fundamental case for specifying acts related to terrorism which are in fact covered by our extant law. That is the issue.
Mr Clarke: I understand it is the issue you have raised with me and I have done my very best to answer it. Obviously I have not answered it to your satisfaction or to Mr Shepherd's satisfaction. I understand that, but what I am trying to say is that we are in a state of affairs where we are seeking to extend the law to outlaw those and those organisations who seek to glorify, to encourage, to promote terrorism in general rather than a particular act.

Q28 Lord Campbell of Alloway: But you are extending it without the requirement for intent which is fundamental to criminal law. There is the fundamental extension. That is the fly in the ointment, if I can put it that way.
Mr Clarke: I have given the answer to Lord Plant and then to Lord Lester about why we have not put the explicit reference to the absolute requirement for intent in the legislation in the way that you have just suggested. As far as the question that it is a rather too woolly form of legislation or a definition which is too woolly, I do not accept that. I think it is very clear what we are talking about and I think legal action is what is needed to deal with it.

Q29 Mary Creagh: You are currently consulting on a possible new power whereby those controlling a place of worship can be required by a court order to take steps to stop certain extremist behaviour. How will the police demonstrate to a court's satisfaction that a place of worship is being used to foment extremism, given the difficulties that we know about in terms of phone tap evidence and also the dangers of revealing people who are acting as agents? What do you see are the practical advantages or are there any practical advantages in applying for a court order in these cases rather than prosecuting the individuals concerned?
Mr Clarke: As you say, we have a consultation document and I do not want to prejudge the outcome of that. The reason why we have put the option of orders rather than specific prosecutions is because the point has been put to us by a number of faiths, not simply the Muslim community, that it would be better to try in the case of a particular place of worship where issues of this kind arise to get it onto a path which did not foster extremism rather than seek simply to punish in any given circumstance. That is why the kind of order regime that we have talked about is being discussed in that context. This is why we are out to consultation, of course. The overall issue is to find a mechanism of dealing with the extremism which is there in some cases and has notably been there in some cases in the past, while not violating the right to worship and the ability of faiths of all kinds to have a place of worship which they can operate in the most effective way. That is why we have the structure and framework that we have. We will look carefully at what people have to say in response to the consultation that we have before drawing up particular proposals for legislation but that is where we are at the moment. Our overall desire is to work with the mainstream communities to ensure that worship takes place in the right way rather than not. One of the most striking things about the ideas that came from the Muslim community in particular, which I discussed them with shortly before the end of September, was the view that preaching should always be in English as well as in another language. That was an idea from them, not from me, precisely to try and deal with some of the concerns that there might be a secretive approach to worship rather than an open approach to worship. It is that kind of thing which is the best approach to try and tackle this.

Q30 Mary Creagh: Do you think that these proposals are likely to be workable given the difficulty of defining a place of worship? I can think of examples where London mosques have been shut down and people have moved out to worship in the street. In that case would the street by defined as a place of worship?
Mr Clarke: There are difficulties of this kind. Perhaps, as an easier example, it is relatively common at the moment for people to move from a mosque to creating a place of worship in somebody's room in a house, not in the street though it could be there too. There could be issues of that type certainly. That is one of the things that we have asked people to comment on in the consultation document that we have.

Q31 Dan Norris: My question goes back to the Terrorism Bill, particularly the pre-charge detention aspect of it. The police have put forward a number of justifications for extending the period from a maximum seven days to a possible maximum of three months. I accept that there are weekly reviews by judges to check that that is okay and needs to continue. One of the justifications is that suspected terrorists will use very sophisticated encryption on data. For example, someone could walk into a shop today and buy a hard drive that would have 192 bit encryption. I do not know how many years it would take to unscramble all that information but is that not an argument for the security services and our police having similar technologies to counter the technologies they are having to face; and therefore requiring resources from government rather than extending the period that suspected terrorists can be detained?
Mr Clarke: There are always arguments for extending the amount of resources that there are. Indeed, there has already been a substantial increase in the amount of resources going to both the police and the security services in these areas. They do not argue—and I do not believe it is true—that lack of resources is what leads to the time taken, for example, in de-encrypting hard discs or the time taken in dealing with overseas intelligence services where it can take time to deal with something; or the time taken for trying to go through literally tens of thousands of CCTV films, as arose after 7 July, to try and get to the basis upon which a charge can be

made. It is true in theory I suppose that in each of those cases an argument could be made that resources alone would resolve the problem. I am quite sceptical about that. I think some of them are very complicated and difficult to deal with. If one is following up leads in a wide variety of different ways, I am not sure that resources will resolve the problem. I accept the argument for more resources but I do not think it is any shortage of resources which has led to the proposals we put before the House in this area.

Q32 Chairman: I want to look at the international issue here. You gave evidence to the Home Affairs Committee that the three months that you were suggesting as a maximum compared quite favourably with some other continental European countries like France and Spain. Are we comparing apples and oranges here because there is a question whether we are comparing a pre-trial or a pre-charge period; also, whether and to what extent in continental countries people can still be interrogated after they have been charged, which is normally not what happens here. Are we comparing the same things here?

Mr Clarke: You are right in that we are comparing apples and oranges. We are comparing completely different legal systems, the adversarial system or the inquisitorial system. One is an apple and one is an orange. I am not entirely convinced that from the point of view of the person who is being questioned it does not feel pretty much the same. I can quite see that somebody detained in a French prison might say, "Thank Christ I have the inquisitorial system rather than that horrible British adversarial system" or vice versa, but I am not convinced it feels that different. That is why I made the comparison I did because the fact is that, though the legal basis of the detention is different in both cases—and it is quite right to say apples and oranges—the reality is that people who are suspected of these kinds of offences are detained for really very substantial periods of time under other jurisdictions, albeit on a different legal base to that which happens in this country.

Q33 Chairman: That brings me on to the investigating judge system which has been a consideration generally in this area for some time now and goes back to recommendations by Lord Carlile and also the Newton Committee. I also raised it myself during one of the debates several years ago. Has the government given any more thought to trying to bring in an investigating judge system into the review of the pre-trial detention period? For example, I know there is the suggestion in the Bill that the detention period should be reviewed on a seven day basis by a district judge but has any consideration been given to a rather more senior judge being involved with more directive powers in terms of the investigation itself, being able to see and check the evidence even if it is secret intelligence?

Mr Clarke: On the second point first, we are very sympathetic to the point made by Lord Carlile that the judicial scrutiny of the period of detention should be supervised by a higher level judge than that currently proposed in the Bill. We are looking at that very closely to see how we could do that to try and meet what his proposals are. During the passage of the Bill I would be surprised if we were not to table amendments to give effect to that. On the more general point, there is consideration being given in government but to be candid there is also disagreement in government and across the whole of public life about the idea of extending the inquisitorial system or the investigating judge regime, whatever one wants to call it, even narrowly to terrorist cases, let alone more generally, as some would argue, into other areas of life. It would be a very major reform which we are considering but have not yet decided to bring forward proposals on because there is not any consensus across the legal world that that is what we should do. Speaking completely as an individual and with the disbenefit of not being a lawyer myself and therefore understanding little of these things, I think there is a lot to be said about an investigating judge regime rather than the current adversarial system. Just about every lawyer I know thinks I am wrong about that. I cite it as an aside but amongst the lawyers who think I am wrong about that are some good colleagues in the government.

Chairman: This is a lawyer who does not necessarily think you are wrong, although there are some around the table who would disagree.

Q34 Lord Lester of Herne Hill: I am one of those lawyers who thinks there is a lot more in the continental system that we should think about. Therefore, I am probably in the minority but I put that to Lord Carlile once when we were taking evidence. On the apples and oranges again, although obviously you are right in saying that continental systems are different from our system, the point that worries me is that in continental systems, even though someone could be banged up for three or four years awaiting trial, the period before you have to charge them is really quite brief. I do not know enough about what happens in France or Germany or Spain to answer this question but I thought the whole point was that you had to charge them within a reasonable time and if you then hold them awaiting trial you are not allowed to use the detention period in order to accumulate more evidence for more charges. I may be wrong about that but is that not a worry? A three month detention period will be before you have even charged the person, which is much longer than happens in continental systems?

Mr Clarke: Again, I hesitate to try and give any authoritative legal opinion on it, but I thought you were wrong. I thought the whole point about the investigating judge system was that you were being held while an investigation was taking place by this investigating judge who would be continuing to investigate the case and therefore put more evidence questioning you over that period and so on, over a lengthy period of time as you say, up to three or four years.

Q35 Lord Lester of Herne Hill: We are told in our brief that the pre-charge detention period is 96 hours in France and 120 hours in Spain. I thought that we were extending that up to three months for pre-charge.

Mr Clarke: We certainly are extending that up to three months potentially in this tiny number of cases for pre-charge but the point I am trying to get at is that I am not at all sure that the concept of a charge in our system is the same as the concept of a charge in the French or German system. I may be wrong and it is an area in which I certainly would not speak with authority on it. Maybe it is another good example of the Home Office spending large amounts of money on research to set out a clearer research paper with answers on this question. My only point about apples and oranges was that, from the point of view of the individual, it may not look very different.

Q36 Chairman: This is an issue we want to look into, in more detail, ourselves. What is the bar in the existing law to charging somebody with a lesser offence and, as more evidence comes to light, bringing more serious charges later? Is it simply that they cannot then be interrogated which is the problem or are there other problems as well?

Mr Clarke: We are very, very active in looking at this particular point in the current circumstances. As an individual, I was quite taken aback when I realised how the current law works, though that is not uncommon when I look at the way the current law works. We are looking at it very actively. It is not simply a question of questioning it; it is also a question of looking at other issues as well. Again, it has significant implications across the whole of the legal system, not just in relation to terrorism. The idea that we can solve this particular issue by that route I do not think is possible in the timescale we are talking about. We are nevertheless very actively looking at the matter. The Attorney General has pressed us to look at this very closely and we are doing that actively. The views of the Committee would be very interesting on that.

Q37 Lord Judd: You have the power both to exclude and deport from the United Kingdom non-UK nationals on the grounds that their presence here is not conducive to the public good. On 20 July you announced that these powers—I think I am quoting accurately—"need to be applied more widely and systematically." On 23 August, you announced the outcome of the consultations which you had been having and published the final list of unacceptable behaviours. It is relevant to note that it is proposed by the government in amendments to the Immigration, Asylum and Nationality Bill that the same list of unacceptable behaviours will be used by you when exercising your proposed power to deprive a person with dual nationality of their British citizenship on the ground that such deprivation is conducive to the public good. The behaviours listed all concern the expression of views and therefore are very central to Article 10 of the European Convention which takes the freedom of expression extremely seriously. Are you satisfied that the phrase "fomenting, justifying or glorifying terrorist violence in furtherance of particular beliefs" is sufficiently precisely defined, bearing in mind the likely impact on legitimate public debate about the causes of terrorism and therefore on freedom of expression? In putting that question, I believe you when you say that you are deeply committed to the principles of democracy and open society. These are immense issues we are dealing with in this discussion with you. They are bound in any healthy democracy to be issues that people want to debate and discuss. Are you really satisfied that this kind of generalised wording draws a distinction between that debate and discussion and what is unacceptable?

Mr Clarke: I am. I very strongly, passionately believe that we should as a society debate these questions. I have been very ready to discuss these in a wide variety of different fora and will continue to do so. I think that is the right way to proceed. Let me take you, if I may, through the history of these events. The Home Secretary has always had—I do not know when it started but well before my time certainly—the power to ban people from the country on the grounds that their presence was not conducive to the public good. It has been used in a whole variety of circumstances, often controversial, because it is a judgment of the Home Secretary at any given time. The events of 7 July led me to wonder whether or not we should extend that power which exists—it does not require a change in law—to a wider range of "unacceptable behaviours". As I said in my statement to the Commons on 20 July, we have hitherto been very careful and not gone over the line into areas which might be construed as attacks on freedom of speech for the reasons that you very clearly set out. However, as I also set out in that statement of 20 July, I believe there is a set of behaviours about identifying and dealing with those who foster hatred and positively, as a matter of their intent—I use the word "intent" in this context—seek to create the environment where terrorist violence can flourish, who positively go down that course as a matter of judgment that they make. I have to decide in those circumstances whether foreign nationals of this type ought to be just entitled to come into this country under those circumstances or whether I ought to exercise the rights that I have to protect us in any regard from those. I decided we should extend it because I think the events and implications of 7 July carried a wide variety of very deep implications that required us to think about this. I think the language that I talk about—i.e., identifying and dealing with those who foster hatred and seek to create the environment where terrorist violence can flourish—accurately identifies the activities we are seeking to address: fomenting, justifying and glorifying. I think it is very clear. We are not talking about any British citizen; we are talking about people who are overseas nationals. I agree within the context of the Immigration Bill we are talking about depriving citizenship to people who have dual citizenship in such circumstances, again, I think perfectly reasonably. It is perfectly reasonable to argue that what I say on this is completely wrong and we should simply say, okay,

it does not matter how you argue, what you do, what kinds of argument you wish to spread, whatever mischief you may be about, however you are trying to seduce or bring young men to engage in terrible acts, it should not be a matter of concern to the Home Secretary. I just cannot accept it and that is why I dealt with the list in the way that I did.

Q38 Lord Judd: You used the words "completely wrong". Forgive me, but that is a good debating technique. It is not that they are completely wrong; it is that these matters are extraordinarily complicated. There are balances to be struck and it might be just possible that you do not have the balance where it should be and the consequences of that could be crucially significant. You referred to intent and of course the Convention on the Prevention of Terrorism also refers to intent. It speaks of an offence glorifying or condoning terrorism being done with the intention of inciting others to terrorism and of the result of provocation being to cause a danger that such a terrorist offence might be committed. Why do you not spell that out in your proposed legislation? Why leave it in the generalised form?
Mr Clarke: There are two completely different questions here. The first is the question about the list of unacceptable behaviours and the way that operates. I do not think I was making a debating point. I simply think people will have to make their judgment about where it falls. I have been at great pains myself to point out as fully as I can that this is, as you say, an issue of balance and judgment on each occasion between particular rights and the overall rights of society as a whole, and that is a balance which is there all the time in every consideration. Am I vain enough to think I have got the judgment on each of these balances correct at every single juncture? I do not think so necessarily. Do I think I am in the right place? Yes, I am. Do I think Parliament, when it looks at it in detail, will go right through it and come to a view? Certainly it will. It will have this debate at each stage as we go through in a very full debate. As far as the issues of intent in Clause 1 of the Bill are concerned, which you mentioned just now, I have got not a great deal to add to what I said to earlier questions on precisely this point, and I have said I will go back to 20 July and look again at what I said there. I have not got anything much further to say on what we have already gone through on this.

Q39 Lord Judd: But you do agree, Home Secretary, that the more specific you can be in terms of existing conventions and the rest the stronger your position will be?
Mr Clarke: Of course, and I think the point that Lord Lester made earlier in the conversation about the principle of legal certainty is also a good one.

Q40 Lord Judd: Would a non-national who publishes critical views seeking to explain why people resort to terrorist violence but who has no intention whatsoever of inciting the commission of a terrorist offence, and where the publication does not give rise to any danger that such an act will be committed, be liable to deportation?
Mr Clarke: I think one would have to look at the detailed circumstances but as you have described it I doubt it. Explanation is not encouragement, and that was the word you used right at the beginning. As I say, one cannot judge in every circumstance but, as you put the question, I doubt it.
Lord Lester of Herne Hill: Can I just express dissent from what Lord Judd said?

Q41 Lord Judd: My last question is this. There is a retrospective dimension to the proposed legislation but Article 10 requires the applicable law to have the qualities of accessibility, foreseeability and predictability to enable individuals to know the consequences for them of their behaving in particular ways. Does the retrospective application of the new list of unacceptable behaviours mean that somebody can be deported for views expressed before the publication of the new list and in circumstances in which the power has never previously been exercised?
Mr Clarke: In looking at any individual case any Home Secretary would take into account all the available information, including the timing and frequency of any comments or actions as well as any indication of changes of opinion, but fundamentally the issue is the opinion and expression of that opinion by the individuals concerned, wherever that was made.

Q42 Lord Campbell of Alloway: Listening to the noble Lord Lord Judd perhaps I could make in the irenic spirit a compromise proposal which deals with the question of intent, deals with the problem of glorification and provides a tight form of definition. If you knock out "glorification" and say that somebody who, in the old test, "aids, abets, counsels or procures an act of terrorism", then "intends to procure" means that he intends to do it. Surely you could tighten up the definition in some way and under extant law it would be an addition, if you like, but it would not be wholly deviant from the extant law because a conspiracy to aid and abet terrorism would be criminal in any event because terrorism in the form in which we are dealing with it involves serious injury, death, damage to property and all the rest of it. I only put it forward as a way perhaps of dealing with one of the points—I am not dealing with the others; there is no time—that Lord Judd made.
Mr Clarke: I will certainly take advice from my lawyers on the particular proposal that you have made and look at it, as I have tried to do all the way throughout, in a flexible manner.

Q43 Dr Harris: Aside from the issue of intent and danger, which I think we have already covered, you could have chosen in your list of unacceptable behaviours to use the same words as you use in the Bill around the encouragement/glorification offence: incitement, encouragement, glorification, but you have chosen, looking at the bullet points, to use the

words "foment, foster"—in terms of "foster hatred"—and "justify". "Justify", in particular, strays arguably into Jenny Tonge/Cherie Blair territory. Why could you not just stick to the words in the Bill? Is it not widening it?
Mr Clarke: Personally I do not think that "justify" does fall into the territory you describe. Secondly, it may be helpful to give some guidance to the timing on this. We published a proposed list of unacceptable practices at the beginning of August. We then consulted and I said in my statement in late August when we had finalised the list that we would look again at that list of unacceptable behaviours when Parliament finally concluded the legislation for this process. We acknowledged that they might not be in the same area and at that stage we had not yet written to the Opposition parties to discuss the position with them. I think the best thing I can say is that there is a case for consistency but I think with consistency, which should be supreme, if I can put it like that, is the wording that is finally resolved by Parliament in this legislation. Once we get to Royal Assent we will look at the relationship between that wording and the unacceptable behaviours wording.

Q44 Lord Lester of Herne Hill: Can it not be said in your favour that your unfettered, undefined power to get rid of someone on "non-conducive to the public good" grounds has now been spelt out by you for the first time in a public document so that there is greater certainty than there was before in that sense, and can it not also be said that you must not mix up the definition of crimes, which is under the convention and so on, and the use of this power, which are two different things?
Mr Clarke: I agree. I am always keen for people to say things in my favour by whatever means and yes, I do think it can be said in my favour that I, unusually by the sums of history, made a statement to the House of Commons about the use of the powers that I have to deal with unconducive behaviours, set out a process for consulting on it (albeit rather brief) and then came back with a public statement about where we would go. I think that is a superior form of doing it rather than simply exercising the power without any public expression of what one is doing. Of course I agree with you that the list of unacceptable behaviours is not the same thing as the legislation, but the point that Dr Harris has just made raised the question for me of whether there could be any beneficial relationship between the two, and the answer is yes but we will look at that once we have got to the point of this legislation being enacted.

Q45 Dr Harris: As I mentioned I would like to follow up that point, which was the point I wanted to follow up originally. I take the point you make about having defined what you mean creates greater clarity, but in your letter to the Opposition you state that in respect of the Bill and the powers to remove citizenship this new clause is "designed to enable the Secretary of State to take away British citizenship from someone who has committed one of the unacceptable behaviours set out in the list which we published on 24 August". The list on 24 August says, and this is the problem, "This list is indicative and not exhaustive". Is that assurance in that letter—that it will be restricted to that list—meaningful, when you actually say that it is "indicative and not exhaustive"? Therefore it is not really, in the way that Lord Lester was implying, restricting your discretion?
Mr Clarke: The use of the phrase "indicative and not exhaustive" does not mean it is meaningless. There is meaning in the sense that I have set out in that list a list of events and activities which are clearly defined, which provides some kind of guidance at any rate, I think quite a lot actually, as to any Home Secretary would act in those circumstances.

Q46 Lord Lester of Herne Hill: On the question of torture, the prohibition against torture is absolute. The torture convention says that you cannot send to a country where you believe that there is a substantial risk of their facing torture. Given that it is absolute, I do not understand how there can possibly be a balance between the absolute prohibition against torture on the one hand and national security or other considerations on the other. Surely, if it is an absolute prohibition, you cannot send someone to a country where you believe there is a risk of torture and there is not an earthly chance in hell or heaven of persuading the European court, in the light especially of what is in the torture convention, to come to a different conclusion?
Mr Clarke: First, you are quite right: we are bound, and even if we were not bound we would not want, to return to anybody to a country if there were a real risk of torture. It is not only that it is unlawful, which it is, but also we would not want as a country to be doing that. There are a lot of issues to be argued about what the extent of the real risk is and how that operates and so on, but that is for the court in any individual case to look at. We think that the *Chahal* judgment, which was narrowly carried in the European court, did not give sufficient account to some of the issues involved in this and that is why we are returning to the European court. We will see what happens in the process. I am not in a position to pre-judge where they are. They will make their judgment in the European court and we will see what emerges.

Q47 Chairman: Quite simply, Home Secretary, are you prepared to deport somebody where you are satisfied that there is a substantial risk of their being tortured in the receiving country?
Mr Clarke: No, and that is not just my position but also the government's position.

Q48 Lord Lester of Herne Hill: If you fail to persuade the court to change the *Chahal* judgment I assume that you are not going to require British judges not to follow the lead of the Strasbourg court, are you?
Mr Clarke: The only purpose of changing the law in this country in a way that was not compliant with the European Convention would be to ask the European court to return to that question.

Otherwise the only choice we would have would be to leave the European Convention, which is not something the government wishes to do in any way. We will see how the judgments go in these cases and decide how to deal with those circumstances.

Q49 Dr Harris: With regard to this issue of deportation with diplomatic assurances, can I first ask you how many individuals are being detained with a view to deportation to countries with which a memorandum of understanding has not yet been agreed, and what then is the legal basis for their detention? Lord Carlile has himself questioned the legality of detaining individuals with a view to deporting them when these memoranda are concluded.
Mr Clarke: We have currently detained six people where we have actually signed memoranda of understanding with the country of nationality and 17 where such a memorandum of understanding has not yet been formally signed. The basis upon which the detention is happening is our assertion that we are imminently going to be able to sign such a memorandum of understanding with people in those cases. I am delighted that we have been successful with two countries and I am optimistic that we will be able to do that with other countries as well. We are at an advanced stage of negotiations and/or discussions.

Q50 Dr Harris: Can you tell us more about the progress you are making with regard to assuring us that there is this imminence around signing these memoranda? Progress and imminence are not the same thing.
Mr Clarke: I do not think I can give you the detailed answer you want except to say that there are substantial discussions taking place with a number of countries, which have taken place both in this country and in those other countries, but I do not think it would be right for me to pre-empt the agreement that is made in the form of joint signing of a memorandum of understanding without the agreement of the other country and so I shall not go into more detail.

Q51 Mr Shepherd: The courts do not share your view.
Mr Clarke: That will be an issue for them. It will be an issue for us too. I wrote a piece in the *Evening Standard* about this in August in which I said that if the courts were to say that a government-to-government agreement was essentially not worth the paper it was written on, which some lawyers have argued (not the generality of lawyers but some lawyers), that would be effectively neo-colonial in its approach and that is my view. I think it would be extraordinary if a British court were not to take serious account of a memorandum of understanding seriously entered into by this government and another government. I have heard the most appalling back-chat conversations of the type, "You cannot trust governments from North Africa", and so on, which I simply reject and I think are completely unacceptable.

Q52 Dr Harris: The fact that you are seeking a memorandum of understanding suggests that there is a reason to do that and that these are countries where torture happens. If that is the case, taking a wider ethical view, how can you justify going unilateral or bilateral when the Convention against Torture is probably the most important (in terms of absoluteness) multilateral approach. In other words, how can you justify seeking to worry about the human rights of these three people, if you are removing three people, while undermining attempts to protect other people in that country? Is that ethical?
Mr Clarke: I think the reverse is entirely the case and I think that liberals ought to welcome our conclusion of memoranda of understanding with these countries because what will happen as a result of this is a much stronger relationship on precisely the human rights agenda which is concerned. It is not my role here to comment on the particular human rights records of other countries but I will observe that signing the Convention against Torture is not of itself a guarantee that torture does not take place in a signatory country. I think a memorandum of understanding around particular cases is a stronger form of agreement.

Q53 Baroness Stern: Home Secretary, can I ask you a question about the post-return monitoring mechanisms? If I can start by saying something in your favour, you are clearly very against violence and I think all of us share that, but that spreads across the board. The Asylum and Immigration Tribunal, in the recent case concerning deportations to Zimbabwe, was very critical about the government's lack of post-return monitoring and the European Committee for the Prevention of Torture, the CPT, in its recent report said that it had an open mind about the possibility of devising effective mechanisms for post-return monitoring, and they do know quite a lot about monitoring. In the light of that what would you see as the minimum content of any post-return monitoring mechanism which the government intends to require in the memoranda of understanding in order to be satisfied yourself that nothing bad is happening to these people?
Mr Clarke: First, I do think it is important to say that there is a qualitative difference between the general immigration returns issues that you mention, for example, in Zimbabwe or indeed in other countries, and the particular type of memorandum of understanding we are talking about concluding in relation to the very small number of individuals we are talking about in these circumstances. I think they are qualitatively different cases, although obviously there are some common features. Secondly, the broad functions to be performed by any monitoring body, for example, practical arrangements for dealing with the situation immediately on arrival and for contacting the monitor will be dealt with in conjunction with the body selected and the government concerned to establish that it is there. The monitoring body would need to have available to it the expertise and

experience necessary to effectively monitor the arrangements. That is what we will work to achieve. We would not sign memoranda of understanding unless we were confident that those memoranda would be maintained. There is a whole range of issues about risks of returns in the case of immigration policy to a number of countries about which there is a very substantial debate and significant Foreign Office advice, and there is a great deal of argument to take place about the risks that are involved in any given circumstance and I do not think we should confuse them for the purpose of this discussion with the cases that we are talking about in this context.

Q54 Mary Creagh: Home Secretary, when you have previously given evidence to this committee you have been asked whether you could confirm that none of the material obtained from the Belmarsh detainees had been obtained from sources abroad where there had been allegations of torture and prisoner abuse. What systems do you have in place personally and the Home Office corporately to ascertain whether intelligence information has been obtained by the use of torture?
Mr Clarke: I do not think I have a lot to add to what I said to the Human Rights Committee before. As you correctly say, I was asked that question before. We are clear that evidence obtained as a result of any acts of torture by British officials or with which British authorities were complicit would not be admissible either in criminal or civil proceedings in the UK, whether the evidence was obtained here or abroad. There is a serious issue about our ability to know about external evidence that comes in any given circumstance. We take the issue very seriously because our policy is unreservedly to condemn the use of torture and we have made it an important part of our foreign policy to pursue its eradication worldwide. However, by definition almost, we cannot, because we are not a world government, know in all circumstances exactly what the situation is. There is a case before the Law Lords on this particular issue as we are speaking where the issue is the extent to which we can know that. The case was heard on 17–20 October. Judgment was reserved and I do not think that before the Law Lords finally judge I want to say anything further. We take very seriously, Ms Creagh, this whole issue of torture. It is a very important issue to us. We do not collude with other governments that seek to do that in any way and it would be quite wrong if we were to do so.

Q55 Mary Creagh: Can we take assurances that prisoners have had access to water toilet facilities, food, etc? We are talking about very small numbers of cases, are we not? It is not world government. It is just six or 10 or 20 people and specific evidence obtained. Can we not ask the governments how it was obtained?
Mr Clarke: We could ask for answers of those kinds and I am certainly prepared to consider that. The problem is one of knowability. The problem is what test could one conceivably have which would extend to every conceivable circumstance in which anybody is held to look at their position. The difficulty I have personally but the government has generally is to say that we know so much about the conditions under which anybody has been held in any circumstances that we can give an absolute assurance, whatever it may be, in relation to any given area. As I say, that specifically is the issue that has been before the Law Lords and that is why I would prefer, if you would allow me, to wait until after we get their judgment before elaborating on that. Sorry—hang on, hang on.

Q56 Mr Shepherd: Eliza Manningham-Buller has actually made some comments on that point, has she not, and they seem a little bit different from yours, that many regimes would take it as an impertinence if anyone were to query their methods and it might dry up the flow of information to British sources.
Mr Clarke: I do not read everything that she says. I do not recall her using the word "impertinence" in that way, and certainly I know for a fact that she takes this issue very seriously as well.
Mr Shepherd: I know she does.

Q57 Baroness Stern: Will the government be supporting Lord Lloyd's Interception of Communications Bill? If not, why not, and when will the government bring forward its own proposal relaxing the absolute prohibition on the use of intercept evidence? You could say "no" and "tomorrow".
Mr Clarke: I will say no to the first question. We will not be supporting Lord Lloyd's Bill. We are actively considering whether we can evolve our position on this but there are two big issues which the committee needs to understand. In terms of making our sources and methods of working available to the defence in any given case there is a massive issue about whether, by making that information available about how we operate, we make the ability to collect the intelligence upon which we rely more difficult to achieve. That is a widespread concern, one that will be influenced by the evolution of technology, one which we have not yet found an answer but one which we are actively investigating. The other one is one more for the lawyers. If there is a telephone conversation between you and me any defence lawyer could say, "What about every other phone conversation you have had? What about any conversation you have had with a friend about me?", and vice versa, in this regard, and would we be forced to collect enormous quantities of material to use any particular part of the information? The best way to deal with this is with some form of pre-trial scrutiny by some independent investigating judge and we are looking again at that as a means of dealing with it. The confidence in the defence not being able to get an enormous amount of work in this regard is not very great.

Q58 Chairman: Home Secretary, without straying into the case of Mr de Menezes, do you think that on such an issue so vital to public confidence as the use

of lethal force by the police the guidelines to which the police are operating should be available in public and subject to parliamentary scrutiny?
Mr Clarke: There is a case for this. I will decide how to deal with it after the IPCC report into that particular incident. I think there is an important question again as to revealing our techniques for dealing with these situations. The issue of how we deal with a potential suicide bomber is a pretty serious one to be considered and is one that we will look following the IPCC report in this particular case.

Q59 Chairman: Thank you for your evidence today, Home Secretary. You have been very frank in the way you have answered all our questions. We look forward to seeing you on a future occasion on another subject.
Mr Clarke: Many, I am sure.

Witnesses: **Mr Peter Clarke, CVO, QPM**, Deputy Assistant Commissioner, Head of the Metropolitan Police Anti-Terrorist Branch and National Co-ordinator of Terrorist Investigations, and **Mr Ken Jones, QPM,** Chief Constable of Sussex Police, Head of Business Area for Terrorism and Allied Matters, Association of Chief Police Officers, examined.

Q60 Chairman: We are now joined by Deputy Assistant Commissioner Peter Clarke of the Metropolitan Police and Ken Jones of the Association of Chief Police Officers for the second evidence session this afternoon in our inquiry into counter-terrorism. Thank you both for coming. Is there anything you would like to say to start or shall we get straight off?
Mr Clarke: We are entirely in your hands, Chairman.

Q61 Chairman: Perhaps I can ask Mr Jones first of all how different is the threat we now face from international terrorism compared to the terrorist threat of the past?
Mr Jones: I think the fundamental difference is that we now have people prepared to use suicide as a weapon and as an ideological motivation rather than as a purely political motivation which we have seen in other forms of terrorism. The other thing that has changed is that the organisation is different. It is shapeless, it is amorphous and it is constantly changing and that is not inside our recent experience. That is a fundamental difference, the suicide issue and the ideological motivation.

Q62 Mary Creagh: The committee always aims to ensure that its scrutiny of the human rights compatibility of government proposals is both rigorous and even-handed. To assist it in this it wants to ensure that it fully understands the "operational" reasons behind your request for the extension to the maximum period of pre-charge detention. Are there any additional operational reasons that you would like to add to those that are summarised for us in the briefing from Assistant Commissioner Hayman?
Mr Clarke: I think most of the operational reasons are broadly touched on in that paper, but obviously all of them are capable of expansion should the committee so wish. I think the broad heads under which we came to the conclusion that this was a reasonable way forward are contained within the paper.

Q63 Mary Creagh: Statistics show that only 36 people in total have been held between seven and 14 days between the beginning of January 2004 and 4 September 2005 under the Terrorism Act and that of the 21 held for more than ten days only two were released without charge. These figures do not support the case that the police are having to release without charge after 14 days significant numbers of suspects. How do you say that the statistics showing the use and outcomes of extended pre-charge detention for 14 days support the case that you are making for extending that period?
Mr Clarke: The first thing the statistics show is that we use the existing powers very sparingly and only in the most serious or complex cases, and we only apply for warrants of further detention after consultation with the Crown Prosecution Service, as I say, only in the most serious cases. That is why the numbers are comparatively low. The reason we are saying that there is a need for change is based partly upon experience and partly upon our perception of the way in which the nature of terrorist groups is changing. Mr Jones has touched on this already. The fact is that the groups we are now looking at, because they operate a regime of no warnings, unlike Irish terrorism in the past, and with a determination, it appears, to cause as many casualties as possible means that we cannot operate in the way we used to, which was to try to arrest terrorists at or near the point of attack, to catch them with the bomb or the gun, if you like, when the evidence was likely to be the strongest to put before the court. The reality now is that our perception is that the threat to public safety is simply so great and our difficulties in penetrating and gaining, if you like, control up to the point of arrest are such that on public safety grounds we have to intervene earlier. This means that when we arrest people we frequently have grounds to arrest, as required by the law, but the evidence in terms of admissible evidence to put before a court is lacking. That means that the admissible evidence-gathering phase begins after the point of arrest and it is that which leads us to say that we need more time. What we are seeing is that the increased use of high technology, of computers, of the internet and of mobile telephony as a means of communication between members of these global, loosely-knit

networks, is such that in order to gain a picture of what we are dealing with and to gain the evidence we need much more time than we had in the past. Every investigation seems to push this trend forward. If I may, and I have to be very careful because there are *sub judice* issues, only this weekend we arrested three individuals who are currently in detention and I am told by my officers that we have recovered some 750 gigabytes of data. I do not know what that looks like. I asked what it looks like and they said, "If we printed it out this would be a pile of paper 66,000 feet high". Obviously, we are not going to be able to go through all of that but we have to investigate as much of that as possible and this we have found repeatedly is where our evidence comes from.

Q64 Mary Creagh: In the Bill, clause 23, paragraph 2(1) the extension of the period of detention by judicial authority can be made in any part of the United Kingdom by a police officer of at least the rank of superintendent. Given the rarity and sparing nature of these powers that you have just described, why is it only the rank of superintendent? It seems to a lay person quite a low grade of officer that can make this application.
Mr Clarke: A superintendent, I would suggest, is quite a senior officer. The point is that it is at superintendent level that we have the senior investigating officers who are in day-to-day command of investigations. That applies not only to terrorist investigations but also right across the board of serious crime. Those officers at that level of seniority are the people with the most complete and detailed knowledge of the development of the case. They are driving the investigation and they are in the best position to put before the court precisely the situation in the investigation and to explain, most importantly, what is happening and why further detention is needed. It is their job in those circumstances to persuade the district judge that they are doing everything as quickly as they can, applying the maximum amount of resources so that the whole procedure can take place as quickly as possible.

Q65 Mary Creagh: Where will you hold suspects who are detained for up to three months and do you think that there is a risk in such a lengthy period of custody that it could amount to inhuman or degrading treatment?
Mr Clarke: I would say straightaway that the facilities available to the police are not suitable for periods of detention of that period. It is probably being envisaged that any detention beyond the 14 days should be in prison and the regime obviously will be a matter for the Prison Service or the Home Office to discuss, but I would envisage that it would be similar to that which is applied to unconvicted prisoners at the moment. Then, in the normal way which we do at the moment, if there is a requirement for further interviews to be conducted we would ask for a production order for them to be placed into police custody for as long as it takes to conduct any further interviews before a return to the prison facilities.

Q66 Mary Creagh: Is there any risk that statements obtained from suspects who have been detained for interrogation for a period much longer than the current maximum of 14 days may be regarded as unreliable by the courts and therefore excluded under PACE?
Mr Clarke: I think there is always that risk. Obviously, the longer a person has been in custody arguably the more that risk increases and that is why all the safeguards that we would wish to be contained within the legislation in our view are terribly important. It is important to recognise as well that we are not asking for this period of further detention solely to be able to question people, if you like, to put the same question again and again. I very much subscribe to the view put forward by Lord Carlile in his report that extending the period of detention solely for questioning is not appropriate. What we feel it is very important for is to investigate the totality of what we are looking at, both here and internationally, so that we can have a picture of what we are dealing with, put together a sensible interview strategy and make better quality decisions about charging in collaboration with the CPS, obviously. This is a discussion I frequently have with them. They want to be in the best position to make high quality charging decisions and the discussions I have with them are very much along the lines that within the current time constraints that is very difficult indeed.

Q67 Chairman: Mr Clarke, you gave one example of the problems you face. Without offending the *sub judice* rules, which obviously we do not want to do, can you give one or two other examples of where you felt particularly under pressure after the two-week period and would have liked longer and, if so, how much longer would you have liked in those cases? I was going to ask Mr Jones then to comment on where the three months has come from. Why not six months, why not one month, why three months?
Mr Clarke: There are numerous cases, many dealing with the decryption of data and the exploitation of computer material, where we would have liked to have longer. Sometimes—and I have to be extraordinarily careful here—it can go something like this. We might have a number of people in custody whom we suspect of conspiring together to commit a terrorist act. We might not be sure exactly what the terrorist act is but we might have recovered or gathered enough material to show that yes, there is some form of conspiracy here. We might get to the stage where we are able to lay charges. What we are very often not in a position to do is understand the roles of individuals within that conspiracy. Quite rightly, defendants are usually advised that they should not answer questions whilst in custody and so we do not have an opportunity at that stage to gain from the suspects' own mouths their role in it. However, there are cases where we have been aware of the fact that some members of these conspiracies, particularly those perhaps who had a lesser role, would like the opportunity to speak to us, to explain their role and in that way not find themselves in the position of being charged as prime conspirators. It is

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my belief that in several cases, had we had longer to gain a proper understanding, as we subsequently have, of the respective roles of individuals within these networks, and if we had been able to put that to them, that we understood that they were playing a lesser role, some of these people would have spoken to us, would have explained their role, would have explained the role played by others and maybe even given evidence of that. There is obviously a degree of speculation in this but I can only rely on my own experience of what I have seen, what I have heard. My belief is that public safety might well have been well served had that been available to us and had that happened. I accept that is to a degree speculative. I wish I could go into more detail here but I am afraid I cannot.

Mr Jones: If I might elaborate on some of those points, because I am not directly connected with investigations, the knowledge I have of other agencies' activities around the world also tells me that the sequential nature of investigations is now a key feature of these global investigations. It is not just a question of resources. In other words, you go from A to B. B might be in Pakistan. That then spawns five or six inquiries in other parts of the world which indeed lead to others. This is putting huge pressure on investigators like Peter to bring these cases to justice. This gathering of information nature of an inquiry is now becoming quite common. Seeking to resolve them in the time that we currently have, which was designed, I think, for more conventional criminal justice processes, is proving difficult. On the point about three months, there is nothing magical about that. It is looking at the series of investigations, looking at the scope of the task that we now face, looking at the sequential nature of investigations and the experience to date, not just in our country but also in others, which suggests that it is around that sort of period where some of the most complex have been resolved. We desperately hope to resolve them inside the seven days, never mind the 14 days or beyond. There is no intention on the part of the Police Service to exploit any new flexibility to coast, take our time or what-have-you. That is not good for those who are suspected of being involved in police activities, or for the public of this country. That is why we are determined to use this new extension, if indeed we are granted it by Parliament, very selectively indeed and very carefully. A long rambling answer, Chairman, but the three months is based on our experience and looking at other jurisdictions and on the technical complexity of some of the inquiries that we are faced with now.

Q68 Lord Lester of Herne Hill: I just wonder why, if these points are correct, it does not apply to all forms of serious organised crime, so that if Parliament were to give you this extension would not the next thing be to extend it to all serious organised crime?

Mr Jones: I would argue not, based on some of the discussions I heard earlier about human rights. We are faced with a completely different threat. The threat from organised criminality does corrode our way of life and our democracy but not in the way that suicide terrorism seeks to kill and maim dozens, if not hundreds, of people. That is the difference. The proportionality test would not be met by me sitting here and saying that for organised criminality we want you to extend the period for which we can detain people up to three months. The argument would not hold water.

Q69 Lord Lester of Herne Hill: Even for very serious conspiracies about drugs or other forms of murder that do not involve terrorism? Do you say that there is some distinction between terrorist purposes and these other forms of serious organised crime, such as money laundering?

Mr Jones: That would be more about convenience for us as investigators. This is a grave, current and enduring threat that the country faces and this is why we are looking for this extension to our capability but in a very narrow way, only around particular suspects. I did read that into the documentation, would not the Police Service seek to push out the boundaries elsewhere? Absolutely not. I personally would be against that.

Q70 Dan Norris: Mr Clarke, you talked about the problems of time and how there is a huge demand on the time of you and your officers. You also painted this vivid picture of a computer hard disk, if it were printed on paper, creating this mountain of paperwork. Is that not really an argument that you need more officers working harder on that paperwork or whatever task you need to be undertaking rather than extending the period from seven days to three months?

Mr Clarke: If I may say so, no, it is not. It is not about resources, as is frequently put to me, "If you had more officers doing this could you not get through it more quickly?". It is about sequencing. If I could give an example, we often seize large numbers of mobile phones and SIM cards in a search. To conduct a search of an average domestic dwelling to the standards demanded by terrorist investigations takes two to three days on average. We frequently find SIM cards and very often, obviously because of their size, they are easily concealable, so we retrieve them. They are then sent to the laboratory where they are downloaded and the data is drawn off them. From the service providers we then have to get the subscriber details and the billing details. Quite often that information is held abroad and so it takes time to get that material back. Once we have received that material we have to analyse it and that involves a lot of charting and cross-checking, going through databases and then trying to make sense of the connections that evolve from this. The relevant parts of that then have to be put into a form of interview strategy to be put to the suspects who are being held in custody. At the same time the material that we hold, the parts that we intend to interview people about, have to be disclosed to the defence. The defence then have to consult with their clients and take instructions and at the end of that process we can get round to asking the questions. That, understandably, takes a particularly long time.

Then, as a result of the answers to those questions or not, we have to start the whole process over again. That is just one example. The same applies to all sorts of other data. Quite often material has to be translated as well. It is not simply about resources. Obviously, I would not sit here in front of you and say that we do not want more resources; of course we do, but it is not simply a matter of resources. It is very much about the sequencing of the activity.

Q71 Dan Norris: Thank you. You seemed to say two things there, first of all that it is not an issue about resources, and then you said it was partially (my word) resources.
Mr Clarke: If the Commissioner were watching he would not thank me for saying we did not need more resources.

Q72 Dan Norris: Is it fair to say that some increase in resources would help and therefore perhaps the three-month detention period is still too long?
Mr Clarke: No, it would not. However many resources we had I do not think it would cut into the basic problem here, which is the sheer weight of material which we are routinely recovering in these cases. This has to be analysed at some point and then focused into an interview strategy and an investigation strategy set by the senior investigating officer. At some point one person has to be aware of what is emerging from all this data. It cannot just be a cavalry charge.

Q73 Dan Norris: So it is a qualitative thing rather than just bodies doing it?
Mr Clarke: At the end of it, yes. We need as much time as we can to gather and grab the data in the very beginning but then it has to be focused, analysed, understood and made sense of and that process gets narrower and narrower.

Q74 Baroness Stern: Mr Clarke, the briefing from Assistant Commissioner Hayman was very helpful to us and the practical examples were also helpful and we were therefore able to understand the problem that you were setting out, but what he did not put in that very helpful document was any statistical evidence suggesting the problems that are caused by the failure to have a three-month limit, how many prosecutions could not be brought, any prosecutions that had to be abandoned or any prosecutions that went wrong because you had to make a wrong charging decision. Do you keep such information and, if you do, would it be possible to provide it to the committee?
Mr Clarke: I cannot sit here and say X number of terrorists have evaded justice because of the lack of provision. I can point to a particular case as an example, if that would help, where, had we had this provision in 2002, the outcome of a recent court case, the so-called ricin trial, might have been very different. Mohamed Meguerba was one of the suspects in that case and it is likely that we would have held him or applied for his detention for sufficient time to find that his fingerprints were on the ricin recipe and he would have stood trial as a main conspirator in that case had he not fled the country. As it was, he was not available to stand trial and so the jury were not able to benefit from his presence in the court. I cannot say whether the jury would have come to a different decision but I think it would have been possible for the prosecution to present the case in a way which was easier for the jury to understand what that conspiracy was about. As much as anything—and I have pointed to other cases and I have to be very careful, as I said,—there have been cases where people might have had a different reaction to their period of detention and to the questions that were being asked of them, where we probably would have had a greater understanding and where possibly charges would have been laid. It is also as much about the changing nature of what we are facing, as Mr Jones alluded to earlier in our conversation. When we asked two years ago for the period of detention to be lifted from seven to 14 days we felt that that was reacting to the change we were beginning to perceive in the nature of these networks and what we needed in order to investigate them. Everything that has happened since then has confirmed in my mind the fact that the initial analysis was right. This changing nature of the threat did require a longer period, and the events of last year in particular, 2004, the cases which we examined then and which are waiting to come to trial, confirmed in my mind that 14 days is insufficient. In one particular case we got to the stage where it was almost by chance on the 13th day of detention that we found the crucial evidence on a computer which enabled the Director of Public Prosecutions to authorise charges. As I say, that case is awaiting trial so I cannot go too much further, but to get to that stage, and there was a comment earlier about do we have to get my officers to work harder, they were actually sleeping on the floor, not going home, just ploughing their way through this vast amount of data, and we would rather serious criminal investigations were conducted in a slightly calmer and more ordered atmosphere than that.
Mr Jones: The other issue, and it is a good question and I tried to have some work done on this, is that it is such a small number of cases that we are talking about now, and Peter has difficulty with that and I understand why, and we are hopefully dealing with a tiny number of cases in the future, but the statistical rigour that might perhaps bolster this is pretty difficult to give you. We did try very hard to do that but without delving into some very difficult cases it is hard to explain. What I can say is that work we did looking at other investigations elsewhere did lead us inexorably towards this very guarded use of extended detention.

Q75 Baroness Stern: You were lucky and found the thing on the 13th day and that is very good news, but does that justify an extension to three months?
Mr Clarke: What is envisaged is up to a maximum of three months. I certainly would not envisage the three months becoming the norm. If it is just two days past 14 days that gets us to the point of charge then the requirement is met. On the point about judicial oversight, I as a police officer would not

want this power to sit in the hands of the police. I think it is absolutely crucial for community confidence in the process that there is robust judicial oversight and that there is as much transparency as is possible in this type of case.

Mr Jones: And professionally we would not want to be coming back to Parliament to talk about an extension beyond, say, three weeks because we had suddenly discovered that the measures we are proposing were not up to the task. The way we see the threat changing and the compression of time from groups becoming interested to initiating an attack has shortened from years to now months. These are all changes that we are having to grapple with, so there is an element of trying to think strategically about this and about the future.

Q76 Chairman: Mr Jones, what is the problem in the present law which would stop you bringing lesser charges against a suspect and then continuing to investigate and question in relation to more serious offences with a view to bringing possibly more serious charges later?

Mr Jones: There are a number of problems with that. A less serious offence, whatever that may be, may or may not be disclosed and there are issues around bail and around the regime whereby offences can be investigated post-charge. It is not quite as simple as that. I know of some pretty complex investigations where there are no charges available, lesser or otherwise; they are just not there, although we have seen some cases where we have had financial offences where we have had to charge. In fact, I have some data in front of me which shows that quite a few people arrested under prevention of terrorism legislation are in fact dealt with for these lesser offences, so it has not provided for us the traction then to take those individuals forward and bring them to book for more serious offences.

Q77 Lord Plant of Highfield: I have two questions. I am not sure who should answer which. First, since the Terrorism Act of 2005 there have been available to the authorities control orders. Prior to that there was a stark choice: charge or release after 14 days. Why, in the brief given to us, was no reference made to control orders because it looks as though control orders might have been the solvent of this particular dilemma of charge or release? The second question, and we were talking to the Home Secretary about it earlier, is, do you think allowing intercept evidence in the courts would help this process that you have been outlining and again possibly reduce the amount of time you would need to hold a suspect?

Mr Jones: On the control orders, we see the control regime as a complement for pre-charge detention, not a substitute, so for appropriate cases it may indeed be the case that a form of control order may deliver what we require. There will be other suspects where to have effectively some sort of house arrest would I think be deeply unsatisfactory for a number of reasons which we discussed when control orders were first mooted. We do not see them in any way as a substitute but rather as a complement for the measures we are proposing. It is an omission on our part that we did not describe that in our submissions to you. Peter might be able to add to that. I am able to speak about the intercept one because I am here to speak for the association today. Let me just read out what the policy is: "The Association is minded to endorse the use of intercept material as evidence but not within the current legal landscape". We see, operationally, presently, the balance of advantage is to remain as we currently are, where we are not comfortable about intercept evidence going to trial. However, we are positively addressing the strictures and constraints which we feel need to be addressed before we can move totally into a situation where we will be adducing intercept as part of criminal trials. It is a positive exploration and it is quite active and vigorous. That is taking place as we speak. I think the Home Office too are looking at this and I would hope that by the end of the year we will have a more definitive statement on that. However, there are some difficulties. We are open to the suggestion, in fact more than that, but there are some risks.

Q78 Dr Harris: I am a bit confused because you said that you accepted that but you did not explain why control orders would not work.

Mr Jones: I did not say they would not work.

Q79 Dr Harris: Sorry; you said they were not a substitute for extended detention. But then in response to Lord Plant you did not explain why. Clearly in some cases it would be a useful substitute since you are seeking to control someone while investigations continue.

Mr Jones: I will defer to my investigator colleague.

Mr Clarke: In some cases it is entirely feasible that it might be appropriate but it is important to remember that what we are suggesting is that extended detention would only be applied for in the most serious cases. The question to ask then is, is a control order an appropriate way of safeguarding the public from the people who, by definition, would be suspected of the most serious terrorist offences? I think the answer must be that the degree of control afforded by a control order might not always be appropriate.

Q80 Chairman: Earlier on, Mr Clarke, you said that you welcomed the judicial role in looking at these extensions and I am very pleased to hear that but could I ask you about the existing practice? Have any applications under the existing rules been refused by judges at any stage to your knowledge?

Mr Clarke: I have been thinking about this. I cannot bring to mind a case where an application has been totally refused. It is very often the case that we will ask for perhaps four or five days and the district judge will say, "No, 48 hours and then I want to hear the case again". That is frequently the case, so the answer to your question is simply that. I cannot bring to mind one where they have said no. I think

that is a reflection of the fact that before we go to court and ask for a warrant of further detention we do think very carefully about it and we do consult with the Crown Prosecution Service as to whether it is an appropriate course of action. If it is not we do not make the application.

Mr Jones: There is a great amount of filtering that goes on before we get to the district judge stage and we certainly like to think that we put in the checks and balances to make sure that unwise applications are never and will never be made.

Q81 Chairman: In the context of the role of judges, certainly Mr Clarke was here when we were asking the Home Secretary about the question of the investigating judge system as in continental Europe. What do you think of that suggestion in terms of those inquiries from your point of view?

Mr Clarke: Yes, I heard the discussion about apples and oranges and all of that. I frequently discuss this with Judge Bruguière from France, who is a lively interlocutor on these subjects. He finds it difficult to comprehend the British system at times where there is not earlier judicial involvement in the direction of the investigation. My only fear about greater involvement is that we are talking about extending detention here with a view to enabling the investigation to be driven forward and if we construct something which looks like the police briefing and putting reports to the CPS, the CPS then briefing and putting reports to a special advocate and then to the district judge, and then perhaps a high court judge becoming involved at a later stage or some other judicial involvement in the actual investigation itself, we may get to a stage where there is so much report writing and briefing that we lose what we are looking for, which is giving us time to focus on the business of investigations so that we can get it done as quickly as possible so that the person can either be charged or released. In principle, and it is obviously a matter for others, I have no difficulty whatsoever with judicial involvement.

Mr Jones: Chairman, can I offer a broader point, and I differ from Peter slightly here? I think that positions judges in a fundamentally different role within our judicial system than they currently have as adjudicators, to becoming inquisitors and I think it poses some pretty direct challenges to the way we do things now, including commissioners' and chief constables' accountability, and there are issues about competence as well. I understand why these debates are taking place but at the end of the day we are here to keep people safe and to bring people to book. That may be the right way but I think there may be some unintended consequences of going down that route.

Q82 Chairman: Certainly this is an issue that the committee may well return to before too long, so if there are any more considered views that you would like to put forward on behalf of the association in writing, I am sure we would be very pleased to receive them.

Mr Jones: We are hoping we have got two views here.

Q83 Lord Judd: You are putting your case in a very balanced way. Would you say that one of the difficulties you are grappling with is that it is being put to the public as a sort of point of principle as distinct from a pragmatic, dispassionate case to do what you have been describing?

Mr Jones: Fundamentally I think some of the megaphone posturing—and I am not going to name names here—that has gone on in the last few months has been deeply unhelpful and it has allowed the media then to distil from that odd words and phrases like "internment" and unfair and unwise comparisons drawn with practices elsewhere in the world. I think this has thoroughly confused the public and has become a bit of a talisman and it never should have. I agree entirely with that point.

Q84 Lord Judd: And you would want us to go away with the overall conviction that your determination is that this should not normally happen; it should only happen in the most exceptional circumstances?

Mr Jones: Yes, and also, my Lord, it is about professional advice. There is nothing in this for us other than to do our duty to keep the people of this country safe. We are determined to do that and bring people to book. The way it has become dramatised, if you like, in the media has been very unhelpful and I have been to lots of public meetings where I have tried to cut through that, without much success.

Q85 Lord Judd: Is it not the case that to do your job well, as with all policing, you need maximum public goodwill and maximum access to intelligence, and the problem you are confronted with is that you may have a hard core of manipulative people but there are a lot of very genuine people who get very anxious that this is in fact internment by another name, or who can be persuaded that that is what is happening? It seems to me that the pragmatic approach has to be terribly strongly advocated.

Mr Jones: Peter and I have discussed this and it is about transparency, it is about judicial oversight and it is about the public seeing that the judicial checks and balances hold sway, not the investigators, and it is about us constantly repeating our messages publicly and to various groups and organisations, and we are determined to carry on doing that.

Lord Judd: It might help if you could put them up in the Savoy!

Q86 Dr Harris: Your last answer in that discussion leads me on quite usefully to talking about public confidence, transparency and oversight. Without getting into the *sub judice* case on the question of legal force, is this not an area above all others where to maintain public confidence. There has to be—and indeed perhaps has to be seen to be—adequate

scrutiny, oversight, parliamentary scrutiny, for example, of the operational matters and the policy in respect of lethal force?
Mr Jones: I can make a general point there but I would obviously be inhibited by the IPCC investigation. Police officers' actions in this country are currently measured against section 3 of the Criminal Law Act. That is the ultimate arbiter of the use of reasonable force. Each and every action we take where we are called to account is measured against that, so I would say that there is already public scrutiny, be it through court processes or inquest.

Q87 Dr Harris: Yes, but there are guidelines, are there not? I am not asking you to get into the IPCC investigation. There are guidelines, they exist, and they can have oversight over them without requiring a specific case with which to go *post facto* to a court. Would you have any objection in the interests of transparency and oversight to there being a parliamentary process of oversight of those guidelines and the implementation of them prospectively?
Mr Jones: I think we have to accept that there is a demand now for some examination of those tactics, but I also would say that those who oppose us, who are intent on mass murder, would also see benefit in having access to those tactics. Post the IPCC report emerging, post the inquest, we will then have to look very seriously at how we can move further towards greater transparency. The only thing I want to do is stop the opposition getting access to our tactics.

Q88 Dr Harris: Maybe I was wrong to imply that transparency automatically followed from scrutiny because we have ways in this House of providing scrutiny without doing it in a public way.
Mr Jones: I agree with that and that is somewhere we will have to go, I think, once the judicial processes I mentioned have been completed. However, I would say that whatever policy we have is bracketed with the European convention. We have seen Treasury counsel advice on that. It is within section 3 of the Criminal Law Act, so we will do our utmost to make sure that whatever processes and procedures we have are in fact lawful and will withstand those scrutinies that we are about to undertake.

Q89 Chairman: Thank you very much. Are there any points you would like to put to us in conclusion or do you think we have covered everything of relevance?
Mr Clarke: No, thank you. We are grateful to the committee for the opportunity to explain our position on some of these issues.
Mr Jones: Likewise. It has been really welcome that we are allowed to say what we feel we need to say to you decision-takers as professionals without the sort of distillation that has gone on in the last few months. It has been very helpful; thank you.

Chairman: Thank you both for coming. I think you have put your case very effectively. We will be producing a report very soon. Thank you for spending time with us at what must be a very busy period, particularly for Mr Clarke.

Monday 31 October 2005

Members present:

Mr Andrew Dismore, in the Chair

Bowness, L.	Mr Douglas Carswell
Campbell of Alloway, L.	Mary Creagh
Judd, L.	Dr Evan Harris
Lester of Herne Hill, L.	Dan Norris
Stern, B.	Mr Richard Shepherd

Witnesses: **Mr Livio Zilli,** UK Researcher, Amnesty International, **Dr Eric Metcalfe,** Director of Human Rights Policy, JUSTICE, **Mr Gareth Crossman,** Director of Policy, and **Mr James Welch,** Legal Director, Liberty, and **Ms Alexandra Marks,** Chair, Reform Board, Law Society, examined.

Q90 Chairman: Good evening, everybody. This is the second of our evidence sessions in the initial phase of our inquiry into counter-terrorism policy and human rights. We are examining the human rights implications of the legislative and non-legislative measures introduced or proposed by the Government since the 7 July bombing and the 21 July attempt at bombing. We are not investigating the events of those days or the shooting of Mr Menezes on 22 July but for the avoidance of doubt I should make clear at the outset to our witnesses and to the press and public that discussion of those events and any other active criminal or civil proceedings is prevented by the *sub judice* rules of both Houses. These rules prevent discussion in Parliament of cases which are active before the courts, including coroners' courts, in order to safeguard the rights to a fair trial and fair consideration of events at an inquest. It is also important that Parliament and the courts give mutual recognition to their respective roles and do not interfere in each other's affairs, so if necessary I will intervene to ensure that the *sub judice* rules are not broken. Can I welcome our various witnesses. I hope that we have found the right name plates. We have got quite a few people here so I would ask my colleagues when asking questions to make it clear to whom the questions are directed. We are joined by Mr Livio Zilli of Amnesty International, by Dr Metcalfe of JUSTICE, by Mr Crossman and Mr Welch of Liberty, and by Ms Marks of the Law Society. Welcome to you all. Perhaps I can start with a general question and perhaps it is best directed towards Liberty in the first instance. What do you say is the overall relevance of the attacks of 7 and 21 July in London to the application and interpretation of the relevant human rights standards?
Mr Crossman: I think an initial reaction would be that we hope that one of the consequences of the attacks on London is that they demonstrate how the human rights tenets that we have in this country can be successfully and properly applied. In any interpretation of human rights considerations the need for necessity and proportionality all go to the heart of any legislative process which ensues. Obviously, the purpose of Parliament is to consider what action is necessary and what new laws should be brought in in order to deal with any new threat as a consequence of the attacks. What we hope to do and what we have tried to do when we have written parliamentary briefings is apply the human rights standards to run throughout consideration of the Convention and apply them to the various proposals that the Government is putting forward.

Q91 Chairman: So do you accept that human rights law imposes on the state a positive obligation to ensure that its laws provide sufficient protection for the life and physical integrity of the population within its jurisdiction against the threat of terrorism?
Mr Crossman: Of course. A positive obligation goes to the heart of any consideration of the Convention. In the first or second paragraph of the two briefing papers that I have written I have said that it is the duty of the state to consider what steps it is appropriate to take as a consequence, so I would not have any disagreement with that in principle at all.

Q92 Chairman: And also to bring suspected perpetrators to justice?
Mr Crossman: Indeed.

Q93 Chairman: You all make the general point that there is always a risk of any government action being counter-productive in terms of alienating the Muslim community. The Home Secretary told us that the Government has worked closely with the Muslim community, and we will be hearing from the Muslim Council of Britain later on. What measures in your view do you think carry the greatest risk of being counter-productive and what positive steps do you think the Government should take to earn the trust and co-operation of the Muslim community at the same time?
Mr Crossman: The two proposals which I think are of greatest concern are clause 1, the offence of encouragement to terrorism, which I believe, because in my view it criminalises careless talk, will be considered disproportionate and excessive by the Muslim community, although I hesitate to use the word "community" when talking about the Muslim community. There is no Muslim community in the same way as there is no other community. I use that because you use those words in your phrase to me, but I am always a bit cautious

of a few representatives of several million people in this country being put forward as community representatives. That said, and you can probably predict what I am going to say here, the other major concern is the extension of pre-charge detention to 90 days which, as we have said, is the equivalent of a six-month custodial sentence. Any group of individuals within this country wants to feel that if, as the Prime Minister has said (and we all must agree), we all have to be combating terrorism in the best way possible and we are all together in this, it is also vital that every part of this country and every person in this country feels that the steps that are taken are fair. It is all very well to look objectively at 90 days and say that it might be necessary, but, if it is the people on your street, if it is the people who are your friends or your family who have been subjected to those custody time limits, you are not going to feel that you are being treated fairly and you are not going to feel that those laws are being fairly applied.

Q94 Chairman: Does anybody disagree with that?
Dr Metcalfe: I agree with everything that Gareth has just said and think it underlines a very important point. Yes, it is likely that the counter-terrorism measures that are being proposed will impact disproportionately on members of the "Muslim community", but the idea that we have measures that limit free expression or due process impacts on us all and diminishes us all. This is a point that we made particularly in our evidence in relation to freedom of expression, that if one section of the community feels afraid to speak out, to express controversial points of view, then everyone's freedom of expression, everyone's interest in free expression, is diminished.
Mr Zilli: Many thanks for giving the opportunity to Amnesty to address you today. I commend the committee for conducting such an important and timely inquiry. If the question is which measures are counter-productive, Amnesty's answer is any measure which violates human rights, including those that result in arbitrary detention, stop and search without reasonable suspicion that a person is about to commit or has committed a criminal offence, discriminatory policing, detention without charge or trial, overt, broad and unlawful infringement of the rights to freedom of association and expression, which obviously are some of the measures concerned in this Bill. Your inquiry is very timely and I would urge the committee to look at what has been happening, at least since 9/11, in this country in relation to the legislative and other measures that have been put in place. I refer in particular to Part 4 of the now lapsed Anti-Terrorism, Crime and Security Act by which people were unlawfully detained for up to three and a half years. The measure that replaced Part 4, the Prevention of Terrorism Act, although facially is non-discriminatory, in its application may raise concerns with respect to its discriminatory effect. I would urge the committee to consider not necessarily simply the measures that have been proposed since the events in July but also the measures that the Government put in place before the events in July.

Q95 Lord Lester of Herne Hill: I would like to ask about clause 1, glorifying terrorism. As I understand it what the Home Secretary says is that people should not be allowed to go on television without being guilty of a serious offence if, after 7 July, they would say it was praiseworthy to bomb London or, for that matter, after the bombing in Hedera in Israel, the same thing, or after the bombing in New Delhi in India. It is said that the existing criminal law does not reach that. The first question I want to ask, and it is best if only one NGO answers because we have to get through a long exam paper and if anyone disagrees they might say so, is this. Do you think that people should be permitted to make such outrageous statements without being guilty of a criminal offence? I am talking about a statement which, immediately after, let us say, the London bombing, glorifies that and in effect advocates it for future use.
Dr Metcalfe: If I can put myself forward as answering on behalf of the panel, I would say that it is quite dangerous to suggest a criminal offence that subjectively assesses the extent to which a person is seen to be praising or glorifying terrorism and attaches criminal liability to that. If someone goes on television and praises the bombers in such a way with the intention of inciting further acts of terrorist violence I have no hesitation in saying that that person should be prosecuted to the full extent of the law and I am happy to go into detail about the full extent of laws that are available to allow that person's prosecution.

Q96 Lord Lester of Herne Hill: Would you elaborate further?
Dr Metcalfe: You have section 4 of the Offences against the Person Act 1861, which prohibits the encouragement, persuading or endeavouring to persuade any other person to murder any other person; you have section 8 of the Accessories and Abetters Act 1861, which prohibits a person from counselling or procuring any other person to commit any other indictable offence. It is also an offence at common law, in addition to statute, to solicit or incite someone to commit any other indictable offence. Section 59 of the Terrorism Act prohibits a person from inciting another person to commit an act of terrorism wholly or partly outside the United Kingdom. Section 1(a) of the Criminal Law Act 1977 makes it an offence to conspire with others to commit offences outside the United Kingdom. Lastly, section 12 of the Terrorism Act prohibits anyone inviting support for a proscribed terrorist organisation. It seems to me from that list that a person who goes on TV immediately in the wake of the 7 July bombings and praises terrorist violence can certainly be considered for prosecution under that and could be convicted of one or more of those offences on the basis that a jury was satisfied that that person had the intention of inciting further terrorist violence. On that basis we

say that the offence that is drafted in clause 1, if this is the harm that you are concerned about, is simply not necessary. There is no gap in the existing law.

Q97 Lord Lester of Herne Hill: That is very clear. Suppose that it was said that you were wrong and that there is a narrow but important gap, call it the public provocation, to commit a terrorist act. Do you think that clause 1 could be redrafted in a way that would meet the basic requirements of, say, the European Human Rights Convention by narrowing the scope of it so that it does not suffer from such over-breadth, or by including a specific criminal intention by being more precise so that it satisfies legal certainty? Can it, in other words, be in your view made compatible?
Dr Metcalfe: Yes. I would say that the best way to make clause 1 compatible with the convention that you referred to, and also, I should add, to bring it in line with Article 5 of the Council of Europe Convention on the Prevention of Terrorism (which is, after all, according to the Government's own explanatory notes to this Bill the reason why they introduced this measure in the first place), would be a requirement of intention on behalf of the person making the statement to encourage or promote further acts of terrorism because it would bring it in line with the rest of our criminal law that says that no person should be punished except for those things that they intend to do, not for things that they inadvertently might happen to bring about because they were perhaps misunderstood by someone else. I think it is particularly important that you have that requirement of intention. It is also found in international law. If you look at the United Nations Principles, the Johannesburg Principles as they are known in shorthand, in relation to freedom of expression in relation to terrorist activities, they make very clear that you have to have a requirement of an intention; otherwise you risk penalising people who had no intention of inciting terrorism and were merely misunderstood.

Q98 Lord Lester of Herne Hill: Finally, do any of you know enough about French or Spanish or Danish criminal law to be able to express a view about what weight we should give to the fact that those three countries have an offence of, in French, *apologie du terrorisme*?
Dr Metcalfe: I am grateful that you mention that. I have had the opportunity to look at the Council of Europe Committee of Experts' report in relation to terrorism that was released in 2004. That report refers to those three countries. The situation is somewhat ambiguous in relation to French and Spanish law but in Denmark it is clear that you have to have the intention to contribute to the execution of a concrete offence, that is to say, a mere indication that more criminal activity in general would be a good thing would not be sufficient to commit *apologie du terrorisme* in Danish law.

Q99 Lord Lester of Herne Hill: Is it not right that in Spain the Spanish Constitutional Court has imposed restrictions on a rather wide offence by case law?
Dr Metcalfe: Yes. I have had a conversation with Professor Walker, and I understand he is giving evidence later to this committee and his answers I think will be more illuminating, but as I understand it a previous Spanish offence did not contain the relevant requirement of intention and was found to be unconstitutional.
Ms Marks: I would like to add one point, which is that the Home Secretary's own press release on 6 October said that this particular part of the Bill was to be clarified to make it clear that the new law would be focused on those who intend to incite further offences. That has not been reflected in the body of the Bill that we have been looking at.

Q100 Chairman: We asked about this last week.
Ms Marks: Indeed; I saw.
Mr Crossman: May I make one small final observation on the clause 1 offence, which is that the Home Secretary, when giving evidence, certainly in front of the Home Affairs Committee, was quite adamant about what he believed would and would not form an offence under the new clause if and when passed. It seems that the definition of terrorism under the 2000 Act, when applied to a speech offence, actually goes further than what the Home Secretary had in mind as being the appropriate definition of terrorism. One area where it was particularly noticeable was when he was talking about the overthrow of the Ceaucescu regime in Romania, where he was saying that it was not his intention that anyone encouraging that would fall within the definition of somebody committing an offence under clause 1. My reading of the Terrorism Act 2000, section 1, is quite clear, that that would fall within the definition. In that case it might be appropriate, if there is a discrepancy between what the definition of terrorism is for a speech offence and what the definition of terrorism is elsewhere, to revisit the definition of terrorism and give a more narrow definition in this Act specifically to the speech offences.

Q101 Dr Harris: Coming back to the issue of Article 5 of the Convention against Terrorism of the Council of Europe which, Dr Metcalfe, you mentioned in your answer, there are broadly two differences I detect beyond the restriction to intention which you have mentioned. One is the fact that that uses the language of "incite" and not "encourage", which you have not commented on, and, secondly, it talks specifically in its article and explains in its appendix the need for the sub-clause that it should cause a danger that one or more such terrorist offences may be committed. Do you believe, in furtherance to Lord Lester's question, that clause 1 could be improved along those lines or is it beyond hope?

Dr Metcalfe: I always believe that it is possible to improve these things, but I agree with you that it is another requirement that was made in the Johannesburg Principles. There has to be a causal nexus, a likelihood that the statement itself will incite or encourage further violence. Mainly that is to prevent people from making statements in the context of perhaps a play or a novel which are unlikely, given the literary context, to give rise to further violence even if on the face of it they disclose an intention to incite such violence. You also asked in relation to "encourage" and "incite". I cannot be too clear on this. I would simply say that "incite" discloses a clearer intention than "encourage".

Q102 Dr Harris: Does encouragement equal indirect incitement? Are they congruent or would you say one was wider?
Dr Metcalfe: I would say that "encouragement" is wider than "incitement", but then again I have trouble with the idea of indirect incitement. It was a distinction made by the Home Secretary, and also found in the language of Article 5 itself that there is a distinction between direct and indirect incitement. If you look at our own criminal law, our own criminal law makes no such distinction. It is perfectly possible to be guilty of incitement in an indirect fashion under the criminal law that I have talked about. This is an important point that I want to highlight. The Home Secretary appeared to suggest in his evidence to the Home Affairs Committee that there was a problem with people inciting acts in general as opposed to specific acts, that is to say, you could only be guilty of incitement if you said to someone to blow up a particular bus at a particular time on a particular date, not acts of terrorism in general. If it were the case that our criminal law does not allow people to be prosecuted where they disclose an intention to incite acts of violence in general, then perhaps I might agree that there is a need for an amendment to make that clear, but I do not in fact think that is true and so for that reason we have not argued for it.

Q103 Dan Norris: I suspect that you may have different answers to the question I am going to ask, which relates to acts preparatory to terrorism. Do you accept that there is a gap in the present law which makes it difficult to prosecute where there is clear evidence of an intention to commit a terrorist act, but there is no evidence of the precise details of any planned terrorist act? In other words, it is the intention but not the other aspects.
Mr Crossman: This obviously, as we all know, has been going around as an idea for some time. It was said at the time that there might be a gap in the criminal law but it had not been identified. Terrorism by its nature is likely to involve more than one person but the element of conspiracy is the need to show the common intention between several people. It may well be that if you charge several individuals with an offence of "acts preparatory" that might get around, and suitably might get around, the need to show that common intention, but the element of intention is there within the offence of "acts preparatory". The only major concern I have about the offence as it is currently drafted is the breadth of the definition of "any conduct". When, God forbid, say, you are looking at a future terrorist attack and you know who might have been involved or who is supposed to have committed the attack and you start retracing their course of conduct over a period of time, and you have anyone who might have come into contact with them suddenly falling under suspicion when you have such an incredibly broad concept as "any conduct", what I felt was that it might be good for the legislation to at least give an indication of the sorts of activity that might be thought of as being appropriate for charging. It would have to be non-exhaustive, and legislation often will contain non-exhaustive lists as an indication of a type of behaviour, but in principle the element of intent is there and therefore I do not think there is a fundamental problem with this offence.

Q104 Dan Norris: Let me be clear: do you feel there is a gap or not really?
Mr Crossman: Yes, I think there was a gap in that the existing conspiracy laws required a need for a common intention between the various people who were going to be charged. Because there is not that need, even though it may well be that there are several people and it might be possible to prove a common intention, it is not a requirement and I think that is fair enough.

Q105 Dan Norris: Is that a view shared by all of you, that there is a gap?
Dr Metcalfe: I take the point that Gareth made just now about the requirement to conspiracy. I would say that there have been other existing terrorist offences which would be used. For instance, section 57 of the Terrorism Act 2000 makes it an offence to possess an article for a purpose connected with the commission, preparation and instigation of an act of terrorism. It seems to me very difficult to think of any kind of preparatory act which might not involve, say, the possession of an article or, under section 58, making a record of information. That said, we do not oppose the creation of this clause. What we do agree with in relation to what Gareth said is that we are concerned with its breadth. It seems to me that "any preparatory conduct" is so broad that there is a danger that it lacks legal certainty. It is simply unclear how a person might avoid the criminal law. We agree with what Liberty has suggested, that you should have a non-exhaustive list of kinds of activities, things like purchasing, procuring or otherwise obtaining any article, material, ingredient or substance. That is the kind of thing that you want to be looking for—and this is hypothetical, of course—so that for the purposes of the rule of law people can know in advance when they are likely to be breaking it. Otherwise, if you have too broad statements there is a risk that people will inadvertently break the law.

Q106 Mr Shepherd: Let me just come in on that, Dr Metcalfe. You do not see a gap that you could concede because you see other instruments of law that could be used to meet the charge. On the other hand, Mr Crossman thinks that there is possibly a gap, but what you are united on is that, whether there is a gap or is not a gap, it is too wide. Is that a fair summary so far?
Dr Metcalfe: Yes, that is correct.

Q107 Mr Shepherd: I have a difficulty here and maybe you can help me with it. I am very nervous of the huge extension of law, and you have cited it and we have had briefs to this effect, covering everything, and so I am much more nervous in saying that if there is not a gap why are we creating additional law that is on the statute book that may be used in ways that we have not quite understood?
Dr Metcalfe: As Mr Crossman made clear, so long as an ingredient of this offence is that you must have the intent to commit an act of terrorism.

Q108 Mr Shepherd: That goes without saying.
Dr Metcalfe: I think that is the strongest safeguard that you can have in legislation of this kind. Where that ingredient is absent we are completely opposed to the creation of this offence.

Q109 Lord Lester of Herne Hill: It is fair to say, is it not, that the Newton Committee and Lord Carlile of Berriew both recommended some such extension in their reports?
Dr Metcalfe: To be clear on this, the Newton Committee said that they could not see that there was a gap, but Lord Lloyd in his review of anti-terrorism legislation in 1996 recommended it, and yes, Lord Carlile has recommended it more recently. We agree with the creation of this offence only for the avoidance of doubt, because we do not think that it would be unreasonable to create a law of this kind even if we do not in practice think there is a shortage of criminal offences. It does not make anything illegal that should not already be illegal, if you fathom my drift.

Q110 Mr Shepherd: So you still do not see a gap yourselves?
Dr Metcalfe: In practical terms I do not think, as the Director of Public Prosecutions told this committee last year, there is a shortage of existing powers but for the avoidance of doubt we are happy for this offence to go forward.

Q111 Dan Norris: Can I draw you out a little on this? Most of us are politicians here and I am still confused by that. What about a situation where there is evidence that an individual has made unsuccessful attempts to obtain chemicals or other substances, all of which are legally available but which in combination can be used to make deadly poisons, say, ricin? With what under the current law could such a person be charged in the absence of any evidence of the precise use which is planned for the poison? To put another alternative to you so that I can perhaps understand whether there is a gap or not and how you see it, if you are not opposed in principle to the creaton of such an offence, are there any drafting amendments you would want to see which would meet whatever concerns you do have?
Dr Metcalfe: To answer the second part of your question first, we have suggested an amendment which I can read to you in terms but probably is a wee bit long-winded. It provides a non-exhaustive list of the kind that Mr Crossman has already talked about, simply saying things like, "'Preparatory conduct' may include making or constructing any article, device or item, obtaining any good or service, creating, manufacturing or preparing any substance". In relation to the first part, this is an unsatisfactory answer but this is the nature of the reality of criminal law and there is no getting round this problem: the problem identified by the Newton Committee is not that you cannot tell that a person has gone out and bought all these deadly substances. The problem is satisfying a jury beyond reasonable doubt that that person had the intent of committing a terrorist offence. Buying household items that may be used in combination to create a deadly substance should not be illegal. It should only be illegal if you are doing those things with the intent of committing a terrorist offence. Creating new offences will not get you round the difficulty of proving that the person had the intention in the first place. That is what the Newton Committee said. It said that the problem is not with the availability of criminal offences. The problem is simply the evidential one: how do you show that the person was engaged in terrorist activity as opposed to just getting a bunch of household chemicals together?

Q112 Dan Norris: Is there anyone else who wants to comment on this?
Mr Zilli: I would just like to make one point which I think underscores a lot of what has been said and that also underscores the concerns that were expressed by some members of the committee in the questioning of the Home Secretary. That is that we already have a whole panoply of criminal offences—aiding, abetting, procuring, inciting and so on—and so in relation to this proposed offence it has to be looked at in the context of the definition of terrorism that has already been provided, which is extremely vague, over-broad and gives certainly Amnesty cause for concern. Secondly, there are the concerns expressed by members of the committee in relation to the necessary requirements of the criminal law, that is, precision and clarity and the need for intent to be proved.

Q113 Lord Judd: It is true to say, is it, that all of you without exception are unhappy about the proposed powers to extend the ability of the Home Secretary to proscribe organisations?
Mr Crossman: Extremely unhappy.

Q114 Lord Judd: No-one dissents from that unhappiness?
Mr Crossman: No.

Q115 Lord Judd: If that is the case it would be helpful to the committee if you could succinctly and clearly put the basis of your anxiety.
Mr Crossman: We had a draft Bill published which had an offence of glorification of terrorism. The Home Secretary accepted and the Government accepted that this offence went too far. It was effectively a strict liability offence that would criminalise speech with no requirement even for negligence. If you are going to extend proscription you are saying, "We accept that this is going too far to make a criminal offence of glorification but we are going to extend the grounds of proscription so that if a non-terrorist organisation, a political organisation, which satisfies that criterion of the extension of glorification is proscribed it will be a criminal offence not for you to go and glorify terrorism but for you to support or do anything to further the activities of an organisation that has been proscribed because it glorifies terrorism". If you accept, as the Government has said, that it is going too far to criminalise glorification then you cannot at the same time justify the extension to proscription so that organisations that glorify can be proscribed.

Q116 Lord Judd: But you would agree, would you, that, whatever one's personal views about it, if the law stipulated that certain behaviour is not acceptable and is an offence, it is logical that such conduct should be a ground for proscribing an organisation?
Mr Crossman: I am sorry. I am confused.

Q117 Lord Judd: If the law states that certain activity is an offence, even if you personally do not think the law should say that, would you agree that it is logical for that offence to be taken into account when deciding whether or not to proscribe an organisation?
Mr Crossman: Yes. If the law has decided that behaviour of a type is criminal, but what I am saying is that if the Home Secretary has already turned round and said that that is going too far, then you have to apply consistency and say that it is going too far in relation to the proscription. I would not be coming out with that argument if the existing offence of glorification was still in the Bill. I am saying you need consistency.

Q118 Lord Judd: Could I therefore ask another question about this whole issue? Do you think it is possible to approach this in a sound way in legal terms without examining more fully the context in which such things can happen? For example, as far as I am aware the proposed legislation nowhere deals with the issue (why should it, some might argue) of state terrorism. If people are discussing a response to state terrorism does that not possibly put a different complexion on a discussion that might take place if there were no state terrorism in the situation in which action was being discussed?
Dr Metcalfe: As I understand your question you are pointing out the problem with the breadth of the provision, which is that if you extend proscription to include discussions of terrorism you are referring, of course, to the definition of terrorism as defined in section 1(1) of the Terrorism Act 2000, and that, of course, applies to all political violence of any kind. We may feel that in our own liberal democratic society political violence is unacceptable but there are other countries and other situations around the world in which it is very easy to talk about political violence as being in some circumstances as justified. You have had numerous examples, such as the ANC. I found particularly interesting the mention you made of state-sponsored terrorism because, coming from New Zealand, I am, of course, familiar with the *Rainbow Warrior* affair which was an instance of the French Government blowing up a ship and killing a Portuguese civilian in Auckland harbour. Yes, these are difficult and complicated issues, but the issue that you raise goes further, deeper if you like, back to the definition of terrorism itself.

Q119 Lord Lester of Herne Hill: None of you has made the point, as I thought you would, that proscribing an organisation is a more serious restraint on free speech, than having a criminal penalty. As Sir William Blackstone reminds us, it is a prior restraint which is more draconian than a threat of prosecution. None of you has made that point. Is that right or wrong?
Dr Metcalfe: We have made it in our written evidence. We have not made it so far in the session but I would agree completely with that point because it triggers so many other powers in addition to that.

Q120 Lord Judd: If I could revert to my previous question, would you not feel therefore that a statement by the Home Secretary, that he can think of no situation in the world where it is possible to talk of any justification for terrorism today, is unrealistic in the context of some real political situations that exist in the world?
Dr Metcalfe: I think it is highly unrealistic and I was surprised that the Home Secretary had made that statement. I think you only have to look, say, as an extreme example, at North Korea, one of the most totalitarian and draconian societies on the face of the planet. To suggest that no-one in the United Kingdom should be permitted to talk about armed resistance to the North Korean regime in the absence of the international community doing anything about it, that to talk about armed resistance against the North Korean regime should be made a criminal offence in this country, seems to me astounding. That is the most extreme example. I think there are many situations around the world on which reasonable people can disagree, of course, but you can legitimately talk about the merits or the morality of political violence against the state in situations where the countries involved are simply not democratic, where the governments or the regimes are repressive.

Q121 Lord Judd: Would you go so far as to say that provisions of the kind envisaged are quite dangerous in terms of the resulting limitation on analysis of what is happening politically in the world?

Dr Metcalfe: Profoundly. It is a profound impoverishment of free speech in this country. Think of how much of our political philosophy and political theory has been born of discussions around the legitimacy of political violence in general and then consider a law that prohibits such discussion. The chilling effect is a very simple point, that for fear of breaching this law people will not only say things which are contrary to this law but are also liable to be contrary to this law. Because it is so broadly defined it will inhibit a great many things that ought to be discussed.

Mr Crossman: On Lord Lester's point could I make one other observation, and that is to agree with what he says. That is in the structure of the legislation that we have. The proscription offence is in Part 2 of this Bill. It is not a criminal offence in itself; it is a proscription. Therefore you would not have the safeguards that are in place for the prosecution to take place, so you would not need the agreement of the DPP to proscribe. This is a decision of the Home Secretary. It does not go through any criminal process. You can appeal against proscription, although I must say that I have always thought that the way in which you are going to appeal against an organisation being proscribed and then having anything to do with an organisation being a criminal offence, would be somewhat difficult. Given that this is a decision of the Home Secretary rather than involving due process of the court, I would say very much that proscription offences are in some ways more concerning than the offences under Part 1.

Q122 Mary Creagh: None of you considers that the case has been made for the proposed extension of pre-charge detention. In your evidence you said that more appropriate and proportionate ways of meeting the police's concerns are available, including by providing the police with additional resources, relaxing the ban on the admissibility of intercept evidence and bringing lesser charges while continuing to investigate more serious allegations. I do not know how many of you were here last week to hear the police and the Home Secretary both refute that quite emphatically, particularly the issue of extra resources. You are also concerned that the justifications relied on by the police apply equally to other types of criminal investigation, and again last week the police were very clear in their evidence about the distinction they make between the need for these powers in terms of terrorism but not in terms of serious organised crime or other crimes. Amnesty, you make the additional point that judicial scrutiny of extensions is simply a review of the reasons adduced by the police of the need for such extension, and it is not onerous for the police to convince the judiciary of such a need. Are any of the justifications put forward by the police in support of extending the maximum period to three months in your view genuine operational difficulties faced by them when investigating international terrorism?

Mr Welch: We probably do accept that there may be circumstances where the police feel they need to act sooner against suspects because of the nature of the offences that they are dealing with, but our view is that there are other measures that could be introduced in order to try and deal with this problem and ought to be before you come to any consideration of extension of the 14-day time limit for detention of people on suspicion of planning or committing terrorism offences. With regard to those measures to which we think consideration ought to be given, first, the use or admission in criminal proceedings of intercept evidence. I do not think it is unreasonable to assume, in the circumstance that, if the police have somebody under suspicion and to feel constrained to take steps to arrest them at an early stage, it is probably on the basis of intercept evidence. So if intercept evidence could then be admissible on a subsequent criminal charge (and that may well be acts preparatory to terrorism which we have just been talking about), this problem is not as acute as the police seem to be suggesting that it is. Therefore, first, if you introduced intercept evidence into criminal proceedings that would be something which we think would go a long way towards dealing with the problems identified by the police. Secondly, we think that the Police and Criminal Evidence Act Codes could be amended to allow interviews to take place after charge. Currently they are not but we accept that there may be certain types of forensic evidence that it would take a while for the police to get. That is pretty standard in criminal proceedings. I have been a criminal practitioner and I know that you very often do not get your forensic evidence until after your client has been committed to the crown court and that may be two or three months even after charge. We accept that there may be an argument for saying that, where that new forensic evidence comes in and there are therefore some legitimate questions which the police can put to a suspect, there may well be justification for amending the law to allow people to be questioned at that point. The third thing is the obtaining of the keys to encrypted evidence, encryption being one of the problems that the police highlight. There already is a power under the Regulation of Investigatory Powers Act to compel somebody to produce an encryption key and it is a criminal offence to fail to do so, so if somebody is a suspect presumably they are going to be the person who would have the key if a computer has been seized from their address, so the proper authorities can make the request for disclosure of the key and if it is not produced that person commits a separate offence for which they could be charged. The fourth thing which the Government might want to consider is the possibility of introducing conditional bail when somebody is released on police bail to return at a later date. At the moment, when somebody has been arrested and the 24-hour period has come to a close they are released pending further police investigation to return at a future date. Under the present law there is no possibility of any conditions being imposed on that bail. We would not see a case for extending that to all criminal offences but we could see that there might be a case for introducing a system in relation to terrorism offences for somebody released in those circumstances to come back at a later date to be subject to quite stringent conditions. We would say

that all those are alternative measures which could go some way collectively, we would say probably all the way, to deal with the problems highlighted by the police.

Q123 Mary Creagh: It is very interesting to hear those potential changes that you have suggested but what would you say to the police evidence that, when they have just made an arrest where there are 750 gigabytes of information, a two-week period is simply not long enough? Similarly, if they are going to go and get the SIM cards from the phone service providers a two-week period is not long enough. Can you see any of those as reasons which are in your view capable in principle of justifying perhaps a shorter extension?

Mr Welch: There is no rule that says the police have to have all their evidence in place at the point when somebody is charged. What they have to do is have sufficient evidence to charge someone and our view is that the types of measure we have suggested are likely, in almost all if not all offences, to allow the police to get sufficient evidence. We appreciate how difficult a task the police face when there is so much evidence to be gone through but unfortunately that is the nature of the beast and that is why we say that resources are relevant here. We accept that the threat we face now is real and that there may well be good grounds for giving the police extra resources so that when faced with these very difficult types of investigation they do have the personal power to deal with them.

Q124 Mary Creagh: Could I turn to Amnesty? I was very interested to read in your evidence that you are worried about prolonged periods of pre-charge detention giving a context for abusive practices such as confessions and the conditions in which people would be held in police custody. It was very clear from the police's evidence last week that people who were held for more than two weeks would be held in a secure environment with perhaps other remand prisoners, for example in a prison environment. Their context was very much not about confession but more about co-operation where people might over a period of time co-operate with the police in order to face lesser charges. What do you say to the police evidence on that?

Mr Zilli: I saw that and I thought it was very telling. I think the premise for Amnesty is that international human rights standards make ample provision for restrictions of the right to liberty and therefore people can be held, for example, in this country under terrorism legislation for up to 14 days without charge or trial. If the question is, are there any justifications that would warrant a further incursion into the right to liberty, no, it would be a further incursion into the right to liberty which is not permissible under human rights standards. You would be looking at a derogation context in which the right to liberty would clearly be violated because of the existence of a public emergency threatening the life of the nation, or whatever the requirement is in Article 15 of the Convention. I was interested in the evidence given to you, particularly about the fact that it was pointed out that people would be held as people on remand on a very serious criminal charge, so they would be held as category A, possibly in a special security unit at Belmarsh Prison, for up to three months. That is not an incursion into the right to liberty that it is possible to contemplate in a lawful manner unless, as I said, there would be a derogation from the right to liberty. I was also interested—and this has already been pointed out—in the remarks made to you which to Amnesty indicate that the person would be arrested on the basis of grounds which would justify arrest and then the investigation would commence at that point to go on to justify holding people for up to three months when there clearly would not be enough to hold them on a criminal charge. The standards, as I said, provide for ample restrictions but at the end of the day they are quite exact and there is a requirement to charge someone promptly. Fourteen days I think is long enough.

Q125 Mary Creagh: Can I finally ask the Law Society, Ms Marks, do you think Lord Falconer's proposal that a more senior judge, such as a High Court judge, be given the power to veto further pre-charge detention of a terrorist suspect answers your concerns? Can I also ask if you are happy with the fact that the police officer level that would be able to apply for this extension is the office of superintendent?

Ms Marks: It would not entirely answer our concerns and the Law Society, along with the other panel members, is opposed to any extension of the period of pre-charge detention, but if there is to be any judicial oversight at all then we entirely agree with the police evidence which was given to this committee last week, which was that there should be robust judicial oversight and that there should be as much transparency as is possible with this kind of offence. It is welcomed that if there is to be judicial oversight then it should be with a senior judge, a High Court judge, rather than a district judge. That does not meet our concerns about the extension of pre-charge detention, but it does go some way to allaying our concerns. However, there is no proposal at all about the grounds on which this judicial oversight is to be undertaken and we do have concerns that if there is nothing on which the judge is required to make this decision then it is merely a rubber-stamping exercise, or could be perceived as such, and there would need to be some indication of the basis on which that judicial oversight is to be conducted. There is no indication of that at all at the moment. I would just like to reinforce what has been said by Liberty about the period of detention and in particular about PACE because it seems to the Law Society that the existing Codes under the Police and Criminal Evidence Act allow there to be further questioning once charges have been laid in certain circumstances which would seem to apply precisely to terrorist cases, for example, where it is necessary to prevent or minimise harm or loss to some other person or to the public, which seems to be right on point. There are other situations as well, for example, to clear up ambiguities in previous answers

or to give the individual an opportunity to comment on further information that has come to light. It seems to us that the reluctance to charge at all for fear that that would prevent further questioning of the suspects is somewhat misplaced even under the existing Codes.

Q126 Mr Shepherd: The point was made to us that the normal advice of a barrister or the counsel to the accused is not to enter into any discussion with the police or the authorities at that point. The advice of counsel would be no co-operation. Is that a reasonable fear?
Ms Marks: I think that fear may be somewhat overstated now, of course, that "no comment" interviews can be commented upon adversely at trial, so I am afraid I do think that that concern is overstated.
Mr Welch: Certainly the experience in the case of Irish terrorism was that that was very much the practice of people arrested. Whether that will be the case in relation to a different type of terrorism we do not know. It is going to depend on the advice of an individual solicitor on an individual occasion, I should imagine.

Q127 Chairman: The evidence the police gave last week anyway was that that was the practice. Can I put a couple of additional points to you that have come out of a letter dated 31 October from the Home Secretary today to the Liberal Democrat spokesman on this point about lesser offences being charged? There are two additional points which I would like you to comment on. First, and I think this is a point for Mr Welch, you could end up with having less protection for the subject if you charged them with a lesser offence than any continued detention on the basis that that lesser offence would not be subject to the judicial oversight that the Bill now proposes, and we can argue about how that should be done. The second point is that there is some integrity about the suggestion that if you bring lesser charges effectively as a ruse it is abusing the system because the real reason you are bringing a lesser charge is not to deal with that charge there and then but to use that as a holding charge whilst you go on and continue your investigations somewhere else. You are effectively abusing the system in that way.
Mr Welch: That is a type of abuse that already happens. For somebody who has been a criminal practitioner I know that I have had clients who have been charged with a lesser offence.

Q128 Chairman: Do you not encourage it by suggesting that—
Mr Welch: No, I am not trying to encourage it but I do not think it is somehow dishonest as the Home Secretary might appear to be suggesting. Secondly, there is a form of judicial oversight because once somebody is charged, of course, they have to be brought before a magistrates court and it is then the magistrates that decide in relation to that charge whether bail should be granted or not, so there is judicial oversight that comes into play.

Q129 Chairman: Supposing bail is refused.
Mr Welch: In which the person ends up on remand in the way that a lot of people charged with criminal offences end up being remanded in custody.

Q130 Chairman: But without the protection provided by the Bill for the judicial oversight of continued detention?
Dr Metcalfe: If I may jump in at this point, that is because you have a judge who has already made the bail decision. That is the judicial guarantee. I do not really understand how post-charge detention can be compared as on a par with pre-charge detention where there has not yet been any effective judicial oversight.
Ms Marks: Can I also make the point that I think it is slightly misleading to describe it as a ruse. It is actually a charge which is substantiated by the evidence. The point that we have made repeatedly is that already the police have to have reasonable grounds for making the arrest and it is simply a question of how long it takes to substantiate those reasonable grounds for suspicion to be able to lay a charge and they will presumably do so on the basis of the slightly higher evidential burden that is required to lay a charge and then a further evidential burden for trial. I do not think to describe it as a ruse is fair to the process.
Mr Welch: I may be wrong because I am talking from memory now as it is a while since I practised as a criminal solicitor, but I think it would also be the case that if somebody were remanded into custody in a remand prison and then the police wished to interview them again, they would have to go to the magistrates and get them remanded into police custody in order that they could be interviewed at a police station. There would again at that stage be an element of judicial oversight as well.

Q131 Chairman: That is what you are saying would happen under this process.
Dr Metcalfe: Let us be absolutely clear about it. If you have someone who is remanded in custody that is because a judge has intervened and taken an independent judicial decision. That is entirely in the hands of the court, okay? Nothing of the kind of judicial oversight that has been proposed in relation to this legislation allows the judge that kind of decision. The question would be, if you are going to put a judge in that kind of position to assess all the evidence, why not charge them? If you are able to satisfy a judge that there is a reasonable case to go forward, in essence why not charge them?

Q132 Chairman: There may be a reasonable case for a lesser offence like benefit fraud, for example, but not for the more serious offences for which they were originally held.
Dr Metcalfe: However, if the judge takes the decision in relation to that and decides, even in relation to the lesser offence, that bail should not be granted, then surely the police have all the public protection concerns alleviated at that point. If you have remanded the person in custody, as I understand it the main justification put forward by

the police is met, their evidence-gathering can go forward and all the forensic tests can come back as and when they like. The police concern is that a dangerous suspect is no longer a threat to the public.

Q133 Chairman: There is also the risk that if they are given bail they are then potentially a risk to the public.
Dr Metcalfe: I am sorry, I do not understand.

Q134 Chairman: If somebody is charged with a lesser offence, like benefit fraud, and they are given bail, then there is a risk to the public if they are suspected of terrorism.
Mr Crossman: There are three grounds for refusing people bail. One is that they are going to abscond, next that they are going to commit further offences and last is they might interfere with the course of justice through, for example, interfering with witnesses. If a court decides that there is not a significant risk of any of those things happening they will grant bail or they might grant bail with conditions. If they decide there is a risk of those things happening they will make a decision to remand in custody. That is the process which we have in criminal law. If the prosecution want to remand in custody, if they do believe that one of those things will happen, they will make their application to the court and the court will make their decision on the basis of what they have heard. That is the nature of the system.
Dr Metcalfe: If you said to a judge, "This person has been arrested in relation to an ongoing terrorist investigation and we are bringing them up on charges in relation to credit card fraud that we suspect are related to an ongoing terrorist investigation of a much larger nature", I would be very surprised if a judge did not have regard to the larger aspects of that investigation when taking a bail decision.

Q135 Lord Lester of Herne Hill: When we were asking the Home Secretary about pre-charge and post-charge detention, he said from the point of view of the bloke being detained it does not make much difference. This was in the context of continental countries which do not allow more than a few days' pre-charge detention. He was saying, "But they can bang them up for three or four years before trial so what is the difference?". Can you try to explain to me, because I am not a criminal practitioner, what is the essential difference between pre-charge and post-charge detention in terms of safeguards?
Dr Metcalfe: One safeguard that I am aware of is that once you have been charged you can make an application to the court to assess the evidence against you. It is essentially like making a charge of no case to answer before the trial is begun. Forgive me: I am a barrister but not a criminal barrister and I cannot give you the technical term for it, but I am aware from having discussed it with my criminal law colleague that this is an available procedure, but generally speaking it is not very effective because courts are unwilling, unless the police have been able to show almost no evidence in relation to someone who has been charged, to dismiss charges at that point but there is a mechanism whereby you can, at least under the common law, challenge the evidence against you. I am not certain what the situation is in relation to continental law countries and I think that is more a problem with the terrorism debate in general.

Q136 Mr Carswell: I have a couple of points on unacceptable behaviours. Do any of you think that the publication of a list of unacceptable behaviours is an improvement on the way in which the Secretary of State's broad discretion to exclude or deport has been exercised in the past?
Dr Metcalfe: In principle it should have been. The Home Secretary's powers are extremely broad. Any foreign national whose deportation would be conducive to the public good he is able to deport, and therefore it would have been extremely welcome to have a clarification of the grounds upon which he will exclude. Case law over time has shown that he has adopted certain policies, that is to say, where he has reason to believe that a person is involved in criminal offences, but in fact what was put forward based on the consultation and finally released in August was incredibly disappointing. You had on the one hand, by reference to activity of fomenting or inciting terrorism, things which are already a criminal offence. It is not necessary for the Home Secretary to bring forward new criteria which simply say, "Where a person commits these criminal offences I will deport them". One would have thought that he would have done so anyway because he already has those powers in relation to public order. Where he went beyond merely listing criminal offences, however, he did so in such a way as to be very vague. He did not specify whether the people were intentionally inciting terrorism or merely misunderstood; he did not attempt to give any clarification as to the kind of context in which their statements might be understood, say, if someone was having that discussion as a teacher in a classroom or writing a novel or a play. He quite simply had no regard to the incredibly broad definition of terrorism which we have already adverted to, both foreign and domestic. It is one thing if someone is inciting acts of terrorism in the United Kingdom; that is fine, but someone having a discussion about the rights and wrongs of political violence in countries like Nepal or Sri Lanka could just as easily be subject to deportation on the grounds that the Home Secretary put forward.
Mr Crossman: The new grounds go much further than much of the legislation that we have been talking about, even the legislation in the draft Bill when we have had discussions about glorification. The new grounds allow for justification of terrorism. That is really a step down. I am not going to start talking about the Cherie Blair/Jenny Tonge type of situation again but really that is where we are at if we are talking about justification of terrorism. There have been long discussions both in front of the Home Affairs Committee and in front of this committee about the types of activity which might be considered to fall into those different categories.

There is no right for non-British nationals to remain in the United Kingdom. However, if we are going to be removing people who are not conducive to the public good something a bit more substantive than justification of terrorism, especially with such an incredibly broad definition of terrorism that we have, would be required. I would like to agree with Eric and say that in this case with justification it is going far further than anything else that we have been discussing previously.

Q137 Dr Harris: Further to that point, and I see the gentleman from Amnesty wanted to come back, perhaps not on this but the Chairman might wish to bring you in, as I understand it, it is not just a plan to exclude or deport. There is a proposal being put before us in the statute in respect of the Immigration, Asylum and Nationality Bill, which was called new clause 4 and now is added to the Bill, which specifies in relation to the list of unacceptable behaviours, though not in the statute, that it will be the Government's policy or plan to have the ability to deprive someone of their citizenship on the basis of behaviour not conducive to the public good, lowering that from a threshold of conduct seriously prejudicial to the vital interests of the UK. I would be grateful if you could comment on that, especially in relation to this point about the vagueness of the terms.

Dr Metcalfe: In relation to deprivation of citizenship, we are talking about one of the strongest penalties which the law can apply. It might seem rather frivolous in relation to someone who is banged up in prison but, if you think about all the rights and privileges that come as a consequence of being a citizen, to be deprived of one's citizenship is an extremely harsh penalty. There is also a question about potential discrimination. It is interesting that it would only apply to dual nationals. Obviously there is no suggestion of someone who only has United Kingdom citizenship being deprived of their nationality. As a dual national myself I wonder why I should be subject to deprivation of citizenship simply because I was not born in the United Kingdom as opposed to someone who is. Leaving those points aside, yes, I share all the concerns that I raised in relation to the deportation or exclusion of a foreign national. Why should such vague grounds be levelled at dual nationals? Why should they too be put into the situation of uncertainty? It has a considerable chilling effect. I just wanted to say as a dual national that if I say anything that might go beyond the bounds of what the Home Secretary considers to be good public discussion he may level deprivation of citizenship charges against me on that basis.

Q138 Lord Campbell of Alloway: It does not say this in question 27 but of course it arises directly on that interesting contribution of Ms Alexandra Marks. I must confess, yes, I do know a bit about criminal law. I used to prosecute in my younger days for the Attorney General on my circuit, but that was a long time ago. The question that I think arises in criminal law at the basis of this is about Lord Carlile's view. What is your view of Lord Carlile's recent recommendation that the judicial safeguards during any extended period of pre-charge detention for terrorism on suspicion should include an investigating role for a security-cleared judge? This comes to your point, where you were saying, and I was very interested in it, that there should be a form of judicial oversight. That form, I assume, in your mind would be a closed investigatory inquiry where submissions are made before a security-cleared judge. You then said it leads to this very interesting question, "Our concerns", I think you said, "would be largely met [but not met] if that were a High Court judge", and I wholly agree it would have to be a High Court judge. What I am very interested in is, what would meet your concerns? Supposing you have got this system that you suggested and you have concerns. Could you explain those concerns and how they could be met?

Ms Marks: Yes, I think I would like to elaborate on my answer because the Law Society is not opposed to judges being more proactive, if I can put it that way, as regards case management but we do have very great concerns about the judiciary becoming more involved in the investigation, if that is what is being suggested. We think it is vital that judges retain their independence and we think there is a great danger if judges are drawn into the investigation, and if I seemed to imply in my earlier answer that robust judicial oversight meant that judges would be drawn into the investigation then I apologise because that is not what we intend. We have to accept, of course, that our legal system is quite different from that of many of our continental cousins in Europe where there is a much more investigative role for the judiciary and they are specifically trained for that purpose. It is not just an issue of training. Our whole adversarial system is quite different and we think there are enormous dangers in adopting a sort of pick-and-mix approach of various continental systems of criminal justice and saying, "We like this bit and we are going to bolt it onto our existing criminal justice system". What I had in mind was rather more, as my colleague from JUSTICE was saying, that there should be a proper use of the PACE codes because, as I indicated previously, it seems that the PACE codes already allow further questioning in certain circumstances which would seem to apply very clearly to these terrorist offences, but the real point is that an individual knows what they have been charged with and appears before a judge who decides what is the appropriate step to take as to bail, and that was the point that was made previously. There are already very clearly laid down grounds for deciding whether bail is appropriate or not while an investigation may be continuing; and I really just want to reiterate the point that I made earlier that if there is to be judicial oversight at all, then we believe that it should be at an appropriately senior level, but that is not at all to suggest that we think that an extension of either the judiciary's involvement in the investigation is appropriate or that there should be an extension in the period of pre-charge detention.

Q139 Lord Campbell of Alloway: I see. You would not accept then what I assumed you had accepted, and I was quite wrong in my assumption. You would not accept, on this question of an extension of a period of detention, that that could be done by a judge who was cleared for security?
Ms Marks: As I just said, I think there are real dangers. I think it would have to be a very clear procedure, and if it involved the judge being in any way involved in the investigation, no, the Law Society would not support that. What I had rather more in mind was that the grounds that were brought before the judge for the continuing pre-charge detention would have to be very clearly stated. There would have to be a very good reason why charges could not have been brought already or, if there was particular evidence that was being pursued and was not available for some very good reason, was not resource related, for example awaiting a response from international authorities, something of that nature.

Q140 Lord Campbell of Alloway: It is all very well, you see—I will leave this, I must not take up more time—but you are going straight across the views expressed by Lord Newton and Lady Hayman when I was asking questions of them some time ago. They virtually said, and I am quoting them because they were an independent inquiry, that you simply could not decide these questions whether you have got to lock somebody up or not and for how long on a security problem without a security cleared judge and without a private session. If you do not accept that, then the whole concept collapses.
Dr Metcalfe: May I come back on a very important point?

Q141 Chairman: Briefly.
Dr Metcalfe: Very briefly, in relation to the closed proceedings that you seem to be suggesting, we are particularly concerned at Lord Carlile's suggestion that they should be using closed proceedings and special advocates. In a House of Lords case in July this year the senior Law Lord, Lord Bingham, made reference to the use of special advocates in situations and proceedings involving the deprivation of liberty, and he expressed doubts whether the use of such special advocates could be held to meet the fundamental duty of procedural fairness. The idea of someone being deprived of their liberty without being able to know the substance of the case against them I think is an extremely serious one, and so for this reason I think the proposal in relation to closed proceedings in bail proceedings is an extremely surprising one.

Q142 Baroness Stern: We are running out of time, but I do think it is important that we have a moment to look at deportation with assurances. I know this is something you all have views about. You have all criticised deportations on the basis of diplomatic assurances in principle because they circumvent the absolute obligation *of non-refoulement*, that is, you must not return anyone to a place where there is a substantial risk of torture. I have got four questions. First of all, in your view is it inherently objectionable to deport on the strength of diplomatic assurances regardless of what they are like and how convincing they are? Secondly, would you therefore think that the courts should disregard them entirely, or could they be relevant to the court's assessment of the degree of risk to the person who is going to be subjected to torture on his or her return? Would it be reasonable for courts to examine each memorandum on its merits? The Home Secretary said to us last week that it was "effectively neo-colonial for some lawyers to argue that a government to government agreement with some states is not worth the paper it is written on." Would you agree with that?
Dr Metcalfe: Very quickly, we do not object to the use of diplomatic assurances in principle, but that is only because in practice they tend to be used in cases not against these kinds of countries. The issue is that in principle they are effective where you have other safeguards and mechanisms that could be looked at, we think it is perfectly right for the court to examine each individual diplomatic assurance on their merits, but taking them on their merits means looking at them in the entire context. They might be perfectly appropriate to use, say, if you were deporting someone back to a country that wanted to join the EU, had already joined the Council of Europe framework, and so forth. It is completely wrong to suggest that they are somehow effective in relation to countries which have all signed up to the UN Convention against Torture but are all known to have breached it. If a country cannot live up to its obligations under an international convention that exemplifies *jus cogens*, the strongest form of international humanitarian and human rights law imaginable, then why should we believe that they will honour a diplomatic assurance? The criticism that JUSTICE and other organisations have been making primarily is not so much that the diplomatic assurances cannot be effective in some circumstances—we use them to return people to the United States to prevent them from being subjected to the death penalty—but we should not be using them against countries which have such a strong record of torture, and, with respect the Home Secretary of State in relation to neo-colonialism, I am afraid I simply do not buy it.
Mr Zilli: Could I add a comment on that? I think it is perfectly appropriate and, indeed, it is the duty of the court and of an independent judiciary to consider anything that is put before them, and so if the Secretary of State decides to assert that so and so would not be at risk of torture on the basis of so-called diplomatic assurances that the Secretary of State has been able to obtain, the Secretary of State is perfectly entitled to make that case before the court, but, ultimately, it will be for the judiciary, for an independent judge, to make that assessment, and the assessment has to be on a case by case basis. It will be on the individual case whether the person concerned would actually risk torture or ill-treatment upon return. I think it is interesting to note the remarks made by Mr Justice

Ouseley, the Chair of the Special Immigration Appeals Commission, in considering applications for bail I think only 10 days ago. He clearly made a pointed remark implying that he does not think, although he did not comment on the specifics of the diplomatic assurances already obtained, that they are going to get the Secretary of State around the Chahal precedent. Secondly, I would like to point out that comparisons between diplomatic assurances in death penalty cases and cases concerning a risk of torture or, say, a profoundly unfair trial for that matter, are misplaced in Amnesty's view. The death penalty, unfortunately, is still a lawful sanction in international law. That cannot be said to be the case for the risk of torture. The reason why the Secretary of State is seeking to obtain diplomatic assurances is precisely because he recognised, and he has recognised that up for up to three and a half years having detained the same people without charge or trial on the basis they could not be returning to their countries of origin, that there was an existing risk of torture upon return.

Q143 Mr Shepherd: How can a British judge faced with this issue come to a conclusion? On what basis, that the government of India is giving us an assurance. It is not good enough. It is asking them to leap over, is it not, their normal processes?

Dr Metcalfe: Not only that, they have a very long experience of doing so, ever since the Immigration Act at least, possibly before. The work of the Administrative Court is very taken up with immigration, judicial review cases and also the work of the asylum adjudicators and so forth, and they have a great deal of fact-intensive experience of examining the conditions in each country, and you get a great deal of reports from organisations such as Amnesty, Human Rights Watch, the Home Office's own country information unit provides them with very detailed information, and a lot of those cases, and in the Chahal case in particular there was very clear evidence that, although the governments of the Punjab and India in general were prepared to give these assurances, they seemingly were not in control of what the individual police stations were doing in the Punjab that made it such a risk.

Q144 Baroness Stern: You will know that the CPT (the European Commission for the Prevention of Torture) said in a guarded little paragraph that it had an open mind about whether it was possible to devise effective mechanisms for post-return monitoring. What in your view would be the minimum conditions that you would expect see in any monitoring system for you to have confidence that the diplomatic assurances were being upheld?

Dr Metcalfe: I am afraid I do not grant the premise of the question, which is that even if you had the strongest, most effective monitoring procedures that they would somehow prevent the risk of ill-treatment in the countries we are talking about. You had monitoring in the Agiza case, the case of Sweden. They had monitoring when they sent someone back to Egypt, who turned out to be tortured. In fact, they found out he was being tortured because of the monitoring. I do not think that strong, effective monitoring would be a safeguard in this kind of case.

Q145 Lord Judd: If there is an imminent threat to life are there any circumstances in which it is permissible to use evidence that may have been obtained under torture or which you may have reason to believe may have been obtained under torture.

Mr Crossman: I am concerned that this confuses somewhat the difference between acting on intelligence and the use of evidence. If the phone goes and you hear there is a bomb planted in the Houses of Parliament and you have reason to believe that has come from a source, or a country, or whatever, where there has been use of torture suspected, you would still act on that intelligence. Of course you would. There is distinction between that and giving something evidential weight in either a criminal or other process against them. I do not think the imminent loss of life situation is really appropriate to a discussion as to the use of torture evidence by the courts.

Q146 Lord Judd: Are you satisfied that the authorities in this country do everything that they should do rigorously enough to discover whether or not information has been secured under torture?

Dr Metcalfe: We know that they do not. The Director of the Security Service, Dame Eliza Manningham-Buller, gave a witness statement to the House of Lords' case a couple of weeks ago in which she stated in relation to material that they had received from their Algeria liaison that they do not ask. They do not ask; they perhaps do not want to know.

Q147 Lord Judd: You are suggesting there is a deliberate policy of not asking?

Dr Metcalfe: They said, it was not so much a policy of not asking, but they felt that it could endanger fair trial good relations with the foreign intelligence agency. This was in striking contrast to the information that was received in the court from the Deputy Prime Minister—and I will ask my colleague from Amnesty to elaborate—in which the Canadian Security Intelligence Service made clear that it did make such inquiries of its foreign intelligence contacts and that in those kinds of situations they would not receive material where they were satisfied or concerned that they had been obtained contrary to a human rights violation of any kind.

Q148 Lord Judd: Do you think anything could be done to tighten up investigations in this area and, if so, what?

Dr Metcalfe: I would certainly commend the Canadian example to the security service and the security intelligence service. I am no expert in those areas, but it seems to me that if one foreign intelligence service of a G8 country is able to make

these kinds of inquiries of their foreign counterparts then there is no reason why the United Kingdom cannot do the same.

Q149 Lord Judd: Do you think that there is a danger that it may be the easy option to use information that may have been obtained under torture? Can you think of ways in which, at least in some instances, other means could be used to deal with the situation apart from relying on such information?
Dr Metcalfe: I am afraid that seems such a general question that it would have to depend on the kind of situation that you are talking about. I have to say I am not aware of any situation in the United Kingdom where the Government has received information obtained by torture and has then rushed to, say, Blackfriars' bridge to disarm the bomb. If it has, it might be an interesting element of this debate. I do not see that there are at the moment any situations where evidence obtained by torture has been of any use. Of course the difficulty is that we do not know, because the United Kingdom made clear in relation to its Algerian example that it did not ask the question.

Q150 Lord Lester of Herne Hill: How do you resolve the dilemma that if you have a really evil, dangerous person, but not enough evidence to try them for any serious charge here? They come from a really terrible country that practices torture, you reject the use of international agreements with that country on the grounds that you have explained, even though the country wants them to face trial there, and they are a threat to security here but you cannot lock them up indefinitely without trial. What does the human rights movement say should be done about that person?
Dr Metcalfe: My own answer to that situation—I am not sure I am able to speak for my colleagues necessarily—but surveillance would seem the obvious answer. The Newton Committee itself stated that when it looked at the issue of deportation as a counter-terrorism measure it could not see the logic in sending someone whom you suspected of being a real threat to national security away from your own jurisdiction. We have all these powers under the law to be able to monitor their personal activities. To send them to another country where you have no effective control over their personal activities . . . .

Q151 Lord Lester of Herne Hill: I was not asking that question. I was saying what do you do with such a person?
Dr Metcalfe: I would keep them under 24-hour surveillance with a view to gathering as much evidence as I could against them that would be admissible in a court of law and charge them, or at least refer it to the CPS.
Mr Welch: I think such a person is very unlikely to exist if you have a full selection of criminal charges available to the prosecution and you have evidence of all types fully available to the prosecution. If intercept evidence was available, I think it is very unlikely that there would be a person who is such a danger that they could not then be prosecuted for a criminal offence in this country and, if found guilty after a fair trial, imprisoned for that offence.

Q152 Chairman: What if there was such a person? That is Lord Lester's point.
Mr Welch: If there is, in that very unlikely event, then I am with Eric Metcalfe on this. If there really is such a person, they are such a danger and they cannot be prosecuted, we would have to accept that extreme forms of surveillance would be appropriate. We appreciate it might be very expensive, but that is the price of liberty.
Mr Crossman: We are talking about surveillance. One of the things about an Article 8 analysis is that it is far more likely, if somebody does constitute that great a threat, that an almost indefinite surveillance could be justified as necessarily and proportionate in those circumstances in the way that, say, Article 5 justification for almost indefinite detention could not be, and so I would say Eric is absolutely right. You asked for the human rights analysis of it, and I think that is the appropriate one.
Chairman: Thank you very much. You have given us a lot to think about in preparing our report.

Witness: **Professor Clive Walker**, Leeds University, examined.

Q153 Chairman: We are now joined by Professor Clive Walker of Leeds University for the second part of this evidence session. I think you were here earlier on for the previous evidence session. A lot of the questions are going to be along similar lines, I suspect. Perhaps I could start off by asking you about the lacuna which the Home Secretary has identified in relation to the law of general incitement which the proposed offence of provocation to commit a terrorist offence is designed to plug. Do you accept that there is such a lacuna in the law?
Professor Walker: I start from the premise, taking the Home Secretary's word on the point, that he is trying to enforce Article 5 of the European Convention on Prevention of Terrorism. If we stick with that formulation in Article 5, then you could say that there are perhaps two areas that amount to a lacuna, although that does raise issues about freedom of expression and I am not sure I accept the premise of the question. But in terms of those lacunas they would be related to the fact that the existing law is primarily directed either against forms of encouragement in relation to proscribed organisations, first of all, or, secondly, relate to forms of incitement or encouragement of acts of terrorism abroad rather than acts of terrorism at home. I would point to those two differences, but

I would also point to the fact that Article 5 is somewhat different in a number of crucial respects from the way in which clause one is actually worded, and some of those we heard about earlier. They relate in particular to the fact that Article 5 requires specific intent, whereas clause one does not, and also clause five talks about an intended outcome in terms of the commission of a terrorist offence, and it does not mention words like "preparation", "instigation" or, indeed, "acts of terrorism, "acts of terrorism" not *per se* being an offence in British law.

Q154 Chairman: What laws do you say already cover this then?

Professor Walker: I would probably endorse a lot of what was said in the earlier session, and I am going over some of their ground, but the ones that I think are of a special relevance here: I mention broadly laws to do with proscribed organisations, and laws to do with incitement abroad—they fall into those two categories. The laws relating to proscribed organisations are set out in section 12 and they cover, for example: "inviting support for a proscribed organisation"—that is in section 12(1); section 12(2) is about "arranging, managing, assisting a meeting to support a proscribed organisation"; section 12(3) is actually "addressing a meeting"; and section 13(1) is "wearing any item or displaying any article which supports a proscribed organisation". Of course "proscribed organisation" includes groups like al-Qaeda which I am not sure is an organisation. It is very wide organisation if it is an organisation. It is more like a concept than an organisation. So it is very easy to support a proscribed organisation. You certainly do not have to have a membership card to support it. That is one area. The other area I said was incitement abroad, and that is covered by section 59 of the Terrorism Act. Any form of incitement of terrorism abroad is an offence under section 59. That was passed not too long ago, particularly with internet sites in mind. Again, as was mentioned earlier, these incitements can be very general in their nature; they may not be aimed at specific people or specific acts. Aside from all of those there are lot of other offences. Dr Metcalfe mentioned some. I would also mention public order offences. I can remember as along ago as before the Prevention of Terrorism Act 1974, which is when anti-terrorism laws in Britain started, and it was not the case that people escaped prosecution for supporting the IRA; they were prosecuted under various public order offences for supporting the IRA and no doubt still could be.

Q155 Dan Norris: I am a sure you will correct me if I am wrong, Professor, because I want to talk a little bit about some of the written evidence that you have put down in relation to the training of terrorism and acts in preparation for it. I notice that you base some of your criticisms of the Bill in those areas on the expression based offences in the Bill, you reference the principle that "only speech which causes harm not offence should be criminalised"—I hope I have got that right—and your criticism of the new offences of training for terrorism and acts preparatory to terrorism appear to be based on the same principle, that the conduct in question is not sufficiently related to harm. Why then does the harm principle apply to non-expression based offences?

Professor Walker: As a liberal democrat in one sense of that term at least I would say that the harm principle applies to all offences, and, indeed, all forms of state coercion; it is not just relevant to forms of offences which relate to expression; and it might be, I think, a good principle to apply across the board. It is why, for example, we penalise, let us say, murder and theft but we have some hesitations about penalising forms of activity which we may find disgusting or outrageous, which was one of the words used earlier, or reprehensible, all of which are part and parcel of the liberal democracy. We all outrage, disgust each other from time to time, but that is living in a free society for you. Seeking to put it in terms of a common phrase, there are those words that are like sticks and stones and do hurt your bones and words that do not; and so we are looking for some sort of link to actual activity which causes harm. The difficulty with preparatory acts, if we look to that, or training, indeed, is that at that stage of the process it is very equivocal what people are actually doing, what they have in mind, and there is a great danger we catch the wrong people. I came from Leeds today with a train ticket and a holdall. It does not make me a terrorist, does it? Although some people with train tickets from Leeds were terrorists. It is a question of the link to the activity and at what point we intervene and prove a crime has been committed, which is why, for example, the Criminal Attempts Act 1981, which currently sets the limit on the extent of the criminal law, uses the phrase that "an attempt is an act which is more than merely preparatory towards the commission of an offence". That is the actual phrase in section one of the Criminal Attempts Act. The reason why the law draws the line at that point is because it wants to be sure that people we are putting in prison really are bad people and that we are not making mistakes; we are not intervening at a point when their actions are equivocal and their intentions are equivocal.

Q156 Dan Norris: Could I follow that up a little? Though you are critical of the width of the new offences that concern training and preparation, do you accept there is some scope, nonetheless, for new offences which would cover conduct not currently caught by existing offences and comply with human rights obligations as well? What amendments, if you do feel that way, would you be proposing?

Professor Walker: Here we probably should look at least at two clauses, may be three. If I can take clauses 5, 6 and 8 together as all are dealing with forms of preparation for terrorism, the case of 6 and 8 dealing with training. In the case of clause 5, my difficulty with clause 5 is I find it very difficult to imagine factual situations which do not fall

under section 57 of the Terrorism Act, which again was mentioned earlier. Section 57 is the provision which criminalises the possession of an article in circumstances which give rise to a reasonable suspicion that the possession is for terrorist purposes. If I have an article, I can see at least there is something tangible there. If do not have an article, what is it? This preparation which is not an article seems to me to be very vague. So, to answer your question, yes, I can see in logic there is a gap there—that there may be forms of preparation which do not involve materials or the possession of something which is for the preparation of terrorism, but I am saying it is dangerous to extend the criminal law in that way because, if I do not have something material there, then I am not sure whether the action can be sufficiently linked to terrorism. Indeed, I mentioned in my submission that the explanatory memorandum which tries to give an example, in a way which I find it very difficult to do, does actually give an example of the possession of materials which is exactly covered by section 57, and there you do not need clause five. That is clause 5. Clause 6, yes, again in logic there is a gap. The existing offences of relevance include section 54 of the Terrorism Act, which talks about training in weapons, munitions training, training where you have to shoot an AK47, or make a bomb, or whatever it might be, and that covers, I think, a broad field, but clearly not as broad as clauses 6 or clause 8, particularly clause eight which is a passive clause of "attendance at a training camp". Yes, I can see again in logic there is an extension of the law here. My question is do we want to extend the law that far because the actions are very equivocal? We are casting suspicions very wide here—for example, if people go off to, let us say, Madrassas in Pakistan, does that immediately cast suspicion on them in all cases? If they access combat-related materials on the Internet, does that immediately cast them as potential suspect terrorists liable to three months detention? Potentially yes, I think is the answer under this legislation. I hope you catch my drift that it is becoming a very wide net that we are casting. In terms of what I would think would be justifiable, I should come back to the European Convention again which the Government says it is trying to enforce. If you look at Articles 6 and 7 of the Convention on the Prevention of Terrorism, it talks about "active recruitment" rather than being recruited, it talks about the "provision of training" rather than being trained, and I would suggest also the tightening of the *mens rea* in clause five and six would also be helpful: that you intend that the training or the preparation does result in terrorist acts, that that is an element of the offence.

Q157 Lord Judd: Professor Walker, you have obviously thought about these issues in some depth and perspective. In your evidence you make the point that clause 17 of the Bill, extending the jurisdiction of UK courts over acts committed abroad, may result in the UK Government being asked "to do the dirty work of dubious foreign governments". Can you tell us a bit more about how you believe the clause gives rise to this risk?

Professor Walker: It is a combination of the impact of clause 17 and the breadth of the offences that we have just been through, clause one, clause 5, clause 6 and clause 8. Let me give you an example, as it might be the best way of doing this. If we imagine that this Bill was enforced 10 years ago, let us say, or even five years ago, and I am the head of, let us call it, the Movement for a Democratic Iraq, and I plot against the Government of Iraq. I encourage those who are daft enough to listen to me by means of publication to engage in forms of terrorism and engage in training to commit forms of terrorism. The forms of terrorism I have in mind might include some of the following: to commit serious violence against a person. That is terrorism under section one of the Terrorism Act if committed with certain motivations. In this case I encourage other people to kill Saddam Hussein's torturer in chief, whoever he was. Serious damage to property: I encourage people to blow up the headquarters of the secret police in Baghdad, or destruction to the electronic systems of the Government, which is also part of the definition of terrorism in section one, I encourage my followers to disrupt electronic systems in a way which stops the wiring of assets to a Geneva bank account or to the subversion of Food for Oil programme, let us say. All of those, are now covered by clause 1, and clause 17 then says that actions under cause one committed abroad are also covered.

Q158 Lord Judd: You make an interesting case. Could I just pursue this for a moment? I do not want to put words into your mouth, but the Home Secretary has been very strong in saying that he does not believe there is any situation anywhere in the world today that can in any way exonerate terrorism. You made the point that there are different forms of terrorism, and we have terrorism against the innocent, you can have terrorism against state institutions, but basically do you think that that concept that there is nowhere which justifies it is valid?

Professor Walker: Where I would agree with the Home Secretary is in terms of the forms of terrorism which are defined by universal offences, and there are quite a few universal offences relating to terrorism. For example, we have offences of hijacking; we have offences of killing diplomats, taking hostages, committing torture. All of these are universal offences based on UN conventions. We have offences of terrorist bombings, a convention related to terrorist bombings, bombings directed against civilians. Here, I am with the Home Secretary, I would agree that in all circumstances those are forms of activity, no matter how bad the regime, whether it is Saddam Hussein or whoever, they are not permissible. They are a bit like war crimes except there is not a war. It is an analogy that I think is useful in that case. My difficulty is this though, that our own definitions of terrorism in section one of the Terrorism Act go

well beyond those universal offences, but whilst I can argue that it might be justifiable to apply those wider concepts in the context of a liberal democracy called the United Kingdom, I might have some doubts whether it is justifiable to employ the same restraints on resistance, if I can call it that, in all societies, in the society of Saddam Hussein to give one example.

Q159 Lord Judd: You are basically making the point that state terrorism has to be taken as seriously as any other form terrorism?
Professor Walker: There are some governments in the world we would rather see deposed and resisted, yes.

Q160 Lord Judd: Chair, I would like to put a last question which is a hypothesis but which I would like to test the Professor's view on. Supposing there is a situation in which there is the kind of brutal regime to which you are referring, supposing some people are contemplating some kind of "terrorist action" against that regime, suppose there are people who do not believe in that situation—terrorism is the right response—but the outside world refuses to acknowledge the terrorism of the regime, is it arguable that the outside world is actually provoking terrorism?
Professor Walker: It is arguable. There are a lot of arguments going on there, and I would get back to my universal anchors, which are the offences in international law. It is a much steadier way of approaching this problem to say that if these are offences in international law, then it really does not matter what the inside or the outside world thinks about them: these people have done wrong. We have examples, of course, of applying this universal jurisdiction in this country. We attempted to apply it against General Pinochet, for example, without entire success in that case, but we did more recently apply it against Faryadi Zardat, who was an Afghan War Lord, with great success. So those who may be in difficult circumstances in their own countries but nevertheless use unacceptable methods, and the unacceptable methods in my definition are crimes which are universally against international law, should be prosecuted—their conduct is not acceptable—but we should hesitate in applying our own concept of what is terrorism on a universal basis. I would suggest that people like Tom Payne might turn in his grave if he felt we could not speak out and glorify American revolutions, for example.

Q161 Lord Lester of Herne Hill: May I say I should have declared an interest in asking my questions. I represented once the People's Mujahideen of Iran, who I think do and did regard the need to kill some of the regime people as being a necessary inevitable way of overturning that regime. We are not talking here about war crimes or international crimes but just murder. Would you think that in an extreme situation, to go back to Lord Judd's questions, that there would be a need in a democracy like ours to allow an organisation like that to be putting forward the need to kill, to commit acts of murder, as the only way, as they see it, of changing the regime? I hope I am not inflaming them by saying this, but you get my point.
Professor Walker: I do.

Q162 Lord Lester of Herne Hill: It is an area you are not covering when you keep talking about international crime. I am talking about just simple murder for political purposes?
Professor Walker: Simple murder is not simple, in fact, because there are some provisions in the Offences against the Person Act about inciting that particular offence abroad, which might be covered. I was thinking more in terms of the kind of activity that the Home Secretary has in mind, which is more general than specific offences, and I certainly think that for the organisation that you mention to say there ought to be let us call it "armed resistance" to make it a bit more vague is arguably justifiable. I am not too sure whether it is or not—I am not an expert on Iran—but what I am arguing is that British law should hesitate very strongly, very hard, before it gets involved in that particular dispute. We already have processes for dealing with such people, called the extradition processes, in which these issues of political justification can be ventilated.

Q163 Mary Creagh: You consider, Professor Walker, the justifications offered for an increase in the maximum period of pre-charge detention, and you say a proportion of cases are made for this and you give us a set of different cases, one of which is currently *sub judice*, so we cannot go into that, but you say there is a lack of evidence that the problems relied on by the police have prevented prosecution in any given case. One of your questions is: does it take longer to obtain communications data about terrorists than it does about drug dealers in the Netherlands? I think that the police officers that we had talking to us last week would say, yes, there was, not least because of the difficulties in obtaining in interpreters. Do you think any of the justifications put forward by the police—the issue of the sequential nature, getting the data together, going back and interviewing people, the difficulty of forensics—are genuine operational difficulties when they are investigating international terrorism?
Professor Walker: I do not wish to traduce the police's evidence about what are genuine operational difficulties. They are the experts on operational difficulties and I am not. What I am claiming to be perhaps something an expert on is what should be the legal implications of those operational difficulties and whether their evidence actually justifies the conclusions in law that they are seeking to produce. To go back to the issues about the difficult cases, I do ask the question: what has altered radically in qualitative terms since October 2003? I mention October 2003 because that is when section 306 of the Criminal Justice Act 2003 was debated in Parliament. It is relatively recent, in other words, that the 14-day detention period was viewed as appropriate for terrorist cases after considerable debate and after considerable opposition, I recollect, by Lord Lloyd *inter alia*. If you read the debate, you will find all the

reasons that the police now cite as reasons were then considered—about forensic evidence, about sequence, about interpretation, and so on. This was in the light of 9/11 and cases since 9/11. I also note that Lord Carlile in his most recent review of the Terrorism Act, which I think was published in May of this year, did not say 14 days is wholly inadequate. So I tend to think that the evidence that the police now have is evidence of a quantitative nature that, of course, major bombings, a number of major bombings at the same time, cause operational difficulties, but those difficulties, I am suggesting, are quantitatively different from what they experienced before, not qualitatively different, and I infer then that their problems are often more to do with resources and the stretching of manpower than creating new difficulties which require new laws.

Q164 Chairman: Did you have an opportunity see the list they gave us last week?
Professor Walker: I did, yes.

Q165 Mary Creagh: They were emphatic about the fact that it was not about more resources, it was much more about the timescales needed. Both the Home Secretary and the police were specifically asked that question. Do you accept the basis of the police's case, which is that, given the tactic of suicide bombing, the police are required to arrest and intervene at an earlier stage than they would be in other perhaps more conventional crimes where you could wait almost until the point the money is handed over or until the aircraft hanger at Heathrow is rammed? Those things are relatively low risk. They were talking to us about the massively high risks of dealing with what we now know are suicide bombers and the fact that they would need to leave the accumulation and analysis of evidence until after arrest. Can you not see that that might be what has changed, to answer to your question?
Professor Walker: Has it changed? How has it changed? We already have section 41 of the Terrorism Act which allows arrest on reasonable suspicion that somebody is involved in terrorism. Why do not we rely on normal police powers? What are the necessary features of section 41? There are a number of things. It allows, for example, arrest on suspicion of terrorism. Terrorism is not an offence. It allows a much broader form of suspicion to be available to the police than would apply under the Police and Criminal Evidence Act. So we have already granted those powers. We grant powers to detain for 14 days to allow the police to accumulate the evidence. Normally the limit is four days. So we have already allowed significant differences. Suicide bombers, of course, are not new. The concrete blocks appeared outside Parliament not in July 2005 but after 9/11. The possibilities of suicide bombers were brought home by attacks in Israel by British suicide bombers incidentally in 2003 at the time the Criminal Justice Act 2003 was being passed. So I am afraid I accept there are operational difficulties, but again I come back to the point, I do not see qualitatively that things have really changed.

Q166 Mary Creagh: Would you be comforted in any way by Lord Falconer's proposal that a High Court judge could be given the power to veto further pre-charge detention of a terrorist suspect?
Professor Walker: There are probably more important safeguards that one could imagine. I have high regard for district judges, so I do not wish to disparage their efforts in this regard. The more important safeguards that I would have in mind are really to do with, first of all, the training of judges, because this is a rather strange jurisdiction that they are getting involved in here, different from the usual cases that they cover. There are issues around the provision of information to the judges as well: the extent to which they can investigate the case. Aside from having a set piece hearing where the CPS and the police present the case to them, the ability to actually read papers for themselves might be useful. Aside from those issues, there are a whole range of other things you could do. I think, for example, having authorisation from a higher level of police officer might also be helpful. I accept the superintendent is likely to be the person in charge, but it would sharpen up their act if their had, say, a deputy chief constable or assistant chief commissioner, looking over their shoulder being required to sign on dotted line beneath where the superintendent signs. A number of things are important. I would not see the difference between a high court and a district judge as being perhaps the most important.

Q167 Baroness Stern: You made a proposal to us, and you are not only one—this has been said by other witnesses—that suspects be remanded on lesser charges to enable questioning to continue in relation to more serious charges. The Home Secretary told us last week that this is under active consideration but he said that it has serious implications for other aspects of the criminal process. Do you agree with him and do you see legal obstacles to adopting your proposal of remanding on lesser charges?
Professor Walker: First of all, I would say there are quite a range of lesser charges which are available, some of which I have already mentioned, such as section 57. Earlier today offences like social security fraud, immigration fraud, were also mentioned. The question is when the Home Secretary raises the question of obstacles or difficulties, which obstacles and difficulties is he talking about? There are probably two he has in mind. The first danger is that the person is released back into the public, and what are we doing to safeguard against that? A number of things could be mentioned at that point. First, when we talk about lesser offences, that is a fairly inaccurate term. For example, section 57—the possession of materials—carries with it a maximum of 10 years' imprisonment. It is not so much of a lesser charge at all; it is quite a serious charge for which most suspects are remanded in custody and not released into the public. That issue is to some extent taken care of by looking more carefully at what these so-called lesser charges actually are. There may be a point in looking at the bail provisions. In Northern Ireland, for example, there is a reverse presumption applied. Instead of having a presumption for bail, in terrorist

cases there is a presumption against bail in Northern Ireland, and looking in that direction may help. Of course in the background there are still control orders which might be used in these cases. There is the issue of safety of the public, if you like, which is one obstacle. The other obstacle is can the police continue their investigation? Will only having 14 days prevent them continuing and completing their investigation? I have not seen much evidence to suggest that 14 days is not enough. I have seen a number of comments, not least in the proceedings from last week, that say that the main purposes of this extended detention is not to question at all and that the police do not expect to get any answers to any questions; and so I am not sure that opportunities to question is an issue that we really should be terribly worried about. If we are worried about it, I suggest there is an alternative procedure, which I mentioned in my submission, which I think is much more proportionate than leaving the person in the hands of the police for three months.

Q168 Baroness Stern: Is that the procedural mechanism for post-charge questioning, in the form of a judicially managed investigation, which you did propose and you distinguish from judicial investigation? Could you perhaps explain to us how this would work in practice and what is the difference between a judicially managed examination and a judicial investigation, which I understand you are opposed to?
Professor Walker: 'Judicial investigation' I am taking to be some kind of variant of what goes on, say, in France or Spain or the continental model. I am not fundamentally opposed to it. It would require a lot of preparation and hard work to bring it into being. I certainly think it would be wrong simply to assign one of her Majesty's judges to this task without, for example, giving a whole range of training in how to investigate crimes, in terms of setting up support mechanisms for judges. You would probably have to have a range of police seconded to the judge's office; you would have to have all sorts of protocols for the transfer of information between the police and the judge's office. That would be a very ambitious scheme and, of course, is not a scheme anything like we have at present; so it is a difficult one. I was arguing for something a bit simpler, which is that if the police continue their investigation after the time limit, whether it is 14 days, which is my view, or whether it is three months, which is their view, and further information, evidence, comes to light—on the 99th computer they find the evidence when they have de-encrypted it, or whatever it might be. I can envisage that the police might like to get some kind of reaction from the suspect at that point: "We found your fingerprints on this piece of evidence. What have you got to say for yourself?" It would be proper then to have a system which is akin to what happens, for example in serious fraud cases, and allows suspects to be brought before a court where the judge is not the investigator but remains an umpire in terms of the questioning. So under my system police remain police, prosecutors remain prosecutors and judges remain judges and there is no mixing of functions between them. That is what I recommend. It is not as radical as it seems. It was invented in 1883; it is just that everybody has forgotten about it. It is in the Explosive Substances Act 1883, section six, which is still in force.

Q169 Lord Lester of Herne Hill: In your written evidence you asked the question, but you did not answer it, about intercept evidence. You said it should be explained why the normal procedures for dealing with public interest immunity cannot satisfactorily deal with any concerns. I think we could be helped if you could explain to us whether you think that the existing procedures on public interest immunity would adequately cater for the Security Service's concerns about the use of intercept evidence. Could you briefly tell us about that so that we can take it up?
Professor Walker: I would say it is an extremely complex and lengthy area of the law, so I hesitate to try your patience and go into the kinds of details that I would in a lecture.

Q170 Lord Lester of Herne Hill: You will have to write to us about it?
Professor Walker: I certainly could do. What I would say is that the courts are well used to balancing the public interest in, for example, national security and both the techniques of the security services and the police and also the evidence that they find by those techniques as against the public interest in the administration of justice, and they manage to apply this to a wide range of what we might call sensitive evidence at present, particularly evidence involving, for example, informants where we may need to keep secret the fact either that there is an informant or especially the identity of that informant; and the same could apply here in terms of balancing. The courts are able to judge whether the intercept evidence, first of all, is material to the trial, and if it is not material they can put it to one side; if it is material to the trial, they can then make a judgment as to whether it would be fair to proceed with the trial without disclosing it to the suspect; and, if they think it is not fair to proceed, then the prosecution has a choice either to proceed with the trial or not, as the case may be. Presumably what we are saying at present is, even where the prosecution think the material is relevant and they would want to use it, they are not allowed to do so—the law forbids them to do so—which I find both an odd, inefficient situation and also a situation of potential unfairness, because if there is material which is relevant to the trial, then it should be heard. At present it is suppressed.

Chairman: Thank you very much Professor Walker for coming. I am sorry we kept you waiting, but I think it has been worthwhile from our point of view.

Witness: **Mr Abdurahman Jafar**, Vice Chair of the Legal Affairs Committee, Muslim Council of Britain, examined.

Q171 Chairman: We are now in the third session of this afternoon with Mr Abdurahman Jafar from the Muslim Council of Britain. Could I first of all start by thanking you for coming at short notice and staying later than we originally expected, but it has been a very interesting section and it has taken us a bit longer to get through than we thought it would. We have seen the memorandum called Protect our Rights which is put forward by an umbrella group of organisations, including yours, but obviously that was before the Terrorism Bill was published, so things have moved on a little since then. Could I start by asking you, first of all, whether you think the Government has sought to engage and consult the Muslim community about what it is doing, what you think the dangers are within the legislation in terms of it being potentially counter-productive towards community relations particularly affecting the Muslim community?

Mr Jafar: There has been engagement. Whether the direction of that engagement has been the correct direction many question. Many Muslims question whether the engagement has been fruitful, whether there has been real substantive progress as a result of that engagement as well. It has been helpful, of course, but many people feel that more could have and should have been done. With regards to the measures being counter-productive, over the past five years there have been four separate counter-terror provisions and the disproportionate number of those who have been end users of these provisions have been Muslims. Recent British Transport Police figures show that since 7/7 until October of this year there have been over 7,000 stop and searches of which over 50 per cent were Muslims. That is a fairer proportion when one considers the number of Muslims who have made up the 900 or so people who were arrested under the 2000 Act since 9/11, where a vast proportion of those arrested and de-arrested and found completely innocent were Muslims. Disproportionality is a very big issue, and there is another dimension that this Act now threatens to bring in which adds to the potential for being counter-productive. Whereas previously counter-terror measures were directed to prevent terrorism in this country, there was a universal acceptance that this was necessary. There was no argument at all, or no legitimate one within the community, or one that was tolerated, that any acts or forms of terrorism within this country could or should take place, and there has been a very firm commitment since 7/7 that there was an increased need for the community to act in unison with everyone else to ensure that these kind of horrors do not happen again. This Bill now brings and threatens to confuse that clarity or focus that the Muslim community had, whereas previously, as I have mentioned, it was about protecting the UK. Now what this Bill does is threaten to conflate the issue of illegitimate attacks against peaceful democracies with legitimate acts of resistance against illegitimate regimes around the world—one cannot oppose Uzbekistan with peaceful means. If you do you get boiled to death—and to say that to support forms of resistance against genocide or forms of resistance against foreign domination, this is in contravention of international law, the universal declaration of unanimous rights, the preamble, makes it perfectly clear that there is a need for man to rebel against tyranny and oppression. The Geneva Convention 1977 amendment makes it perfectly clear not only do people have a right to resist, with armed use, illegal occupation but other states have a duty and a responsibility to assist that. On the one hand you have Muslims, who make up around 80 per cent of the world's refugees according to UNHCR figures. They are extremely concerned about international issues, and oppression does seem to be, again, a disproportionate reality of what is happening in a Muslim world, and to say that you are no longer allowed to express opposition to this form of agrarius human rights violations and to say that if you do you equate it with supporting what happened on 7/7 threatens the debate that is happening within the Muslim world. We as Muslims are coming to terms now with a secular democracy, not just as a mid-way but as an end to what we as Muslims want to achieve. It is not about having exclusive state, it is about living with universal principles. This is a very important debate that is happening within the Muslim world and this is threatening to curtail and divert that very important debate. I think that is a really horrific counter-productive effect of this new route that the Bill is going towards.

Q172 Chairman: Which particular measures that are being proposed now more generally do you think carry the greatest risk of being counter-productive?

Mr Jafar: The "glorification", "incitement" of terrorism, "acts preparatory", the MCB does not in principle oppose, because they harm national security and it may be an issue of national interest that this island is not used in order to further acts abroad which are violent—that is a national interest issue—but with regards to freedom of expression that will be curtailed as a result of clause one. The 90-day extension is extremely worrying. One of the reasons why Lord Carlile accepted that in principle (with the eight safeguards) was, I believe, evidence from Peter Clarke where he said in 2000 an Algerian named Mohammed Megeurba was arrested, and we have just found out that his fingerprints were on the ricin recipe. The proposition he was propounding was that if we had had these powers then he would have been detained for 90 days and we could have found the fingerprints, but that is the equivalent of saying all of these 900 people who have been arrested should have been detained for 90 days. In 2000 Mohammed Megeurba was released—there was no evidence that he had committed a crime—and he is no different from the other 900 people who were wrongly arrested under the Terrorism Act. Giving this 90-day extension would be seen by the

community as internment similar to that which was suffered by the Irish community, and that increased support for Irish nationalism, it increased the oxygen that was available to terrorist cells, and I fear that that is a possible outcome of the extension.

Q173 Lord Lester of Herne Hill: The glorification of terrorism. If hypothetically someone goes on British television immediately after 7 July and glorifies, praises the bombings or, to take more recent examples, praises the bombings in Hedera in Israel on the ground that Israel is in illegal occupation of Palestine, or praises the bombings on the market in Delhi on the ground that India is against Kashmiri rights—suppose that in those situations that happens—should that be a crime?
Mr Jafar: The thing is, with inventive and creative prosecutory exercise, they could already be framed as crimes as such. The conviction of Faisal in the Court of Appeal recently under the Offences of the Persons Act is one example of a good, creative prosecutory judgment.

Q174 Lord Lester of Herne Hill: But suppose the Government and Parliament decided to put the matter beyond doubt by having a new offence, and I understand your objections to the way it is phrased in clause one, but do you think that could be saved and be compatible with human rights if the definition were narrowed, made clearer and there were specific intent, or is your position that it cannot be saved and therefore should be rejected?
Mr Jafar: If it was made very clear that the nihilistic perversion of Islam that created 9/11 or 7/7 were to be criminalised and that legitimate resistant movements would not be, then I see no objection to that. There is a universal agreement that what happened on 9/11, 7/7 are completely wrong—that is a view within Islam and outside Islam—but I believe there is a way in which that could be separated from supporting legitimate acts of resistance against oppression. I do not know what they are. I do know that that Article 5 of the European . . . .

Q175 Lord Lester of Herne Hill: The European Convention?
Mr Jafar: No, I am sorry. Clause one is intended to bring into effect the Article 5 of the . . . .

Q176 Lord Lester of Herne Hill: The European Convention for the Prevention of Terrorism?
Mr Jafar: Yes, the prevention of terrorism. I know that our threshold is a lot lower. Acts of violence against a person are very different from what the European Convention says. It talks about disruption to politics, to society, et cetera. I think there could be clarity as well in defining exactly what terrorism is. The European Convention, I believe, has a different definition as well.

Q177 Lord Lester of Herne Hill: I am sorry to press you, but you have not answered my question about specific intent. Would the Muslim Council of Britain regard it as necessary that there be a deliberate intention of glorifying or instigating terrorism or not?
Mr Jafar: Completely. That is in accordance with the European Convention.

Q178 Lord Lester of Herne Hill: How do you draw the line between what you were saying to us now, which is that it would be right to criminalise, I think you called it, the perversion of Islam on the one hand and other ideologies on the other where armed struggles are being advocated? I do not see how, speaking for myself, how the criminal law could draw such line, but does the Muslim Council have suggestions as to how that might be done, because it seems to me that what you call the perversion of Islam some people might regard as not the perversion of Islam, and political Islam and religious Islam, one can imagine all kinds of terrible controversies. How can you possibly in law make a definition of a bright line separating one from the other?
Mr Jafar: There could be a clause which excludes support for legitimate resistance movements as an exclusion.

Q179 Chairman: Are you saying, for example, there is a difference between the bombing of Woburn Place, the bomb in the market place in Jerusalem and the bomb in the market place in Delhi?
Mr Jafar: That is the crux of the problem. Maybe you cannot legally separate those.

Q180 Chairman: You said there is a distinction between those three?
Mr Jafar: In substance of course. It depends on who is doing it, what the situation is and on what basis they are doing it and what options are open to them. I am not saying anything is right or wrong, but that is a problem. There is no need to have a more precise measure when you can have pre-existing measures which will get exactly the result you want and need without having to enter this area of unclarity and potentially damaging results.

Q181 Chairman: What the Home Secretary is saying to us is that we now have this gap in the law where somebody can go on national TV and say the 7 July bombers were wonderful people, martyrs, people should go out and do exactly the same thing, it was a great thing that they did, without specifically focusing on a particular event or a specific occasion, which is where the gap in the law is now. Are you saying that it should be a crime or not?
Mr Jafar: I am saying that it should be and that is what the conviction against Faisal was all about.

Q182 Chairman: That was an offence of soliciting murder, was it not?
Mr Jafar: It was, but I can see no difference between acts of terrorism and soliciting murder.

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Q183 Dr Harris: Can I pursue the same line of questioning that Lord Lester pursuing. He asked you what importance you placed on the need to have intention as a requisite for successful conviction of whatever we agree is the offence and that it should not be offence without intention because these are kind of like speech crimes and can be misinterpreted. Is the Muslim Council of Britain certain that it is being consistent in that regard when it publicly advocates a non intentional offence in regard to religious hatred also with a long prison sentence like seven years, and is this making you reconsider your approach to the Religious Hatred Bill?
Mr Jafar: We have never had a completely difficulty line on either of these two provisions. One we favour. We think that if you can have the equivalent in race-hate speech then you can have the equivalent in religious-hate speech. With regard to glorifying acts of terrorism which could be supporting legitimate resistance movements, we think intention is vitally important because the nature of the speech that could fall foul of this law could be one in which an academic partakes, could be one in which a politician rightly engages.

Q184 Dr Harris: Which law? Do you mean the religious hatred law, because the same could apply to that?
Mr Jafar: No. Not really. The religious hatred law is quite specific and very narrow. It is about the kind of speech that would make and incite hatred against a particular religious community. That is different from, for instance, glorifying one religion over another or a wider concept.

Q185 Chairman: Can I come back to the point you made about the case of Faisal, which was soliciting murder. As I recall the evidence in that case, Faisal had produced series of audio-tapes in which he specifically incited people to kill the Jews. The case I put to you was not that specific. One of the concerns I think there has been is that people make this general statements encouraging terrorism in general terms without the specificity that you see in the Faisal case?
Mr Jafar: I thought the Faisal case is being used as an example because it is not specific. Killing not just Jews; it was Christians; it was a whole host of people who are not Muslims. It was very unspecific, I thought. It was not the crime of soliciting sitting murder against Jews; it was the crime of soliciting murder *per se*. I see no difference, in essence, between advocating plating a bomb in any particular country or against any particular type of civilian population as being different. That is quite specific.

Q186 Dr Harris: You did not answer, I do not think, and forgive me if you did, Lord Lester's specific question. Do you think that someone going on television and saying that the 7/7 attacks were praiseworthy should be a criminal offence?
Mr Jafar: Yes. It should be a criminal offence.

Q187 Dr Harris: But you do not think that should apply necessarily to attacks on civilians in other places. Leaving side attacks on military forces, would you say it is extendable, that criminal offence of saying an attack on civilians is praiseworthy, to all situations where civilians are targeted specifically. It is a yes or no really.
Mr Jafar: No. An attack on a civilian population does not fall within the ambit of legitimate resistance. I do not understand the question. There is legitimate resistance and there is illegitimate resistance.

Q188 Dr Harris: Yes, and I think that is helpful, because that would mean that you would now answer Lord Lester's question by saying that attacks in Jerusalem and in Delhi are praiseworthy, not necessarily they should be emulated, but even just that they are praiseworthy, should be criminalised because they target civilians?
Mr Jafar: They incite murder, yes. They incite murder. That is a crime in this country.

Q189 Chairman: Can I go back to my original line of questioning after that interlude and put to you some more general questions. How do you think relations between the Muslim community and the police have developed since July?
Mr Jafar: I think historically there have been problems with that relationship. There has been a desensitised culture within the police of religious issues while they acclimatise to racial issues. That cannot be said with regard to religious issues. People suffer religious abuse, violence promoted by anti-religious sentiments and these are not properly recorded as religious hate crimes. There has been, unfortunately, a distrust within the Muslim community of the police, and so since 7/7, immediately after 7/7, I think there was a very sharp focusing of priorities in the community and a very firm commitment to work with the police, but I think a lot of that goodwill and commitments is being dissipated and it is going back to business as usual, as figures showing disproportionality in some instances of police brutality against minority members in custody come to light.

Q190 Chairman: What about relations generally between the Muslim community and the wider community. How have they developed since July?
Mr Jafar: I think there was an NOP survey a month after 9/11 and eight out of 10 British people said that they do not view Muslims or Islam any less favourably now. A BBC poll two months ago showed over 60 per cent of the population in this country do not think racial profiling is a good thing. I think there is a wealth of goodness in the people of this country, of which I am proud to be a part, but I think that there is a semi-permeable membrane wherein that good large majority of this population can understand Muslims but Muslims live within a very isolated community. Their experiences are very different. Their experiences are one of social deprivation, of unemployment, of living in poverty. I think over 60 per cent of

Pakistani and Bangladeshi families live below the poverty level and they live in areas where they are subjected to racial discrimination and not the niceties of life; and so I think the experiences of Muslims in this country, unfortunately, is not a good one. I think we need a lot of investments. I think the current issue and the threat of terrorism needs to have a multi-faceted approach, and I think if you confine it to one of law and order it will prove to be counter-productive, as empirically that seems to also be the case with the Irish problems, and Afro-Caribbean problems. I think there needs to be a broader approach to the community one which looks at the domestic issues of social deprivation as well as even talking about the more uncomfortable issues of foreign policy.

Q191 Chairman: The last question in this section and following on from the criticism you made of the way the law is going, what will the consequences for community relations be between the Muslim community and the wider commune if there were to be a repeat of the 7 July attacks?
Mr Jafar: I fear that there will be more knee-jerk legislation.

Q192 Chairman: I am not talking about legislation; I am talking about community relations. What do you think the impact on community relations would be if there was another attack?
Mr Jafar: There was a prediction that there would be a very big back-lash after 7/7, and the police acted commendably in relation to that and worked very closely with the community to prevent that. I think that their work and the messages they sent out immediately post 7/7 did a lot to commend that, but I fear that another incident like that may be a tipping point and may have stretched tensions too far. It is very worrying. Everything that has happened up until now in terms of community relations is fairly predictable, and if one follows that logic through, it will only be a magnification of the already problematic scenario.

Q193 Chairman: This is the dichotomy between the Government trying to take action and the police trying to take action to prevent an attack and the consequences for community relations in that direction as opposed to the consequences for community relations if they were unable to frustrate another attack?
Mr Jafar: I am sorry?

Q194 Chairman: It is a dichotomy between the two, the balance, on the one hand, of the Government and the police taking action through legislation and through the things the police do, stop and search and all the rest of it, to frustrate another attack and the impact on community relations in that direction, as opposed to the impact on community relations if they fail and there is another attack?
Mr Jafar: Yes, I do not think terrorism is something that can only be defeated by law and order. You have to approach the causes of terrorism. I think it is communities that ultimately defeat terrorism. That is a very strong message that was sent out by the police in the diversity section, and I think that is a very logical and rational approach to it and historically it has been the way terrorism really has been defeated, by offering solutions, by working with that disenfranchised community and empowering that disenfranchised community in order to be a stakeholder in the system as opposed to a marginalised community.

Q195 Baroness Stern: I am afraid I am going to move you back to the specifics of the law, if you do not mind. In your briefing paper you are not very favourably disposed towards the new offence of acts preparatory to terrorism, which we have mentioned already. You say that the reason for it is quite unclear and that sections 57 and 58 of the Terrorism Act 2000 will already criminalise many such acts. Are you opposed in principle, therefore, to the creation of the offence of acts preparatory to terrorism in clause five of the Bill and do you accept that there is a gap in the present law which makes it difficult to prosecute where there is clear evidence of an intention to commit a terrorist act but there is no evidence of the precise details of any planned terrorist act?
Mr Jafar: Yes, in principle the MCB accepts that.

Q196 Baroness Stern: There is a gap?
Mr Jafar: There is a gap and there needs to be clarity in this law. One can envisage a situation where a family taking a distant relative. They could fall foul of this law, so there needs to be far greater clarity, but in principle this document was made by a number of organisations, of which the MCB was just one, and that specific part does not reflect MCB's approach to the Bill.

Q197 Lord Judd: You have a view, I imagine, on what is proposed or what is being examined as a possibility of deportation with assurances. Could you tell us what your views are on this?
Mr Jafar: There are some countries, unfortunately, which systematically torture their population and use torture and ill-treatment as a method of controlling their population. I think deportation to specific countries like Libya, like Syria and may be Sudan, countries where torture is systematic, not just incidentally abused by members of the security services but a systematic government policy, then I think assurances will not alleviate . . . .

Q198 Lord Judd: You believe they should be discounted altogether, those assurances?
Mr Jafar: It should be a case by case basis. I think there is no reason why the EU cannot compile a database of countries and their practices of torture and their practices of deportation. We have access to this information already. We know Sweden deported to Egypt and people were abused; we know in England failed asylum seekers have been returned to various countries and immediately detained and tortured. We have access to this information.

31 October 2005 Mr Abdurahman Jafar

Q199 Lord Judd: It has been said by the Home Secretary and others that to discount the reliability, for example, of the memorandum of understanding is neo-colonial or patronising. How do you respond to that?
Mr Jafar: Most countries have signed up to international law, have signed up to the universal declaration of law. It is illegal to carry out torture, yet they consistently and systematically discard these provisions. It is not a matter of neo-colonialism, it is a matter of ingrained practice by these countries to abuse their citizens and to use torture. This is a simple factual precedent.

Q200 Lord Judd: Do you have a view on whether there is a possibility of effectively monitoring a situation where somebody has been returned where there are assurances. Do you think some means of effectively monitoring this could be devised and if so how?
Mr Jafar: I think in some countries that may be a useful method. I think it is one that we should have had even before this whole issue has arisen with regard to asylum seekers, etcetera, et cetera. I think it would be better for a UN or an EU type of body to do this, which would be very far dispatched from the Secretary of State's concerns.

Q201 Lord Judd: Could I just interrupt you, because, as I understand it, I may be wrong but as I understand it, most of the reputable international organisations have said they want no part of a monitoring responsibility; so possibly what is being examined now is, for example, the role of NGOs which are indigenous to the country concerned. How do you feel about that?
Mr Jafar: In the most extreme countries which abuse their citizens there are no NGOs. There can be no independent monitoring. Unless we can enforce some way in which may be there can be conciliatory access to these detainees on a periodical basis, I am uncertain, but I think inherently one must be extremely cautious in returning to countries where torture is systematic. I think it would be very difficult to uphold a decision of an assurance from such a country because they have been known to violate their obligations under international law.

Q202 Mary Creagh: Last week the Home Secretary told us that the proposals out for consultation about a new power to control a place of worship by orders rather than by prosecutions were as a result of views expressed by the Muslim community, that it would be better to proceed in this way to avoid fostering extremism. What do you think about those proposals? Do you think they are going to be workable in view of the difficulty of defining a place of worship, particularly if it is in somebody's garage, house or out on the street?
Mr Jafar: I think it was unnecessary to have a place of worship. It seems to limit what could be a good law, because there could be pubs that are used for that purpose. In reality it was a dupe that was used for this purpose for the Bradford bombers. There could be many institutions and proprietors who could be asked to carry out these measures, and by limiting it to a place of worship seems to not only question the effectiveness of such a proposition but the factual basis of what happens, we have got 1,100 mosques in this country and only one has ever been infiltrated by the Muhajiroun and extremists, and that is the case of the Finsbury Park Mosque. You cannot base a whole law and executively propose to criminalise a community. What we are doing in having provisions which potentially can order the closure of mosques is to punish the community.

Q203 Mary Creagh: Can I make it clear, the Government is consulting on a possible new power; it is not a law at the moment; so these are observations that would be useful to feed into that consultation process. What steps is the mainstream Muslim community taking to prevent extremism in Mosques? The Home Secretary cited an idea that had been put forward by the community. If preaching were to take place in English, for example, what would you say to that?
Mr Jafar: This has got very wide support in the community. It is all about this debate, it is about this development, it is about what is a second generation community or a third generation really making its roots in this country and owning this country as part of its own rather than being seen as outside. These steps are commendable and very appropriate, but I think the question is again wrong because it is not the mosques where extremism takes place or takes root, or develops; it is outside the mosques; it is in private homes; it is in gyms. The mosque is very rarely a place where extremism develops. If you look at the northern riots, none of the people involved in those riots were a result of either Muslim schools or a result of a mosque education. They were all secular educated, all adopting lifestyles, which were football, etcetera, oriented, and so it is not the mosque where these problems occur. I think the Muslim community is doing a lot, not just in the mosque but outside the mosque. In this month of Ramadan we have seen radio stations where again the very important debates that need to take place within the Muslim community are taking place. The MCB have undertaken a consultation process with a huge number of youth organisations to find out exactly what factors are facing them, what problems they have, etcetera, and so a huge assessment of the youth in the community, and this is amongst many, many other measures where there is a very firm focus on the proposition that terrorism in the UK must not be tolerated; but again we fear that that is being diverted into a debate about disproportionality, about unfairness under the current anti-terror legislation.

Q204 Mary Creagh: To go back to the Finsbury Park Mosque, is it not the case that the fact that there were no powers to deal with extremism in mosques an issue that meant that the entire community was being punished already by the fact that the mosque had been overtaken by extremists and most people who lived round there had to find somewhere else to worship?
Mr Jafar: I think there was legislation. What the extremists were doing in that mosque breached a lot of laws. The problem was the community were not taken seriously. They were not listened to. For over a decade they were approaching the Charity Commission, the authorities, asking for help, asking for intervention. These people were threatening, using violent threats against members of the Muslim community, but there was very little action and there needs to be more religious sensitivity training in the police, there needs to be closer cooperation with the police in order to have us not only as end users in terms of subjects, but also as users of legislation, as users of the criminal justice system.

Q205 Mary Creagh: You can understand why the police were reluctant to intervene in that case?
Mr Jafar: I think it is because of an historical inability to relate with the community. They did not know us. They did not understand the issues. They had no training terms of understanding the community, in terms of understanding extremism. There would be great benefit in greater diversity training, in greater sensitisation of religious issues.

Q206 Chairman: In relation to the Finsbury Park Mosque, the Charity Commission, to be fair, issued various orders but they had no power to enforce them, which was one of the problems. We cannot go into that in detail because the case is potentially *sub judice*?
Mr Jafar: Yes, but there are other examples, individuals, certain clerics. Muslim have been calling for prosecutions, have been providing evidence, and there has been very little movement or these allegations are taken historically with very little degree of seriousness.

Q207 Chairman: Maybe that is why the Government is looking to strengthen the law.
Mr Jafar: A greater commitment to serve the community without discrimination would also go towards that.

Q208 Dr Harris: Are you aware of the new list of unacceptable behaviour that the Home Secretary issued in the summer which will inform his decision about deportation or exclusion of foreign nationals, effectively, from this country?
Mr Jafar: Yes.

Q209 Dr Harris: You are aware of it.
Mr Jafar: I am aware of what is in the public domain, yes.

Q210 Dr Harris: What is your view on the terms in which those unacceptable behaviours are couched? For example—and I will read from it—"producing, publishing, distributing material, public speaking, including preaching, etcetera, to express views which ferment, justify or glorify terrorist violence in furtherance of particular beliefs or foster hatred which might lead to inter-community violence in the UK". Do you think that is just right, too narrow or too broad?
Mr Jafar: I think it is extremely broad. The Secretary of State already has discretion to exclude people who are non-conducive to the national interest. That already is very broad. I think that provision could be used. Again, the problem with being more explicit for the Muslim community is that there is a perception that it is targeting legitimate liberation or resistance movements, which may sometimes use language which in a UK context would not be correct.

Q211 Dr Harris: The Home Secretary argues that in providing this list, although he says it is indicative and not exhaustive, he is clarifying what is potentially a broad power which is, as you said, conduct, or likely conduct, or something like that, not conducive to the public good. Do you accept that argument, that in specifying to a certain extent he is narrowing and not broadening, even if you think the terms are broader than you would like them to be?
Mr Jafar: But he is not replacing the broader provision, the broader provision stays?

Q212 Dr Harris: Correct?
Mr Jafar: The point I am making is that the objective is achieved either way. It is just that the latter way seems maybe unjustifiable but it could be seen by people who are very concerned about international issues to be disproportionate and to be directed against silencing or censoring.

Q213 Dr Harris: My final question is about the wording, and this is something I put to the Home Secretary as well. Would you be happier, even though you are not happy, if the Terrorism Bill, the places of worship guidelines that you had discussions about and these unacceptable behaviours all use the same terms like "encouragement of terrorism", because the places of worship talks about fostering extremism, which may or may not include the encouragement of terrorism and this, as I have said, talks about fostering hatred and justifying. Would you be happier, or simply never happy, if it was restricted to a specific offence defined in the Terrorism Bill?
Mr Jafar: Yes, I think there has to be consistency in the way we approach this issue. There are many facets and different types of extremism. There is one type which everyone agrees on, but that is just saying extremism *per se* is not what everyone is against, and there is a potential that . . . .

Dr Harris: I have been described as extreme by government ministers, probably with some validity, in my time!

Q214 Baroness Stern: Can we just have a little discussion about the extension of pre-charge detention? My first question would be: do you accept that developments in international terrorism, including the use of suicide bombers (and this is certainly the evidence that the police have put to us) present the police with new problems in ensuring public safety?
Mr Jafar: I think the bare assertion that a suicide bomber necessitates a different approach to someone who would place a bomb in a shopping-bag and leave it—I cannot see the logic behind that. I can understand that international terrorism requires a different approach, and I can certainly see that there is justification for Parliamentary intervention and new legislation, but not anything beyond 14 days. I do not think a case has been made out for it at all.

Q215 Baroness Stern: So you are not convinced by any of the justifications that the police have put forward mainly about their operational difficulties in doing all that they have to do within the 14 days?
Mr Jafar: No, I am convinced that there is a need for measures to be taken to assist them, but there can be amendments to bail, there can be amendments to the way we approach charges, there can be amendments to having people on control orders, surveillance, etcetera, but there are two options that we have. We have one, increasing pre-trial detention which has the potential of devastating hundreds of lives. To date Muslims have been, as I have said, the end user of a lot of anti-terror legislation disproportionately and it really does disaffect people. Just by being arrested one night they are judged as being found guilty in their community, and being detained for six months—I am sorry, three months, which is the equivalent of six months, it is very difficult to see how one can pick up their life after an experience like that. I think 14 days separates western democracies from other nations. There are other nations that use three months, and they, like Sudan, like Libya, they all have three months' pre-trial emergency detention.

Q216 Baroness Stern: We are talking about pre-charge?
Mr Jafar: Yes, sorry, pre-charge, not pre-trial.

Q217 Baroness Stern: Carry on.
Mr Jafar: I think a line needs to be drawn with regard to what is acceptable. The arguments for the 14-day extension in 2003 were almost identical to what is being put forward as the justification for the three months. To date the longest person kept in detention has been 13 days. There have been some people detained, about three or four, for 10 days and released without charge whatsoever, but there could have been three months.

Q218 Baroness Stern: Would you be opposed to any extension over 14 days?
Mr Jafar: Because the objectives can be achieved by other methods, I would object, yes. I think the police need their assistance, need Parliamentary intervention, but there is no need for an extension of 14 days.

Q219 Baroness Stern: Lord Carlile, who reviews the terrorism powers, as you know, said that the problem is not about the length of the pre-charge detention but the safeguards of the suspect during the period of pre-charge detention. Do you agree with that?
Mr Jafar: I do agree. I was pointing out countries which have three months pre-charge detention and they invariably abuse human rights, and there seems to be a pattern that people can easily admit to crimes they have not committed in the period of three months. It is a very draconian measure and I think it is disproportionate.

Q220 Baroness Stern: So you are opposed to three months whatever the safeguards for the suspect during those three months are?
Mr Jafar: I think traditionally the judiciary, when it comes to issues of national security, have given great deference to the Executive, and I think that that would also be the case here, as has been the case with SIAC?

Q221 Lord Judd: The proposed legislation envisages an extension of the powers of proscription. What is your reaction to that?
Mr Jafar: I think some organisations which do espouse violence, like Muhajiroun, that is a good thing, but when you try and use proscription to silence political dissents and views that you do not like, like Hizb Ut Tahrir, although I do not like them I completely disagree and hate them with a virulence, but I cannot say that they promote violence and I cannot conscientiously think of a reason why they should be banned.

Q222 Lord Judd: Would you argue that proscription, if not very convincingly handled, could actually provoke a worse situation?
Mr Jafar: Completely. They are already working outside the mosque structure, they already work within cells, so this would not be a big change, this would add to their argument that a secular liberal democracy simply cannot give you justice, that there is no way a secular liberal democracy could provide the answers. This would further add weight to the arguments propounded by extremists with this nihilistic philosophy.

Q223 Lord Judd: There is one specific question I would like to put before I finish. If it is accepted that there is an offence of encouragement of terrorism, should the encouragement of terrorism be one of the grounds on which a decision about proscription should be made?
Mr Jafar: I am against encouragement of terrorism in principle if it does include proscribing legitimate resistance movements. Therefore, following on from that, I would be against that being used as a basis for

proscription, but inciting murder or inciting acts of terrorism against civilians or supporting certain terrorist movements, then that should be proscribed?

Q224 Lord Judd: Your basic thesis, if the Chairman permits me to put this question, which it seems to me you have repeated several times in this session, is that you are unhappy about a lot that is being proposed in the absence of what you believe is an acceptable definition of terrorism.
Mr Jafar: Yes.

Chairman: A nice straightforward question and answer to round off our session. Thank you for coming. It has been a lot longer session than we thought, but there was a lot to tell us which has been very interesting and helpful for our future deliberations. Thank you for coming and for staying longer than everyone expected.

Written evidence

1. Copy of letter from Rt Hon Charles Clarke MP, Secretary of State for the Home Department to Rt Hon David Davis MP and Mark Oaten MP with attachments re draft clauses to the Terrorism Bill on glorification and the issue of pre-charge detention period

I wrote to you on 15 September enclosing draft clauses for the Terrorism Bill.

I am sure that there are many points arising from them that we will want to debate during the Bill's Parliamentary passage but I think it is fair to say that most attention has focused on two particular issues the proposed new offence of glorification of terrorism and the proposal to increase the maximum pre-charge detention period. It might therefore be helpful to bring you up to date on these two issues.

We have looked to what could be done to ameliorate some of the concern that has been expressed about the proposed glorification offence and think we have found a way.

What we have done is to move glorification into clause 1 of the Bill and removed what was previously clause 2. The effect of this is to make it an offence to make a statement glorifying terrorism if the person making it believes, or has reasonable grounds for believing, that it is likely to be understood by its audience as an inducement to terrorism. Questions about which terrorist offences are covered by the glorification offence, and from how long ago, also disappear because the test of what constitutes a glorifying offence is based on the person making the statement's belief as to its effect on the audience. I hope you will agree that this is a more satisfactory formulation.

I attach a draft version of clause 1 with these changes made and would be interested in your reaction.

Turning to the issue of the maximum pre-charge detention period, I remain convinced, for the reasons set out in my previous letter, that we need to increase the limit to three months. I would expect that limit to be reached only in the very rarest of cases but nonetheless I believe that there will in the future be such cases where the various factors which I outlined previously will mean that such a detention period is warranted. The judicial oversight which will exist will mean that detention will only be possible if it is necessary and if the investigation is being carried out as expeditiously as possible.

To inform the debate I enclose some statistics which we recently sent to the Home Affairs Committee. They show, I think, that the police do make sparing use of their existing detention powers and I would expect them to do likewise with the amended powers. I also attach a paper which has been prepared by the Metropolitan Police which affirms the case for, and their support for, the proposed extension.

I am copying this letter and attachment to the Chairs of the Home Affairs Committee, John Denham, the Intelligence and Security Committee, Paul Murphy, the Joint Committee on Human Rights, Andrew Dismore, the Constitutional Affairs Committee, Alan Beith and the Independent Reviewer of.the Terrorism Act 2000, Lord Carlile. I am also placing a copy in the Library of the House of Commons and on the Home Office website.

6 October 2005

DRAFT OF A BILL TO

Make provision for and about offences relating to conduct carried out, or capable of being carried out, for purposes connected with terrorism; to amend enactments relating to terrorism; to amend the Intelligence Services Act 1994 and the Regulation of Investigatory Powers Act 2000; and for connected purposes.

Be it enacted by the Queen's most Excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows:-

PART 1

OFFENCES

Encouragement etc. of terrorism

1. Encouragement of terrorism

(1) A person commits an offence if —

(a) he publishes a statement or causes another to publish a statement on his behalf; and

(b) at the time he does so

(i) he knows or believes, or

(ii) he has reasonable grounds for believing,

that members of the public to whom the statement is or is to be published are likely to understand it as a direct or indirect encouragement or other inducement to the commission, preparation or instigation of acts of terrorism or Convention offences.

(2) For the purposes of this section the statements that are likely to be understood by members of the public as indirectly encouraging the commission or preparation of acts of terrorism or Convention offences include every statement which—

(a) glorifies the commission or preparation (whether in the past, in the future or generally) of such acts or offences; and

(b) is a statement from which those members of the public could reasonably be expected to infer that what is being glorified is being glorified as conduct that should be emulated in existing circumstances.

(3) For the purposes of this section the questions what it would be reasonable to believe about how members of the public will understand a statement and what they could reasonably be expected to infer from a statement must be determined having regard both—

(a) to the contents of the statement as a whole; and

(b) to the circumstances and manner in which it is or is to be published.

(4) It is irrelevant for the purposes of subsections (1) and (2)—

(a) whether the statement relates to the commission, preparation or instigation of one or more particular acts of terrorism or Convention offences, of acts of terrorism or Convention offences of a particular description or of acts of terrorism or Convention offences generally; and

(b) whether any person is in fact encouraged or induced by the statement to commit, prepare or instigate any such act or offence.

(5) In proceedings against a person for an offence under this section it is a defence for him to show—

(a) that he published the statement in respect of which he is charged, or caused it to be published, only in the course of the provision or use by him of a service provided electronically;

(b) that the statement neither expressed his views nor had his endorsement (whether by virtue of section 3 or otherwise); and

(c) that it was clear, in all the circumstances, that it did not express his views and (apart from the possibility of his having been given and failed to comply with a notice under subsection (3) of that section) did not have his endorsement.

(6) A person guilty of an offence under this section shall be liable—

(a) on conviction on indictment, to imprisonment for a term not exceeding 7 years or to a fine, or to both;

(b) on summary conviction in England and Wales, to imprisonment for a term not exceeding 12 months or to a fine not exceeding the statutory maximum, or to both;

(c) on summary conviction in Scotland or Northern Ireland, to imprisonment for a term not exceeding 6 months or to a fine not exceeding the statutory maximum, or to both.

(7) In relation to an offence committed before the commencement of section 154(1) of the Criminal Justice Act 2003 (c. 44), the reference in subsection (6)(b) to 12 months is to be read as a reference to 6 months.

Statistics on Arrests Under the Terrorism Act 2000

[These statistics are compiled from recent police records and are therefore subject to adjustment as cases go through the system]

Key Facts and Stats

Police records show that from 11 September 2001 until 30 September 2005, 895 people were arrested under the Terrorism Act 2000.

Charges

138 of these were charged under the Act. Of these, 62 were also charged with offences under other legislation.

156 were charged under other legislation. This includes charges for terrorist offences that are already covered in general criminal law such as murder, grievous bodily harm and use of firearms or explosives.

Convictions

23 Individuals have been convicted of offences under the Terrorism Act.

Other Information:

The following table gives the outcome for those not covered above—

Outcome	
Transferred to Immigration Authorities	63
On Bail to Return	20
Cautioned	11
Received a final warning	1
Dealt with under Mental Health Legislation	8
Dealt with under Extradition Legislation	1
Returned to Prison Service Custody	1
Transferred to PSNI Custody	1
Released Without Charge	496

The maximum period of detention pre-charge was extended to 14 days with effect from 20 January 2004. Between that date and 4 September 2005, 357 people have been arrested of whom 36 have been held for in excess of 7 days. The breakdown of these cases is as follows:

2004

Period	*Number held for this period*	*Charged*	*Released without charge*
7–8 days	3	1	2
8–9 days	0		
9–10 days	11	6	5
10–11 days	1	0	1
11–12 days	0		
12–13 days	0		
13–14 days	9	9	0

2005

Period	*Number held for this period*	*Charged*	*Released without charge*
7–8 days	1	1	0
8–9 days	0		
9–10 days	5	4	1
10–11 days	1	1	0
11–12 days	1	1	0
12–13 days	2	1	1
13–14 days	2	2	0

Letter from Andy Hayman QPM MA, Assistant Commissioner, Metropolitan Police to Rt Hon Charles Clarke MP, Secretary of State for the Home Department

COUNTER TERRORISM LEGISLATION

Thank you for giving me the opportunity to comment on the issue of extending the maximum period of detention.

You will see from the attached briefing note the operational requirements for extension to the maximum period of detention without age to three months, for which I am a strong advocate:

I do appreciate that there may be concern in some quarters regarding whether this is too long a period.

The checks and balances to be imposed by the judiciary will, I believe, ensure that investigations are conducted in an expeditious manner and detention on only continues where necessary.

6 October 2005

Annex

ANTI TERRORIST BRANCH (SO13)

Three Month Pre-Charge Detention

This paper will set out the issues from a police perspective which are driving the need for a pre-charge period of detention in terrorist cases which, subject to regular judicial oversight, might extend for a period of up to three months. The paper will be divided into three sections as follows:

- The overall case for change from current arrangements
- Actual case studies derived from recent investigations
- A theoretical case study drawing together many of the issues into one "storyline".

The Case for Change

Throughout the campaign waged by Irish terrorists, the concept of counter-terrorist investigation focussed on interdicting the terrorist at or near the point of attack. This enabled the best evidence to be obtained, in terms of catching the suspect in possession of terrorist material, or at a point where the evidence as to his intentions was unequivocal. In the times when the requirements of disclosure were not so stringent, this approach enabled the intelligence agencies, their techniques and investigations to be shielded from exposure in judicial proceedings.

The threat from international terrorism is so completely different that it has been necessary to adopt new ways of working. Irish terrorists deliberately sought to restrict casualties for political reasons. This is not the case with international terrorists. The advent of terrorist attacks designed to cause mass casualties, with no warning, sometimes involving the use of suicide, and with the threat of chemical, biological, radiological or nuclear weapons means that we can no longer wait until the point of attack before intervening. The threat to the public is simply too great to run that risk. During every counter-terrorist investigation a balance is struck between the maintenance of public safety, the gathering of evidence and the maintenance of community confidence in police actions. Public safety always comes first, and the result of this is that there are occasions when suspected terrorists are arrested at an earlier stage in their planning and preparation than would have been the case in the past. In one recent case it was not possible to be sure that the terrorists were not about to mount an attack, and so the decision was taken to arrest. At that point there were more than ample grounds to make the arrests but there was little or no admissible evidence. That had to be gathered dining the following 14 days, with key parts of the evidence emerging by chance from a mass of material at the very end of that period.

The heart of the issue is this. Public safety demands earlier intervention, and so the period of evidence gathering that used to take place pre-arrest is often now denied to the investigators. This means that in some extremely complex cases, evidence gathering effectively begins post-arrest, giving rise to the requirement for a longer period of pre-charge detention to enable that evidence gathering to take place, and for high quality charging decisions to be made.

Aside from the changed concept of operation described above, there are a number of specific features of modern terrorism that drive the need for an increased period of time to be available before the decision to charge or release can properly be made. These can be summarised as follows:

- The networks are invariable international, indeed global in their origins and span of operation. Enquiries have to be undertaken in many different jurisdictions, many of which are not able to operate to tight timescales.
- Establishing the identity of suspects often takes a considerable amount of time. The use of forged or stolen identity documents compounds this problem.
- There is often a need to employ interpreters to assist with the interview process. The global origins of the current terrorist threat has given rise to a requirement, in some recent cases, to secure the services of interpreters who can work in dialects from remote parts of the world. Such interpreters are difficult to find. This slows down the proceedings, restricting the time available for interview.
- Terrorists are now highly capable in their use of technology. In recent cases, large numbers (hundreds) of computers and hard drives were seized. Much of the data was encrypted. The examination and decryption of such vast amounts of data takes time, and needs to be analysed before being incorporated into an interview strategy. This is not primarily a resourcing issue, but one of necessarily sequential activity of data capture, analysis and disclosure prior to interview.
- The forensic requirements in modern terrorist cases are far more complex and time consuming than in the past, particularly where there is the possibility of chemical, biological, radiological or nuclear hazards. Following the discovery of a "bomb factory" in Yorkshire after the 7 July attacks in London, it was over 2 weeks before safe access could be gained for the examination to begin.

It took a further 6 weeks to complete the examination. The Al Qaeda methodology of mounting simultaneous attacks inevitably extends the time it takes for proper scene examination and analysis.

— The use of mobile telephony by terrorists as a means of secure communication is a relatively new phenomenon. Obtaining data from service providers and subsequent analysis of the data to show linkage between suspects and their location at key times all takes time.

— There is now a need to allow time for regular religious observance by detainees that was not a feature in the past. This too causes delay in the investigative process during pre-charge detention.

— A feature of major counter-terrorist investigations has been that one firm of solicitors will frequently represent many of the suspects. This leads to delay in the process because of the requirement for consultations with multiple clients.

All of the above factors have contributed to the requirement, in the most serious and complex cases, for there to be the possibility of extended detention for the purposes of investigation prior to point of decision about charging or release. It is not an issue that can be resolved simply by putting more resources into the investigation. Certainly this can help, in turns of ensuring that as much material as possible is available to investigators and to prosecutors. However, the process of staged disclosure to the defence, consultation with clients to take instructions, interview and assessment is essentially sequential, which the application of extra resources will not materially shorten.

Case Studies

Operation Springbourne 2002–05—the so-called "ricin" plot. This was a wide ranging investigation into a network of Algerian extremists who were engaged in terrorist activity. Some of this activity was clearly terrorist in nature, but at the same time there was a great deal of peripheral supporting activity involving the use of forged documents, cheque and credit card fraud and the like. The investigation ran over, several months and spanned not only the UK but some 20 other jurisdictions as well. Many of those jurisdictions (especially those with an inquisitorial system) work to extended timescales in such cases, and cannot respond to our enquiries within the timeframes demanded by our pre-charge time limits. The challenge was to analyse a huge amount of material, to identify the prime conspirators (and what it was they were plotting to do), and to clarify the roles played by each of the suspects. This proved impossible in the time available, and the result was that several suspects were originally charged with terrorist offences who were eventually proceeded against for crimes such as fraud or forgery. This is symptomatic of the current situation where investigations have to be shaped to fit the procedural requirements of the time-limited charging procedure, rather than simply following the evidence in an objective search for the truth. Had there been the opportunity to understand the complexities of the conspiracy before the decision was required to charge or release; the right charges against the right people could have been determined from the outset. The quality of the original charging decisions would also have been higher, and it is probable that the suspect who fled the country while on bail and who eventually proved to have been a prime conspirator, would have stood trial in this country. If that had happened, the outcome of the trial process might have been very different.

* * * * *

Theoretical Case Study

This case study has been constructed with the assistance of the Crown Prosecution Service and draws upon issues that have arisen in many real cases. The statistics used are entirely typical of the scale of events that have been seen in terrorist investigations in recent years.

The Security Service are held by an agent that a group of men in various parts of the country are planning terrorist attacks on the Houses of Parliament and the British Embassies in Pakistan, Istanbul and Morrocco. They have been exploring conventional and homemade explosives as well as CBRN possibilities. It is believed that this will be carried out in 3 months time. The agent is reliable and his information must be acted on for public safety reasons.

Surveillance is started on 2 of the men identified and over a period of 2 months they are seen with numerous other people. All of the people seen are unknown to intelligence services and cannot be identified. 5 key addresses were identified and probes put into each over the period.

The agent does not know where the dangerous materials are being stored or where they have been obtained from although he believes that some might have been brought in from abroad. The men are believed to be all illegal entrants to this country and are each living on at least 2 false identities.

Police arrest 15 people following the execution of Terrorism Act warrants in 4 different areas of the country on day l. Each arrest requires time-consuming custody procedures; sterile arrest, transportation to the secure suite at Paddington Green, the forensic examination of prisoners and taking of evidential samples. The samples are particularly important as it is thought that the men are not who they purport to be and/or not from the countries they claim to come from. Each has at least one false passport.

These procedures have to be completed before any detained person can consult with their legal representatives. On this occasion they took about 8 hours for each person. Some could be conducted simultaneously, but some (like booking in with the Custody Sergeant) had to be done individually.

The fingerprints are sent to 5 differerit countries to see if the men can be properly identified.

With 15 people under arrest, a disclosure strategy was required so as to achieve the best evidence from the interviews and test the accounts given. This was done whilst the defendants were being examined and other procedures carried out, and whilst the police were waiting for the solicitors to arrive. Each disclosure package given to the respective legal representative required lengthy consultations with the detainees.

2 firms of solicitors represented all the detained men. Their representatives were not available immediately; the police had to wait 4 hours for one and 5 for another. Each firm only provided 2 representatives. The initial consultations with each client lasted on average 4–5 hours. This time took up some of the time available to the officers to conduct their detailed interviews and enquiries, the clock did not stop running whilst the detainees were taking legal advice.

In addition all 15 men need to be allowed to observe prayer 5 times a day and all say that they need an interpreter.

In the first 14 days a total of 165 interviews were conducted. Most of the suspects are saying nothing, but as more evidence is put to them by the 14th day, 2 appear to be getting concerned and might talk.

Within the first 4 days of detention, 55 forensic searches were conducted around the country involving residential and non-residential properties and vehicles, again involving an enormous amount of work by officers to speedily assess the relevance of exhibits within the time limits imposed.

Each of these required a separate warrant and information received led the police to believe that there could be CBRN material on the premises as well as possibly conventional and homemade explosives. This meant that specialist teams had to be deployed and some of the premises were unsafe to enter until various forms of risk assessments had been done and procedures carried out. There are only a limited number of specialists available to do this work and it was only possible to do one premise at a time. 10 of the premises require this procedure and were in three of the different parts of the country, some about 5 hours drive away from the other.

During this period of time a vast amount of exhibits were seized during the searches. This had to be examined, prioritised, sifted for relevance, an assessment made of which individual should be questioned about which exhibit and a decision made on which should be sent to experts in chemical weapons, which on biological, which to FEL and which to the AWE.

There were about 4,000 exhibits labelled in the first week with many more outstanding for examination. At least half of the documentary exhibits (about 600) are in Arabic. Most of the available interpreters are being used for the interviews and after trawling the country police manage to locate another 3 who can begin on the documents. There are also several boxes of videos tapes the contents of which the police do not know until they have been viewed. There are no labels on them. A cursory viewing of a handful shows that they are extremist in nature and mostly with Arabic voiceovers or individuals speaking in Arabic on. There is little point in the officers viewing these further as they cannot understand them.

A decision had to be taken about where each of the exhibits should go first. It is decided to fingerprint 300 documents first. Half of these are handwritten and will also need to be examined for handwriting analysis. All the identification documents found (at least 100) need to go for expert analysis to see if they are false. 15 of these are French, 10 each are Spanish, Italian and Turkish, but the majority appear to be of Eastern European extraction, maybe Bosnian, and all have to be submitted to their country of origin to check whether they are genuine.

There have been over 268 computers seized together with 274 hard drives; 591 floppy discs, 920 CD DVDS and 47 zip discs. The High Tech Crime Unit say that every computer hard drive seized during that period of time takes a minimum of 12 hours to image for the assessment teams at Paddington to then provide to the interviewing officers. The preliminary assessments carried out, due to the time constraints imposed, cannot be considered as thorough and have to be revisited as other factors emerge and different matters become relevant. About a quarter of the computers and hard drives have encrypted material on them and the suspects are refusing to give the keys saying that the computers, even those found in identifiable homes, are nothing to do with them. Assistance is required from a number of agencies here and abroad with regard to this and an assessment has to be made about which computers to prioritise.

It is not clear which of these computers was used the most as the man believed to be the leader and 2 others have been itinerant, using at least 20 of the known addresses over the last 6 month period.

The main suspect was of no fixed abode. He had items of personal property at a number of addresses. Some in false; fingerprint and DNA work done in the first 4 weeks enabled police to establish this.

During the first two weeks 60 seized mobile telephones, mostly pay as you go, were forensically examined. The sheer volume of material to be gathered from these examinations meant that much of it was not available until the 6th week of investigation. This evidence is crucial as it is needed to corroborate associations and prove movements. DNA analysis is required to discover which telephones have been used by which suspects, again because they have used or visited many addresses.

Some 25,000 man hours were spent examining CCTV footage. Some 3,674 man hours are used to assess the eavesdropping material gathered by probes operating 24 hours each day over an 8 week period. There are 850 surveillance and observation point logs that must be assessed for their evidential value. This evidence will be crucial to establish who was present at which meetings and what was said.

In the first 4 weeks the police identified 6,000 actions in the investigation 10,000 documents, 2,300 statements and 7,000 exhibits have been seized or created by week 8 of the. investigation. Crucial evidence is still awaited from DNA, other scientific work and from various foreign enquiries coming in gradually over the period of detention.

Letters of request for legal assistance in gathering evidence abroad have been written by prosecutors and sent through emergency channels to 17 countries.

As the enquiries progress more addresses are being identified, more searches done and more exhibits, computers and false documentation with photographs of the suspects and others are being discovered. In amongst the documents are some bearing the picture of a well known international terrorist being held in custody in another country where it is not easy for the police to obtain access or information. This might be a crucial link with some of the suspects being held and an approach needs to be made through diplomatic channels.

Throughout the detention period it is becoming abundantly clear that there were plans to use a dirty bomb in the Houses of Parliament, conventional explosives for an attack on 2 of the Embassies and a possible chemical attack on the third. Each suspect has several identities. We are waiting to hear if the requested countries can establish the true identity of the men. Fingerprints of each man are being found on some documents of a suspicious nature. It is unclear however which role each man took and whether they can be linked to any or all of the planned attacks.

The case is largely circumstantial as no chemicals or explosives or anything else of that nature has been found despite the fact that the targeting document (found on the 50th computer to be examined in the 7th week) shows that the attack on Parliament was due to take place 2 days after the arrests.

2 prosecutors are working full time with the Anti Terrorist Branch making applications to extend pre-charge detention, drafting initial and supplementary letters of request and reviewing the evidence as the investigation progresses. Experts from 10 different disciplines are working on exhibits and documents seized as well as scouring addresses and cars for explosive and other traces and three-quarters of the police capacity has been involved in various actions including examination of exhibits, computers, interviewing, etc.

5 October 2005

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2. Copy of letter from Rt Hon Charles Clarke MP, Secretary of State for the Home Department to Rt Hon David Davis MP and Mark Oaten MP, re draft clauses to the Immigration, Asylum and Nationality Bill as counter-terrorism measures

I am writing to provide you with further details of the counter terrorism measures we plan to include in the Immigration, Asylum and Nationality Bill and to seek your views on them. I wrote to you on 15 September indicating that I planned to legislate on a number of points. I am now attaching draft clauses on the measures covered in that letter, and on an additional measure providing for a streamlined appeal process aqainst deportation orders in national security cases. I would welcome your comments on them by 18 October.

In my letter of 15 September I set out my intention to take forward the following measures: to clarify the position where an immigration officer or constable may obtain a warrant issued in anticipation of arresting someone who is liable to detention upon service of intention to deport; in granting British citizenship, to extend the statutory requirement that the Secretary of State must be satisfied that all applicants must be of good character; to deny right of abode where it is conducive to the public good; and to give enhanced powers to Immigration Officers operating embarkation controls. I am now attaching draft clauses relating to these measures.

I also said I wished to clarify our ability to deny asylum to terrorists. The draft clause I am now enclosing interprets the exclusion clause in the Refugee Convention relating to “acts contrary to the principles and purposes of the United Nations” to include acts of committing, preparing or instigating terrorism, as well as encouraging or inducing others to commit such acts. It also provides that in an asylum appeal where the case has been refused in reliance on one of the exclusion clauses in the Refugee Convention, the AIT or SIAC must consider the exclusion issue first and if they agree that the case has been made on that point they must dismiss the asylum appeal.

I also referred deprivation of citizenship in my previous letter. The draft clause provides for the Secretary of State to deprive a person of a British citizenship status if he is satisfied that deprivation is conducive to the public good. This will replace the current test for deprivation of citizenship, which is that the person concerned must have done something seriously prejudicial to the vital interests of the United Kingdom. The new power will apply only to dual nationals and cannot be used to make a person stateless. It is designed to enable the Secretary of State to take away British citizenship from someone who has committed one of

the unacceptable behaviours set out in the list which we published on 24 August. This will operate alongside my existing power to exclude or deport foreign nationals whose presence is not conducive to the public good because their behaviour is unacceptable.

In addition, I am proposing a streamlined appeal process against deportation orders in national security cases. It will make the substantive appeal against the deportation order non-suspensive; in particular, the person concerned will be able to challenge the national security case against them only from abroad. They will however be able to appeal on human rights grounds before removal. This will speed up the deportation process but will still allow judicial scrutiny before deportation of arguments about the treatment the person concerned would be exposed to if removed.

We intend to move these clauses in Committee, and so I would welcome comments by 18 October.

I am copying this letter and attachments to the Chairs of the Home Affairs Committee, John Denham, the Intelligence and Security Committee, Paul Murphy, the Joint Committee on Human Rights, Andrew Dismore, the Constitutional Affairs Committee, Alan Beith and the Independent Reviewer of the Terrorism Act 2000, Lord Carlile. I am also placing a copy in the Library of the House of Commons and on the Home Office website.

12 October 2005

IMMIGRATION, ASYLUM AND NATIONALITY BILL

Arrest and detention pending deportation

Mr Tony McNulty

To move the following Clause:

> "At the end of paragraph 2(4) of Schedule 3 to the Immigration Act 1971 (c 77) (deportation: power to detain) insert "; and for that purpose the reference in paragraph 17(1) to a person liable to detention includes a reference to a person who would be liable to detention upon receipt of a notice which is ready to be given to him.".

Information: embarking passengers

Mr Tony McNulty

1

To move the following Clause:

"(1) Schedule 2 to the Immigration Act 1971 (c 77) (control on entry, &c) shall be amended as follows.

(2) In paragraph 3(1) for the words from 'and if he is not' to the end substitute—'and, if he is not a British citizen, for the purpose of establishing—

(a) his identity;

(b) whether he entered the United Kingdom lawfully;

(c) whether he has complied with any conditions of leave to enter or remain in the United Kingdom;

(d) whether his return to the United Kingdom is prohibited or restricted by virtue of an enactment.

(1A) An immigration officer who examines a person under sub-paragraph (1) may require him, by notice in writing, to submit to further examination for a purpose specified in that sub-paragraph.'

(3) After paragraph 16(1A) insert—

'(1B) A person who has been required to submit to further examination under paragraph 3(1A) may be detained under the authority of an immigration officer, for a period not exceeding 12 hours, pending the completion of the examination.'

(4) In paragraph 21(1) after '16' insert '(1), (1A) or (2)'.".

Refugee Convention: construction

Mr Tony McNulty

1

To move the following Clause:

"(1) In the construction and application of Article 1(F)(c) of the Refugee Convention the reference to acts contrary to the purposes and principles of the United Nations shall be taken as including, in particular—

(a) acts of committing, preparing or instigating terrorism (whether or not the acts amount to an actual or inchoate offence), and

(b) acts of encouraging or inducing others to commit, prepare or instigate terrorism (whether or not the acts amount to an actual or inchoate offence).

(2) Where the Secretary of State rejects an asylum claim on the grounds that Article 1(F) of the Refugee Convention applies, the Asylum and Immigration Tribunal, or the Special Immigration Appeals Commission—

(a) must begin substantive deliberation on any appeal in which the rejection is to be considered by considering whether or not Article I (F) applies, and

(b) if it concludes that Article 1(F) applies, must dismiss the appeal in so far as it relies on the Refugee Convention.

(3) In this section—

'asylum claim' means a claim by a person that to remove him from or require him to leave the United Kingdom would be contrary to the United Kingdom's obligations under the Refugee Convention,

'the Refugee Convention' means the Convention relating to the Status of Refugees done at Geneva on 28th July 1951, and

'terrorism' has the meaning given by section 1 of the Terrorism Act 2000 (c 11).".

Mr Tony McNulty

1

Schedule 3, page 29, line 40, second column, at beginning insert "In section 40A(3), the word 'and' before paragraph (d).".

Deprivation of citizenship

Mr Tony McNulty

2

To move the following Clause:

"(1) For section 40(2) of the British Nationality Act 1981 (c 61) (deprivation of citizenship: prejudicing UK interests) substitute—

'(2) The Secretary of State may by order deprive a person of a citizenship status if the Secretary of State is satisfied that deprivation is conducive to the public good."

(2) At the end of section 40A(3) of that Act (deprivation: appeal) add—

', and

(e) section 108 (forged document: proceedings in private).';

(and omit the word 'and' before section 40A(3)(d)).".

Deprivation of right of abode

Mr Tony McNulty

3

To move the following Clause:

"(1) After section 2 of the Immigration Act 1971 (right of abode) insert—

'2A Deprivation of right of abode

(1) The Secretary of State may by order remove from a specified person a right of abode in the United Kingdom which he has by virtue of section 2(1)(b).

(2) The Secretary of State may make an order under subsection (1) in respect of a person only if the Secretary of State thinks that it would be conducive to the public good for the person to be excluded or removed from the United Kingdom.

(3) An order under subsection (1) may be revoked by order of the Secretary of State.

(4) While an order under subsection (1) has effect in relation to a person—

(a) section 2(2) shall not apply to him, and

(b) any certificate of entitlement granted to him shall have no effect.'

(2) In section 82(2) of the Nationality, Immigration and Asylum Act 2002 (c 41) (right of appeal: definition of immigration decision) after paragraph (ia) insert—

'(ib) a decision to make an order under section 2A of that Act (deprivation of right of abode),'.".

Acquisition of British nationality, &c

Mr Tony McNulty

4

To move the following Clause:

"(1) The Secretary of State shall not grant an application for registration as a citizen of any description or as a British subject in accordance with a provision listed in subsection (2) unless satisfied that the person is of good character.

(2) Those provisions are—

(a) sections 1(3) and (4), 3(1), (2) and (5), 4(2) and (5), 4A, 4B, 4C, 5, 10(1) and (2), 13(1) and (3) of the British Nationality Act 1981 (c 61) (registration as British citizen),

(b) sections 15(3) and (4), 17(1), (2) and (5), 22(1) and (2), 24, 27(1) and 32 of that Act (registration as British overseas territories citizen, &c),

(c) section 1 of the Hong Kong (War Wives and Widows) Act 1996 (c 41) (registration as British citizen),

(d) section 1 of the British Nationality (Hong Kong) Act 1997 (c 20) (registration as British citizen), and

(e) article 6(3) of the Hong Kong (British Nationality) Order 1986 (SI 1986/948) (registration as British Overseas citizen).

(3) Where the Secretary of State makes arrangements under section 43 of the British Nationality Act 1981 for a function to be exercised by some other person, subsection (1) above shall have effect in relation to that function as if the reference to the Secretary of State were a reference to that other person.".

Appeals: deportation

Mr Tony McNulty

1

To move the following Clause:

"(1) After section 97 of the Nationality, Immigration and Asylum Act 2002 (c 41) (appeals: national security) insert—

'**97A National security: deportation**

(1) This section applies where the Secretary of State certifies that the decision to make a deportation order in respect of a person was taken on the grounds that his removal from the United Kingdom would be in the interests of national security.

(2) Where this section applies—

(a) section 79 shall not apply,

(b) the Secretary of State shall be taken to have certified the decision to make the deportation order under section 97, and

(c) for the purposes of section 2(5) of the Special Immigration Appeals Commission Act 1997 (c 68) (appeals from within United Kingdom) it shall be assumed that section 92 of this Act—

(i) would not apply to an appeal against the decision to make the deportation order by virtue of section 92(2) to (3D),

(ii) would not apply to an appeal against that decision by virtue of section 92(4)(a) in respect of an asylum claim, and

(iii) would be capable of applying to an appeal against that decision by virtue of section 92(4)(a) in respect of a human rights claim unless the Secretary of State certifies that the removal of the person from the United Kingdom would not breach the United Kingdom's obligations under the Human Rights Convention.

(3) A person in respect of whom a certificate is issued under subsection (2)(c)(iii) may appeal to the Special Immigration Appeals Commission against the issue of the certificate; and for that purpose the Special Immigration Appeals Commission Act 1997 shall apply as to an appeal against an immigration decision to which section 92 of this Act applies.

(4) The Secretary of State may repeal this section by order.'".

(2) In section 112 of that Act (regulations, &c) after subsection (5A) insert—

"(5B) An order under section 97A(4)—

(a) must be made by statutory instrument,

(b) shall be subject to annulment in pursuance of a resolution of either House of Parliament, and

(c) may include transitional provision.'".

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3. Copy of letter from Rt Hon Charles Clarke MP, Secretary of State for the Home Department to Rt Hon David Davis MP and Mark Oaten MP, re the definition of terrorism applicable to the new offences in the Terrorism Bill

I have today written to John Denham regarding the definition of terrorism that will apply to the new offences in the Terrorism Bill since he had raised the issue with me. I thought it worth writing to you in a similar vein.

As you will know, the new offences in the Terrorism Bill attract the existing definition of terrorism which is contained in the Terrorism Act 2000. For ease of reference I attach a copy of that definition at annex A. We are making one slight change to that definition in the Bill to ensure that threat to international organisations, such as the United Nations, as well as to national governments is covered.

I believe that any definition of terrorism should be one that is well established and that we should not seek to fashion a new one for this Bill. We have therefore looked at the existing definitions of terrorism in international conventions.

The latest EU definition is the one used in the Council Framework Decision of 13 June 2002. The definition which that convention contains is in annex B. The only earlier EU definition—the Council Common Position on Measures to Combat Terrorism of December 2001—is substantially the same but goes slightly wider to encompass those who direct or participate in terrorist groups.

I don't believe that this definition is substantially different from the UK's existing definition and it is hard to see that it has any advantages over it. Certainly, if one were looking to narrow the definition, there is no conduct included in the UK's current definition of terrorism which would be excluded if we moved to the EU definition.

There is no single UN definition of terrorism and that is why negotiations are taking place at the moment on a UN Comprehensive Convention against Terrorism.

UN security Council Resolution 1566, agreed on 8 October 2004, contains a statement of the actions which it believes should be criminalised (annex C) though not a formal definition. This statement is fairly widely drawn but excludes serious damage to property so, had it been in place, would have meant that the PIRA attacks on the City of London in the 1990s would not have constituted terrorism.

The latest draft of the UN Comprehensive Convention also contains a definition of terrorism (annex D) though I must stress this has not yet been agreed and negotiations are still ongoing. Again it is hard to see what the advantage of this definition, should it be agreed, would be over what we have already.

I understand the desire to try to find a definition of terrorism that concentrates on attacks on civilians but so far as we can establish no such definition currently exists. Not only that, but I would be concerned by any definition of terrorism which would have excluded PIRA attacks on British troops or the property attacks mentioned above from its remit, to say nothing of attacks on British forces in Iraq or Afghanistan. If nothing else we need to ensure that we are able to proscribe organisations that engage in such activities.

My view, therefore, is that we need to stick with the definition that we have. An important safeguard is that any prosecutions for offences in Part 1 of the Terrorism Bill require the consent of the Director of Public Prosecutions/Attorney General which will ensure that prosecutions which are not in the public interest do not take place.

I am copying this letter to Lord Carlile, the Rt Hon Paul Murphy, Rt Hon Alan Beith, and Andrew Dismore. I am also placing a copy in the Library.

25 October 2005

Annex A

TERRORISM ACT 2000

1.—(1) In this Act "terrorism" means the use or threat of action where—

(a) the action falls within subsection (2),

(b) the use or threat is designed to influence the government or to intimidate the public or a section of the public, and

(c) the use or threat is made for the purpose of advancing a political, religious or ideological cause.

(2) Action falls within this subsection if it—

(a) involves serious violence against a person,

(b) involves serious damage to property,

(c) endangers a person's life, other than that of the person committing the action,

(d) creates a serious risk to the health or safety of the public or a section of the public, or

(e) is designed seriously to interfere with or seriously to disrupt an electronic system.

(3) The use or threat of action falling within subsection (2) which involves the use of firearms or explosives is terrorism whether or not subsection(1)(b) is satisfied.

(4) In this section—

(a) "action" includes action outside the United Kingdom,

(b) a reference to any person or to property is a reference to any person, or to property, wherever situated,

(c) a reference to the public includes a reference to the public of a country outside the United Kingdom, and

(d) "The government" means the government of the United Kingdom, a Part of the United Kingdom or of a country other than the United Kingdom.[1]

(5) In this Act a reference to action taken for the purposes of terrorism includes a reference to action taken for the benefit of a proscribed organisation.

Annex B

EU COUNCIL FRAMEWORK DECISION

1. Each Member State shall take the necessary measures to ensure that the intentional acts referred to below in points (a) to (i), as defined as offences under national law, which, given their nature or context, may seriously damage a country or an international organisation where committed with the aim of:

— seriously intimidating a population, or

— unduly compelling a Government or international organisation to perform or abstain from performing any acts, or

— seriously destabilising or destroying the fundamental political, constitutional, economic or social structures of a country or an international organisation,

shall be deemed the terrorist offences:

(a) attacks upon a person's life which may cause death;

(b) attacks upon the physical integrity of a person;

(c) kidnapping or hostage taking;

(d) causing extensive destruction to a Government or public facility, a transport system, an infrastructure facility, including an information system, a fixed platform located on the continental shelf, a public place or private property likely to endanger human life or result in major economic loss;

(e) seizure of aircraft, ships or other means of public or goods transport;

(f) manufacture, possession acquisition, transport, supply or use of weapons, explosives or of nuclear, biological or chemical weapons as well as research into, and development of, biological and chemical weapons;

[1] This is being amended in the Terrorism Bill to include international organisations, such as the UN.

(g) release of dangerous substances, or causing fires, floods or explosions the effect of which is to endanger human life;

(h) interfering with or disrupting the supply of water, power or any other fundamental natural resource the effect of which is to endanger human life;

(i) threatening to commit any of the acts listed in (a) to (h).

Annex C

UN SECURITY COUNCIL RESOLUTION 1566

Recalls that criminal acts, including against civilians, committed with the intent to cause death or serious bodily injury, or taking of hostages, with the purpose to provoke a state of terror in the general public or in a group of persons or particular persons, intimidate a population or compel a government or an international organisation to do or to abstain from doing any act, which constitute offences within the scope of and as defined in the international conventions and protocols relating to terrorism, are under no circumstances justifiable by considerations of a political, philosophical, ideological, racial, ethnic, religious or other similar nature, and *calls upon* all States to prevent such acts and, if not prevented, to ensure that such acts are punished by penalties consistent with their grave nature;

Annex D

UN COMPREHENSIVE CONVENTION (DRAFT)

1. Any person commits an offence within the meaning of this Convention if that person, by any means, unlawfully and intentionally, causes:

(a) Death or serious or bodily injury to any person; or

(b) Serious damage to public or private property, including a place or public use, a State or government facility, a public transportation system, an infrastructure facility or the environment; or

(c) Damage to property, places, facilities or systems referred to in paragraph 1(b) of this article, resulting in or likely to result in major economic loss,

when the purpose of the conduct, by its nature or context, is to intimidate a population, or to compel a Government or international organisation to do or abstain from doing any act.

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4. Submission from the Home Office to the JCHR's inquiry into counter-terrorism policy and human rights

1. The Committee asked for written evidence from any interested individuals or organisations on the human rights implications of developments in counter-terrorism policy in the UK since 7 July 2005 and potential future developments in that policy, and in particular—

— the various measures announced by the Prime Minister at his press conference on 5 August;

— the Government's intention to deport non-UK nationals suspected of terrorism on the basis of diplomatic assurances and the potential conflict with Article 3 ECHR;

— the new list of "unacceptable behaviours" indicating some of the circumstances in which the Home Secretary may exercise his powers of exclusion or deportation;

— the possibility of allowing sensitive evidence, including intercept evidence, to be adduced in criminal trials;

— the possibility of establishing a judicial role in the investigation of terrorist crimes; and

— the overall social and political context in which human rights standards are understood and applied by the courts, the Government and others, and in which the requirements of security are reconciled with those standards.

2. The Government's overall strategy to respond to the events of July were reflected in the Prime Minister's statement on 5 August and are based around six core elements (which were set out in written evidence submitted by the Home Office to the Home Affairs Select Committee in September):

(I) Strengthening the law to enable more prosecutions to be taken against those engaged in terrorism.

(II) Improving the judicial processes in cases involving terrorism.

(III) Preventing extremists from fomenting terrorism in the UK by excluding or deporting them.

(IV) Working with all faith leaders and with the Muslim community to create a society where all faiths can live together in mutual respect and support.

(V) Working with our international partners to deliver the counter-terrorism agenda.

(VI) Protecting our borders.

3. This paper picks up the points the Committee has asked for evidence on by setting out in more detail our approach to (I–IV) above. In delivering each we recognise the need to retain and strengthen our human rights and values. But the right to be protected from the death and destruction caused by indiscriminate terrorism is at least as important as the right of the terrorist to be protected from torture and ill-treatment. The Government is clear that we must not only ensure the protection of individual rights but also the protection of democratic values such as safety and security under the law. While basic human rights are enduring, terrorist attacks, including on Istanbul, Madrid and now London, demonstrate that Europe faces a new and heightened threat to which we must respond.

(I) Strengthening the Law to Enable More Prosecutions to Be Taken against Those Engaged in Terrorism

4. We have always said that the best way to deal with the terrorist threat is to prosecute those engaged in terrorism wherever possible. We need a legal framework which addresses the difficult balance in protecting the rights of the individual and the rights of society.

5. Prior to 7 July, we were working up proposals for a new Counter-Terrorism Bill, to be brought forward in the spring, which would have at its heart three new offences—acts preparatory to terrorism, indirect incitement to terrorism, and the giving or receiving of terrorist training. Since 7 July we have been thinking further about what we need to do to isolate extremist organisations and those individuals who promote extremism. The legislation we are taking forward will deliver this by making it clear that glorification of terrorism is unnaccetable. It will attack the focuses of extremist organisation whether they be in training camps, bookshops or in places of worship. We believe this package of legislative measures is compliant with ECHR and a more detailed summary of our justification for this is attached at annex A.

(II) Improving the Judicial Processes in Cases Involving Terrorism

6. The Committee asked about the possibility of establishing a judicial role in the investigation of terrorist crimes and the possibility of allowing sensitive evidence, including intercept evidence, to be adduced in criminal trials. Securing effective judicial processes in cases of terrorism has in the past been made more difficult by the necessity of using material that, if revealed in open court, would damage national security interests or put lives at risk. Special procedures, such as those used in the Special Immigration Appeals Commission, have been developed and specialist judges identified. Since 7 July we have announced in addition that we will:

- expand the court capacity necessary to deal with control orders and other terrorism-related cases, increasing the number of specialist judges able to deal with such cases;
- examine whether it might be possible to institute procedures which would enable more sensitive evidence to be adduced in criminal trials; and
- consult on setting a maximum time limit for all future extradition cases involving terrorism.

7. We are working closely with the judiciary on the development of these measures and there will be extensive judicial oversight of provisions in the Bill such as extending the time suspects can be detained pre-charge.

(III) Preventing Extremists from Fomenting Terrorism in the UK by Excluding or Deporting Them

8. The events of the summer confirmed that the circumstances of our national security have changed. In many cases the only means of reducing the threat to our citizens posed by individuals from abroad who foment or instigate terrorism is by removing them to their home countries. In part that will be achieved by broadening the scope for using the home Secretary's powers to exclude or deport people, but the Government has made clear it is also about a new approach to deportation orders under existing grounds. The Home Secretary made it clear on 20 July that he would be looking to make more extensive use of his existing powers. Since the beginning of 23 August individuals whose presence has been assessed as a threat to national security and public order have been served with a notice of intention to deport.

Memoranda of Understanding

9. To enable us to give effect to all decisions to deport individuals, it is critical that we have an effective route to deportation. In some cases, this will include having in place clear agreements with foreign Governments about the proper treatment of those to be deported in order that the decision to deport are consistent with the UK's obligations under the ECHR.

10. Since December last year the Government has been actively seeking Memoranda of Understanding (MoUs) with key foreign Governments to enable deportations to proceed. Since 7 July that work has gathered further pace and momentum. An approapriate MoU was signed with Jordan in August. Negotiations with Algeria and several other Governments have progressed significantly and we expect to be in a position to make further announcements very shortly.

11. A number of people have expressed doubts about the courts willingness to accept these MoUs or the assurances contained therein. It is the belief of the Government that in fact the courts will give proper weight to assurances given by Governments in good faith.

Article 3 of the European Convention on Human Rights

12. We have no desire to opt out of, or seek to amend Article 3. Protection from torture and ill treatment is a fundamental human right, and we would not return and individual to a country in the knowledge that they would be tortured. Nor would we extradite or remove a person where the death penalty would be carried out on their return. However the Home Secretary made clear in a speech to the European Parliament on 7 September, that we do believe it is necessary to look very carefully at the way in which the case law around the application of the ECHR has developed, particularly in relation to national security deportations.

13. We believe states should legitimately strike a fair balance between the nature of the threat to their national security if a particular person were to remain, against the extent of the potential risk of ill-treatment to that person in the state to which they are being returned. That was the view of seven of the 19 judges of the European Court of Human Rights (ECtHR) who considered the Chahal case in 1996.

14. Using normal practice, and with the support of the Netherlands, the UK has been granted leave from the ECtHR to intervene as a third party in a case which the Netherlands currently has before the Court, which turns on Article 3. Intervention has been granted. We will ask the Court to revisit the issues surrounding national security expulsions in the light of current circumstances.

Unacceptable behaviours

15. The Home Secretary has always had the power to remove people from this country on the basis of conduct which would not be conducive to the public good. In the past it has been exercised in certain circumstances—for example where there is a threat to national security, public order or risk to the UK's relationship with a third country. It has not traditionally been used to deal with those who foment terrorism, or seek to provoke others to commit terrorist acts. The decision not to use the power in the past reflected the need to tread very careful in matters relating to freedom of speech. However in the light of the attacks in July the Government concluded that the risk to free speech was no longer greater than the security that could be offered by broadening the definition of the basis on which people could be excluded.

16. The Home Secretary therefore announced on 20 July that he would consult on how to apply his powers more widely. On 24 August following a short consultation the Government published a list of unacceptable behaviours (attached at Annex B).

17. The Government recognises the sensitivities around the use of theses powers and intend to use them in a measured and targeted way. They are not intended to stifle free speech or legitimate debate about religious or other issues. As for all deportation cases we will not extradite a person where the death penalty will be carried out on return . Nor we will remove a person under immigration powers, where this will lead to treatment contrary to Article 3 of ECHR. Nevertheless we believe it essential that if there are people who do not have an absolute entitlement to be in this country and who are abusing the UK in order to promote or assist terrorism in any way it is reasonable that the Home Secretary should be able to use his powers to prevent them from being in the country. That is what the list of unacceptable behaviours seeks to do.

Immigration, Asylum and Nationality Bill

18. The Government is also proposing to add new clauses to the Immigration, Asylum and Nationality Bill. These will cover excluding those associated with terrorism from asylum, deprivation of British citizenship where this is conducive to the public good, and non-suspensive appeals against deportation orders in national security cases.

19. Under these provisions, any person committing, preparing or instigating terrorism, as well as encouraging or inducing others to commit such acts will be denied asylum. On deprivation of nationality, the Government is proposing a new power to enable the Home Secretary to deprive a person of British citizenship status if he is satisfied that deprivation is conducive to the public good. This will apply to the unacceptable behaviours set out in the list published on the 24 August.

20. The provision on non-suspensive appeals against deportation orders in national security cases will provide that the substantive appeal against a deportation order will be from abroad, but the person concerned will be able to make an in country challenge to SIAC on human rights grounds. Where necessary, we will obtain assurances and satisfactory monitoring arrangements as described above in order to show that the individual will not be at risk when returned.

21. The Home Secretary is seeking the views of the opposition spokesmen on these additional measures and wrote to Mr Davies and Mr Oaten on 12 October setting out what these will cover. Once finalised, the measures will be published as amendments to the Bill. We aim to table these amendments at the Bill's Committee stage in the Commons from the 18–27 October. We will provide further evidence on these measures once the amendments have been published.

(IV) Working with All Faith Leaders and with the Muslim Community to Create a Society where All Faiths Can Live Together in Mutual Respect and Support

22. The Government's efforts to tackle extremism are firmly rooted in the need to strengthen our democracy and secure the rights of all communities by promoting a society based upon the true respect of one individual for another, one culture for another, one faith for another one race for another. The measures we the Government is taking to address extremists is not in any way whatever aimed at the decent law-abiding Muslim community of Great Britain. The Government recognises know that this fringe of extremism does not truly represent Islam and that much of the insistence on strong action to weed out extremism is coming most vigorously from Muslim community.

23. That is why we are working in partnership with the Muslim community to root out extremism and tackle the causes of radicalisation amongst a minority of our young people. A key part of that is to continue to deliver our longstanding commitment to tackle deprivation and feelings of alienation, which create fertile ground for extremists to prey on.

24. Following the London bombings in July, the Home Secretary set up seven working groups to look at issues around integration and tackling extremism. The convenors of the working groups reported back to the Government on 22 September and set out a number of proposals, including a—

- National Advisory Council of Imams and Mosques: This would: advise mosques on how to prevent them being used by extremists; on how to reduce their reliance on using ministers of religion from abroad; set standards; and increase the cohesion and leadership skills of imams.
- National forum against extremism and Islamaphobia: This independent initiative would: provide a regular forum for a diverse range of members of the British Muslim community to discuss issues relating to tackling Islamophobia and extremism that impacts on the Muslim community; involve both respected scholars and community activists in addition to others; and have access to Government in order to share outcomes and understandings.
- Country-wide "roadshow" of influential, populist religious scholars: This would: expound the concept of Islam in the West and condemning extremism.

25. The Government welcomed the approach and is continuing the dialogue with Muslim communities and supporting the work that they are undertaking.

18 October 2005

Annex A

Summary of the ECHR Compliance of Terrorism Bill Measures

The Bill published on 12 October engages the European Convention on Human Rights with regard to Articles 5 (right to liberty), 6 (right to a fair trial), 7 (necessity for criminal offence to be clear in law), 8 (respect for private and family life), 10 (freedom of expression), 11 (freedom of assembly and association), and Article 1 of the First Protocol (peaceful enjoyment of possessions). One or more of these is engaged by one or more of Clauses 1 (Encouragement of Terrorism), 2 (Dissemination of terrorist publications), 6 (Training for Terrorism), 7 (Powers of forfeiture in respect of offences under section 6), 12 (Trespassing etc on nuclear sites), 21 (Grounds of proscription), 22 (Name changes by proscribed corganisations), 23 (Extension of period of detention by judicial authority), 24 (Grounds for extending detention), 25 and 26 (All premises warrants for searches in terrorist investigations), 27 and Schedule 2 (Search, Seizure and forfeiture of terrorist publications), 28 (Power to search vehicles under Schedule 7 to the Terrorism Act 2000 (c 11), 29 (Extension to internal waters of authorisations to stop and search) and 34 (Applications for extended detention of seized cash). In general, these Clauses are judged to be compatible with the ECHR because they will be clearly defined in primary legislation, in pursuit of a legitimate aim and proportionate.

Clauses 1, 2, 6 and 21 engage Article 10. Clause 1 makes it an offence to encourage terrorist activity, whether directly or indirectly, including glorifying statements. Clause 2 makes it an offence to disseminate terrorist publications. Clause 6 makes it an offence to give or receive terrorist training, including through sharing information. Clause 21 widens the grounds for proscription to include groups that glorify terrorism. The measures in the Bill are judged compatible with the Article 10 because they would be prescribed by law, pursue a legitimate aim, meet a pressing social need and are proportionate to the aim being pursued.

Clause 1 engages Article 7 in addition to Article 10 because it could be argued that the description of the offence is insufficiently precise. However, it is judged to be compatible with Article 7 because the European Court recognises the need for criminal law to be flexible and acknowledges that general descriptions can be interpreted and applied by the courts. Clause 12 (trespassing etc on nuclear sites) engages Article 7 but is deemed compatible because civil nuclear sites will be clearly marked and trespassers will be aware they are committing an offence.

Clauses 21 and 22 (relating to proscription) engage Article 11. Article 11(2) permits limits to be places on freedom of assembly and association if such limits are prescribed by law and are necessary in a democratic society in pursuit of specified aims. The measures pursue the legitimate aim of preventing crime and are deemed to be proportionate. For these reasons, both Clauses are deemed to be compatible with Article 11.

Clauses 25, 26, 27, 28 and 29 engage Article 8, as does Schedule 2. They all involve powers to search or seize property in relation to terrorist investigations. They are judged to be compatible with Article 8 because they are created in primary legislation, pursue a legitimate aim (the prevention of crime) and are proportionate to the aim pursued. Clause 27 and Schedule 2 also engage Article 1.1 of the First Protocol, as does Article 7, because they involve seizing property, but all are regarded as compatible because they will be precisely defined in primary legislation, in pursuit of a legitimate aim and proportionate.

Clauses 23 and 24 (detention times) engage Article 5. In the absence of European Court jurisprudence on the length of time for which a person may be detained pending charge, they are judged compatible because individuals detained under these powers will be suspected of having committed an offence, which is a legitimate basis for detention under Article 5(1)(c), and detention will be in accordance with a procedure proscribed by law.

Clause 34 (closed hearings for cash seizures) engages Article 6 because it involves closed hearings. It is compatible with Article 6 because such hearings will not finally determine the civil rights and obligations of the person affected.

Annex B

List of Unacceptable Behaviours

The list of unacceptable behaviours covers any non-UK citizen whether in the UK or abroad who uses any means or medium including—

- writing, producing, publishing or distributing material;
- public speaking including preaching;
- running a website; and
- using a position of responsibility such as teacher, community or youth leader;

to express views which:

- foment, justify or glorify terrorist violence in furtherance of particular beliefs;
- seek to provoke others to terrorist acts;
- foment other serious criminal activity or seek to provoke others to serious criminal acts; or
- foster hatred which might lead to inter-community violence in the UK.

This list is indicative, and not exhaustive.

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5. Submission from the Mental Health Act Commission to the JCHR's inquiry into counter-terrorism policy and human rights

The Mental Health Act Commission functions as a safeguard for patients detained under the Mental Health Act 1983, through its monitoring of the use of powers and discharge of duties of that Act, and in its visiting of such patients in their hospital environments.

In June 2004 we submitted evidence to the Joint Committee on Human Rights[2], in which we expressed our concerns over the treatment of detainees under the Anti-Terrorism Crime and Security Act (ATCSA) who had been transferred out of prison using Mental Health Act powers. We were particularly concerned over the apparent policy that such detainees should receive treatment in conditions of high security at Broadmoor Hospital, irrespective of whether such a placement was clinically appropriate. We highlighted the case of one detainee, Mahmoud Abu Rideh, who was admitted to Broadmoor Hospital at the Home Office's insistence despite considerable opinion (including that of the doctor who was to treat him in Broadmoor Hospital) that it was an inappropriate placement.

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[2] Joint Committee on Human Rights *Review of Counter-terrorism Powers* 18th Report of Session 2003–04, HL Paper 158, HC 713, Appendix 2.

In response to the Committee's call for further evidence, we would like to draw attention to the following points.

1. The Use of Broadmoor Hospital to Receive Detainees Transferred from the Prison System: the Government's Response to the European Committee on the Prevention of Torture and Inhuman or Degrading Treatment or Punishment

In our 2004 evidence, we set out our concerns at Government's apparent assumption that anti-terrorism detainees requiring psychiatric inpatient treatment should be sent to Broadmoor Hospital, irrespective of clinical need. It was revealed in June 2005 that the European Committee on the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) had visited one of the detainees, Mr Abu Rideh, in March 2004 and had informed the UK Government that it believed his placement at Broadmoor Hospital to be clinically inappropriate. The CPT noted apparent serious deterioration of Mr Abu Rideh's condition and feared permanent damage. Following its visit the CPT requested his transfer as a matter of urgency to a different type of treatment facility.[3] We knew nothing of this at the time that we were visiting Mr Abu Rideh at the hospital.

The Government has categorically rejected the assertion of the CPT that the situation of ATCSA detainees, including that relating to the Mr Abu Rideh, "could be considered as amounting to inhuman or degrading treatment" implying a breach of Article 3. The UK Government maintains that throughout their detention individuals received "humane and decent treatment and the appropriate levels of medical and psychological care".[4] We do not doubt that, with some exceptions in the case of staff members who were disciplined following substantiated complaints made by Mr Abu Rideh, the clinical and nursing staff at the hospital did indeed do their best to provide humane and decent care. We do question whether the placement should be described as having been an "appropriate level" of care.

In the published response to the CPT, the Government stated that the Home Secretary's decision that a High Security Hospital placement was appropriate for Mr Abu Rideh "was accepted by the MHRT . . . an independent judicial body, which has powers under the Mental Health Act 1983 to discharge restricted patients".[5] In our view this response is factually incorrect, for the following reasons:

(i) The response does not make clear that the risk assessment upon which the Home Secretary justified a High Security Hospital placement was focussed upon his suspicion that Mr Abu Rideh was a "terrorist" as broadly defined at s 21 of ATCSA[6], rather than upon his mental state and consequent need for particular levels of psychiatric care. In this sense, however, we concede Mr Abu Rideh was not treated differently to any other transferred prisoner, in that the security requirements for a patient's care need not be limited to clinical requirements alone, but must take account of wider security needs including those presented by the nature of the criminal charge or conviction against that patient.

(ii) However, Mr Abu Rideh *was* treated differently in comparison with other transferred prisoners (ie those detained under powers other than ATCSA) in that the allegations against him that would justify the level of security required for non-clinical aspects of his detention were neither revealed to the patient, his legal representative, nor the MHRT. Instead, the justification for high security care in Mr Abu Rideh's case was presented to the MHRT in the form of previous executive and judicial (SIAC) determinations over his certification as a suspected "terrorist" within the broad meaning established under s 21 of ATSCA. More importantly, given the role that the Government has claimed for the MHRT in its response to the CPT report, the Secretary of State made representation to the MHRT arguing that the MHRT had "neither jurisdiction, competence or expertise in relation to matters of national security and no remit to question the Secretary of State's belief over national security".[7] The question of the appropriate level of security was therefore argued by the Secretary of State to be "a matter for the Secretary of State and not the Tribunal" so that it was "plainly inappropriate for the Tribunal in any way to comment upon the level of security which is appropriate for Mr Abu Rideh's detention".[8] The solicitor acting for Mr Abu Rideh at his MHRT hearing, Ms Lucy Scott-Moncrieff, has written that she was told on the day of the MHRT hearing by counsel for the Home Office that if she attempted to argue that Mr Abu Rideh could safely be moved to a specialist nursing home which had been identified as potentially suitable for his care by his clinical team at Broadmoor Hospital, a Home Office witness would be

[3] Council of Europe (2005a) *Report to the Government of the United Kingdom on the visit to the United Kingdom carried out by the European Committee on the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) from 14 to 19 March 2004*. CPT/Inf (2005)10. Strasbourg, 9 June 2005. Para 7.

[4] Council of Europe (2005b) *Response of the United Kingdom Government to the report of the European Committee on the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) on its visit to the United Kingdom from 14 to 19 March 2004*. CPT/Inf (2005)11. Strasbourg, 9 June 2005. Para 15.

[5] Council of Europe (2005b) para 26.

[6] s 21 of ATCSA 2001. It would seem from the SIAC judgment of October 2003 that Mr Abu Rideh was detained under suspicion of "having links" with terrorist groups, and that the main focus of such suspicion was his fund raising activities related to his charitable work.

[7] Outline submission of the Secretary of State for the Home Department for Mr Abu Rideh's MHRT hearing of the 9 January 2004.

[8] *ibid*.

called to give evidence that other allegations, including allegations of violent or potentially violent behaviour, "might" have been made in closed session of previous SIAC hearings.[9]

(iii) We understand that Mr Abu Rideh's lawyers had been given no indication that violent behaviour or intended violence was alleged in connection with SIAC hearings (including information given at the time of the SIAC hearings indicating in broad terms the essence of evidence presented in closed session). The insinuation of undisclosed allegations regarding violence or intended violence outside of the MHRT hearing by Home Office counsel raises the disturbing question of which of the Home Office's accounts of its allegations against Mr Abu Rideh was accurate (ie it would appear that either the summary of the SIAC closed-session evidence was incomplete, or the insinuation made outside the MHRT hearing was groundless). This apparent inconsistency would seem to seriously undermine the public credibility of the "closed" evidence justifying detention or detention at particular levels of security.

(iv) The Government response to the CPT report is disingenuous in implying that the MHRT's "powers under the Mental Health Act 1983 to discharge restricted patients" were exercisable in relation to Mr Abu Rideh. The Home Secretary, having told the Tribunal that it was not appropriate for it to consider making any recommendations regarding transfer to lesser security hospitals, further argued to the Tribunal hearing that the question of whether Mr Abu Rideh should be discharged from hospital had to be approached "by reference to the practical alternative": ie whether he should be returned to prison. The Tribunal duly accepted that "the reality is that the Tribunal's decision could only result in the patient being returned to prison . . . or remaining in Broadmoor or some other secure hospital".[10]

We note that the CPT was "not convinced" by the reply of the UK Government that Broadmoor Hospital was the most appropriate setting for Mr Abu Rideh in view of his clinical needs and the risks he presents to the public.[11] The Committee concluded that the approach of the UK Government "which appears to give little weight to therapeutic considerations—and thus to the patient's well-being—is not, in the opinion of the Committee, acceptable".[12]

2. The Inadequacies of Aftercare Provision for Those Detainees Released from Broadmoor Hospital in March 2005

The CPT recommended that UK authorities should take the necessary steps to ensure that Mr Abu Rideh, "whose mental state has seriously deteriorated whilst in detention, benefits without further delay from the whole range of treatment required by his condition".[13] All those detainees who were transferred to hospital under the Mental Health Act should have been entitled, under s 117 of that Act, to appropriate aftercare upon discharge from hospital.

We are greatly disappointed at reports of poor provision and lack of support offered the men, exacerbated by the conditions of control orders attached to their release.[14] In Mr Abu Rideh's case, the lack of support was exacerbated by imprisonment for breaches of the restrictions placed upon him by his control order, despite attempts at suicide whilst in prison and the availability of an alternative hospital placement. The Home Office could have changed the terms of Mr Abu Rideh's control order to facilitate hospital rather than prison disposal following the court hearing in May 2005 but did not do so.[15]

Although the timing and arrangements for the detainees' release under control orders was in the hands of the Home Office, we are not aware that it requested or facilitated the involvement of other agencies in assessing or providing support and aftercare to the detainees upon their release from hospital. In this way the fulfillment of a legal duty under the Mental Health Act 1983 appears to have been frustrated.

3. The Reincarceration of Detainees Previously Transferred From the Prison System on Health Grounds

We are extremely concerned that men whose previous imprisonment led to serious mental disorder and transfer under the terms of the Mental Health Act have now been reincarcerated under the terms of the 1971 Immigration Act on an indefinite basis, whilst awaiting deportation to countries once diplomatic assurances have been received that they will be neither killed nor tortured there.

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9 *London Review of Books* "Suspicion of Terrorism; Lucy Scott-Moncrieff on Mahmoud Abu Rideh, detained without trial". 5 August 2004, p 22–24. The nursing home had been identified by the RMO in charge of Mr Abu Rideh's treatment to provide him with appropriate treatment and care, and also meet the security requirements of the Home Office through preventing unsupervised access to telephones and providing escorts whenever he went out. Within three months of opposing such arrangements, the Home Office released Mr Abu Rideh on bail arrangements with little psychiatric support and an electronic tag as a security measure.

10 Application of Mahmoud Abu Rideh, hearing 9 January 2004, Broadmoor Hospital. Reasons for the Tribunal's decision, para 12.

11 Council of Europe (2005a), para 11.

12 *ibid.*

13 *ibid.*

14 *See,* for example, Michael White and Vikram Dodd "Teething troubles hit new terror act", *The Guardian* 14 March 2005; Audrey Gillan and Falsal al Yafai "Control orders exposed", *The Guardian*, 24 March 2005.

15 Audrey Gillan "Terror suspect returned to jail" *The Guardian* 5 May 2005.

The solicitor for many of the 10 men detained on these grounds since August 2005 has informed the press that five are suffering from serious mental disorder, and at least half of the men are reported to have been those subject to control orders.[16] We understand that at least one such detainee has attempted suicide in prison whilst awaiting deportation. One detainee, who had been treated in Broadmoor Hospital prior to his release under the terms of a control order in March 2005, has now been re-admitted to the hospital from the prison where he had been held since August under Immigration Act powers and where his mental condition once again deteriorated to the point where he was in need of urgent transfer. We understand that the placement in Broadmoor Hospital is the result of a direction from the Home Office, and that the clinical team in Broadmoor Hospital remained of the opinion that a hospital of lesser security would provide a more appropriate clinical environment.

The concerns that we raised with the Committee in June 2004 have therefore once again become relevant to the treatment of persons under detention in the United Kingdom's penal and psychiatric system. Apparent Government policy to transfer detainees requiring inpatient psychiatric treatment to Broadmoor Hospital (or another High Security Hospital) irrespective of clinical requirements or the potential for such placements to be further deleterious to their mental health, may be in contention with the prohibition of inhuman treatment or punishment under Article 3 of the European Convention on Human Rights (ECHR). The proportionality of executive directions to High Security Hospital facilities in the face of clinical opposition is all the more questionable where the State has, until recently, allowed those that it had labeled "terrorists" under the general definition of ATCSA to live in the community subject to control orders.

We are of the view that the State is obligated with a heightened duty of care towards detainees who are released from detention under the Mental Health Act by virtue of s 117 of that Act. Where the use of mental health powers was in response to mental disorder caused or exacerbated by previous incarceration, the State may be failing in this legal duty (and in danger of failing in its duties to protect life under ECHR Article 2 insofar as its actions may increase risks of suicide amongst its detainees) in returning men to prison (or even to High Security Hospital care) where their mental health will be further imperiled. We are mindful that the detainees continue to face indefinite detention without charge and with neither the detainees nor their legal teams being informed of the evidence against them that was the basis of previous detention and now renders their presence in this country undesirable. We note the view of the British Psychological Society[17] that this is the "toxic element" causing serious mental health problems: our limited oversight of the processes of appeal undertaken by Mr Abu Rideh over the last year, which we have discussed under heading 1 above, suggests that it also may seriously compromise the detainees' ability to exercise their rights of liberty and security of person under ECHR Article 5 and right to a fair trial under Article 6. Insofar as dispersal of detainees to unknown destinations pending deportation arrangements may have severed connections between them and their families in this country and abroad, rights to family life under ECHR Article 8 may also be engaged.

12 October 2005

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6. Submission from Amnesty International on the Draft Terrorism Bill

> "*Human rights law makes ample provision for strong counter-terrorist action, even in the most exceptional circumstances. But compromising human rights cannot serve the struggle against terrorism. On the contrary, it facilitates achievement of the terrorist's objective—by ceding to him the moral high ground, and provoking tension, hatred and mistrust of government among precisely those parts of the population where he is most likely to find recruits.*
>
> *Upholding human rights is not merely compatible with a successful counter-terrorism strategy. It is an essential element in it.*"
>
> Kofi Annan, UN Secretary-General[18]

INTRODUCTION

States have an obligation to take measures to prevent and protect against attacks on civilians; to investigate such crimes; to bring to justice those responsible in fair proceedings; and to ensure prompt and adequate reparation to victims. An integral part of fair proceedings is to ensure that anyone arrested or detained on reasonable suspicion of having committed an offence, regardless of the real or imputed motivation for its commission, or whether the crime is classified as a "terrorist offence" or not, is charged promptly with a recognizably criminal offence—or released.

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16 James Sturke and Agencies "Ten detained over 'threat to national security'" *The Guardian*, 11 August 2005.

17 Joint Committee on Human Rights *Review of Counter-terrorism Powers* Eighteenth Report of Session 2003-04, HL Paper 158, HC 713, Appendix 5, p 73.

18 Keynote address to the Closing Plenary of the International Summit on Democracy, Terrorism and Security, 10 March 2005 (aka the Madrid meeting) delivered by UN Secretary-General Kofi Annan.

Amnesty International unconditionally and unreservedly condemns attacks on civilians, including those in London in July 2005, and calls for those responsible to be brought to justice. The organization recognizes that in the aftermath of the July attacks it is incumbent upon the UK authorities to review legislative and other measures with a view to ensuring non-repetition of such attacks. It is equally incumbent on the UK authorities to ensure that all measures taken to bring people to justice, as well as all measures to protect people from a repetition of such crimes, are consistent with international human rights law and standards. Security and human rights are not alternatives; they go hand in hand. Respect for human rights is the route to security, not an obstacle to it.

The absolute necessity for states to ensure that all anti-terrorism measures be implemented in accordance with international human rights, refugee and humanitarian law has repeatedly been made clear by the UN Security Council, the European Court of Human Rights, and the Committee of Ministers of the Council of Europe, among others.[19]

For example, the UN Security Council has, in a declaration on the issue of combating terrorism attached to Security Council Resolution 1456 (2003), stated that: "States must ensure that any measure taken to combat terrorism comply with all their obligations under international law, and should adopt such measures in accordance with international law, in particular international human rights, refugee, and humanitarian law".[20] As recently as 14 September 2005, the UN Security Council adopted Resolution 1624 (2005) which "[s]tresses that States must ensure that any measures taken to implement paragraphs 1, 2 and 3 of this resolution [ie measures to prohibit and prevent incitement to commit terrorist acts] comply with all of their obligations under international law, in particular international human rights law, refugee law, and humanitarian law".[21]

The Council of Europe's Guidelines on Human Rights and the Fight Against Terrorism also categorically confirm that no measures taken against terrorism must be permitted to undermine the rule of law.[22]

Most recently, the UN Summit Declaration of September 2005 has again emphasized that measures taken to combat terrorism must comply with international law.

> We recognize that international cooperation to fight terrorism must be conducted in conformity with international law, including the Charter and relevant international Conventions and Protocols. States must ensure that any measures taken to combat terrorism comply with their obligations under international law, in particular human rights law, refugee law and international humanitarian law.[23]

Having carefully considered a number of the provisions in the draft Terrorism Bill 2005 in light of international human rights standards, particularly those concerned with the rights to liberty, to the presumption of innocence and to freedom of expression and association, Amnesty International considers that some of the Bill's provisions are inconsistent with the UK's obligations under domestic and international human rights law and that, if enacted, may lead to serious human rights violations.

For the purpose of this briefing, Amnesty International's comments are confined to the offences set out in Part 1 of the Bill, including the new offences of "Encouragement of Terrorism" and "Dissemination of Terrorism Publications", Clause 17 concerning new grounds for proscription, as well as the proposal to extend the maximum limit of detention in police custody without charge or trial from 14 days to three months.[24]

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[19] See respectively, UNSC Resolution 1456 (2003), Annex para 6; *Aksoy* v *Turkey* (1996) 23 EHRR 553, para 62; and the Council of Europe Guidelines on Human Rights and the Fight against Terrorism, 11 July 2002.

[20] UN Doc S/RES/1456 (2003), Annex, para 6.

[21] UN Doc S/RES/1624 (2005), para 4.

[22] Adopted by the Council of Europe Committee of Ministers on 11 July 2002, H(2002)004. See in particular Guidelines II and III:
"II. Prohibition of arbitrariness
All measures taken by States to fight terrorism must respect human rights and the principle of the rule of law, while excluding any form of arbitrariness, as well as any discriminatory or racist treatment, and must be subject to appropriate supervision.
III. Lawfulness of anti-terrorist measures
1. All measures taken by States to combat terrorism must be lawful.
2. When a measure restricts human rights, restrictions must be defined as precisely as possible and be necessary and proportionate to the aim pursued."

[23] UN World Summit Declaration 2005, para 85, adopted by the Heads of State and Government gathered at the UN Headquarters from 14–16 September 2005, UN Doc A/60/L.1, A/RES/60/1.

[24] Amnesty International's views presented in this briefing relate to the initial version of the draft Terrorism Bill 2005 of 13 September 2005, as well as to the amendment to Clause 1 of the Bill attached to the Home Secretary's letter dated 6 October 2005 to the Rt Hon David Davis MP and Mark Oaten MP. Relevant excerpts from the 13 September 2005 draft Terrorism Bill 2005 and the amendment of 6 October 2005 are reproduced respectively in appendix I and II attached to this document.

BACKGROUND

Emergency legislation in the UK has been of concern to Amnesty International since the 1970s. Throughout the last three decades the organization has been greatly concerned that various emergency provisions and other measures taken in the context of the conflict in Northern Ireland have resulted in human rights violations. The organization has documented throughout the years how provisions of such legislation have violated human rights law and facilitated human rights violations, including arbitrary detention, torture or other ill-treatment and unfair trials. More recently the organization has likewise been greatly concerned about the serious human rights deficit of policies and legislative measures that have been pursued in the UK in the aftermath of the 11 September 2001 attacks in the USA, including, in particular, the detention without charge or trial of non-deportable foreign nationals purportedly suspected of involvement in international terrorism and the admissibility of "evidence" obtained through torture or other ill-treatment in legal proceedings.

Against a background of the enactment in the last five years of three pieces of anti-terrorist legislation—the Terrorism Act 2000, the Anti-terrorism, Crime and Security Act 2001 and the Prevention of Terrorism Act 2005—each of which contains provisions which are clearly incompatible with human rights law and standards and have given rise to serious human rights violations, in September 2005 the UK government published a new draft Bill, the Terrorism Bill 2005.

Amnesty International is concerned that the new Bill, including as amended on 6 October 2005, contains further sweeping and vague provisions which, if enacted, could violate the rights to freedom of expression and association of people prosecuted under them, and would have a chilling effect for society at large on its exercise of the rights to freedom of expression and association. In addition, the Bill, if enacted in its current form, would extend the maximum time limit allowed under anti-terrorism legislation for detention in police custody of people purportedly suspected of involvement in terrorism without charge or trial from 14 days to up to three months. In turn, such prolonged detention would violate the right to liberty and freedom from arbitrary detention, given that one of its key constitutive elements, the right to be promptly informed of any charges against oneself, would be disregarded; detention in police custody without charge or trial for up to three months would also violate the right to a fair trial, by undermining the presumption of innocence and the right to silence.

Amnesty International is therefore greatly concerned that the implementation of this Bill would inevitably lead to serious human rights violations and to a further alienation of certain sectors of the UK population, particularly those identified as Muslims. Instead of strengthening security, it will further alienate already vulnerable sections of society.

1. DEFINITION OF "TERRORISM"[25]

The Terrorism Act 2000 brought into permanent statutory form a definition of "terrorism" and numerous provisions identical or similar to offences grounded in that definition which had been enshrined in so-called "temporary" emergency legislation in the UK over the previous three decades at least.[26]

[25] While there is no specific offence of "terrorism" in UK law, the definition of "terrorism" on the basis of which numerous offences have been codified is that provided in section 1 of the Terrorism Act 2000 which defines "terrorism" as follows:
"1.—(1) In this Act "terrorism" means the use or threat of action where—
(a) the action falls within subsection (2),
(b) the use or threat is designed to influence the government or to intimidate the public or a section of the public, and
(c) the use or threat is made for the purpose of advancing a political, religious or ideological cause.
(2) Action falls within this subsection if it—
(a) involves serious violence against a person,
(b) involves serious damage to property,
(c) endangers a person's life, other than that of the person committing the action,
(d) creates a serious risk to the health or safety of the public or a section of the public, or
(e) is designed seriously to interfere with or seriously to disrupt an electronic system.
(3) The use or threat of action falling within subsection (2) which involves the use of firearms or explosives is terrorism whether or not subsection (1)(b) is satisfied.
(4) In this section—
(a) "action" includes action outside the United Kingdom,
(b) a reference to any person or to property is a reference to any person, or to property, wherever situated,
(c) a reference to the public includes a reference to the public of a country other than the United Kingdom, and
(d) "the government" means the government of the United Kingdom, of a Part of the United Kingdom or of a country other than the United Kingdom.
(5) In this Act a reference to action taken for the purposes of terrorism includes a reference to action taken for the benefit of a proscribed organisation."

[26] These provisions were enshrined in the Emergency Provisions Act, which was first introduced in 1973 and the Prevention of Terrorism Act, which was first introduced in 1974.

Among many others, Amnesty International expressed its concern about the vagueness and breadth of definition of "terrorism" during the Parliamentary passage of the Terrorism Bill 2000[27] and has been reiterating its anxiety about it since the enactment of the Terrorism Act 2000.[28]

In particular, the organization continues to be concerned that the definition of "terrorism" includes not only the use but also the threat of action involving serious violence against a person or serious damage to property or designed to seriously interfere with or disrupt an electronic system. The purpose qualifying such an action or threat as terrorist, ie advancing a "political, religious or ideological cause", is also very wide and open to subjective interpretation. The definition is vaguely worded and could be used to prosecute supporters of social and political movements, for example, anti-nuclear campaigns. The lack of a clear definition gives cause for concern because the decision to bring a prosecution for such offences leaves scope for political bias in making a decision to bring a prosecution.

Amnesty International reiterates its concern that the definition of "terrorism", and thereby any offence which is based on it, may violate the principle of legality and legal certainty by being too wide and vague and, therefore, by failing to meet the precision and clarity requirements for criminal law. In this regard, Amnesty International continues to be concerned that conduct which may be criminalized pursuant to the definition of "terrorism" provided in the Terrorism Act 2000 may not amount to a "recognizably criminal offence" under international human rights law and standards. In turn, this may lead to a risk that people may be prosecuted for the legitimate, non-violent exercise of rights enshrined in international law, or that criminal conduct that does not constitute "terrorism" may be criminalized as such.

In light of its long-standing anxiety about the vagueness and breadth of the definition of "terrorism" enshrined in the Terrorism Act 2000, as well as its concern about the lack of compliance of the various anti-terrorism provisions with internationally recognized fair trial standards, Amnesty International continues to be concerned that any arrest, detention, charge and trial in connection with an offence bolted onto this definition may lead to injustice and risk further undermining human rights protection and the rule of law in the UK.

In addition, Amnesty International considers that various existing and proposed anti-terrorism provisions may violate the right to be free from discrimination[29] and the right to equality before the law and equal protection of the law without any discrimination, enshrined in, *inter alia*, Articles 2(1)[30]

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[27] See, for example, *United Kingdom: Briefing on the Terrorism Bill*, AI Index: EUR 45/43/00, published in April 2000.

[28] See, for example, *United Kingdom—Summary of concerns raised with the Human Rights Committee*, AI Index: EUR 45/024/2001, published in November 2001, pp. 17–19. In particular, Amnesty International expressed concern that the enactment of the Terrorism Act 2000 created a permanent distinct system of arrest, detention and prosecution for "terrorist offences" which would violate the internationally recognized right of all people to equality before—and equal protection of—the law without discrimination. This different treatment is not based on the seriousness of the criminal act itself but rather on the alleged motivation behind the act, defined in the Act as "political, religious or ideological". Some of the provisions that Amnesty International continues to be concerned about, in particular, are the following:

- wide-ranging powers of arrest without warrant;
- denial of a detainee's access to a lawyer upon arrest: the right to legal assistance can be delayed, up to 48 hours, if the police believe the granting of this right may impede the investigation;
- the Act allows for a consultation between lawyer and detainee to be held "in the sight and hearing" of a police officer, if a senior police officer has reasonable grounds to believe that such consultation would lead to interference with the investigation;
- the provisions regarding judicial supervision of detention are significantly weaker than under ordinary legislation. Under ordinary legislation, the maximum period of detention without charge is four days, where the initial 36 hours of detention in police custody can be extended for a further 36 hours and a further 24 hours with judicial authorization.
- the shifting of the burden of proof from the prosecution to the accused who must prove their innocence in various provisions of the Act;
- concern that the right to fair trial may be infringed if people are charged on the basis of intelligence information provided by other governments or on the word of informants, if this information is then kept secret from the defendant for alleged security reasons (through the use of public interest immunity certificates);
- provisions allowing police officers to obtain court orders to force journalists to hand over to the police information in their possession which the police claim may be useful to their investigation.

[29] In its General Comment 18 on non-discrimination adopted on 10 November 1989, the Human Rights Committee has clarified the meaning of the term *discrimination* by stating that "the Committee believes that the term 'discrimination' as used in the Covenant should be understood to imply any *distinction, exclusion, restriction or preference* which is based on any ground such as race, colour, sex, language, *religion, political or other opinion, national or social origin,* property, birth or *other status,* and *which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise by all persons, on an equal footing of all rights and freedoms".* General Comment 18, paragraph 7. [emphasis added].

[30] Article 2(1) of the ICCPR states: "[e]ach State Party to the present Covenant undertakes *to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant, without distinction of any kind,* such as race, colour, sex, language, *religion, political or other opinion,* national or social origin, property, birth *or other status."* [emphasis added].

and 26[31] of the International Covenant on Civil and Political Rights (ICCPR), and in Articles 1[32] and 14[33] of the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR). Amnesty International recognizes that not all differential treatment amounts to prohibited discrimination. This has been noted by the UN Human Rights Committee, which has stated that: "not every differentiation of treatment will constitute discrimination". The Human Rights Committee has clarified that differential treatment will not be prohibited "if the criteria for such differentiation are reasonable and objective and if the aim is to achieve a purpose which is legitimate under the Covenant".

However, the implementation of the above-mentioned anti-terrorist provisions has effectively given rise to a different regime for the administration of criminal justice with respect to people purportedly suspected of involvement in terrorism which is neither reasonable nor objective nor aimed at achieving a legitimate purpose. This regime provides fewer safeguards for the suspect than s/he would be entitled to under the ordinary criminal law. Amnesty International considers that, in the context of measures that can lead to the deprivation of liberty of the individual, any departure from ordinary procedures and safeguards recognizing and according rights to the suspect in a manner which is practical and effective is unjustified and, therefore, unlawful.

Furthermore, the organization notes that the majority of states, individually, and the international community as a whole, have recognized that even people suspected of the most heinous crimes, such as war crimes, genocide and other crimes against humanity have a fundamental and inalienable right to enjoy respect for the highest procedural rights precisely because of the nature and gravity of the crimes of which they stand accused and the severity of the penalties they may face if convicted.[34]

2. Offences Featured in Part 1

Provisions set out in Part 1 of the draft Terrorism Bill 2005 of 13 September 2005 (as amended on 6 October 2005)—entitled "Encouragement of Terrorism" and "Dissemination of Terrorist Publications" respectively—purport to criminalize the making and dissemination of statements which may "indirectly incite terrorism".

Amnesty International is concerned that the above-mentioned provisions are inconsistent with UK government's obligations under domestic and international human rights law.

The organization considers that the formulations of these offences are vague because they rely on the definition of "terrorism" in the Terrorism Act 2000, and on concepts such as "direct or indirect encouragement or other inducement", "glorification", and the notion of "terrorist publication", all of which are widely open to ambiguity and lack clarity. Amnesty International further considers that the scope of these provisions is sweeping and disproportionate. These provisions also fail to squarely address the element of intent. Amnesty International has concluded that these provisions violate the right to freedom of expression and fail to meet the necessary requirements with respect to clarity and precision of the criminal law.

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[31] Article 26 of the ICCPR states: "[a]ll persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status."

[32] Article 1 of the ECHR states: "[t]he High Contracting Parties shall secure to everyone within their jurisdiction the rights and freedoms defined in Section I of this Convention."

[33] Article 14 of the ECHR states: "[t]he enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status."

[34] For example, Article 55 of the Rome Statute of the International Criminal Court provides the following:

"Article 55 Rights of persons during an investigation

1. In respect of an investigation under this Statute, a person:

(a) Shall not be compelled to incriminate himself or herself or to confess guilt;

(b) Shall not be subjected to any form of coercion, duress or threat, to torture or to any other form of cruel, inhuman or degrading treatment or punishment; and

(c) Shall, if questioned in a language other than a language the person fully understands and speaks, have, free of any cost, the assistance of a competent interpreter and such translations as are necessary to meet the requirements of fairness;

(d) Shall not be subjected to arbitrary arrest or detention; and shall not be deprived of his or her liberty except on such grounds and in accordance with such procedures as are established in the Statute.

2. Where there are grounds to believe that a person has committed a crime within the jurisdiction of the Court and that person is about to be questioned either by the Prosecutor, or by national authorities pursuant to a request made under Part 9 of this Statute, that person shall also have the following rights of which he or she shall be informed prior to being questioned:

(a) To be informed, prior to being questioned, that there are grounds to believe that he or she has committed a crime within the jurisdiction of the Court;

(b) To remain silent, without such silence being a consideration in the determination of guilt or innocence;

(c) To have legal assistance of the person's choosing, or, if the person does not have legal assistance, to have legal assistance assigned to him or her, in any case where the interests of justice so require, and without payment by the person in any such case if the person does not have sufficient means to pay for it;

(d) To be questioned in the presence of counsel unless the person has voluntarily waived his or her right to counsel."

The organization also considers that, if enacted in their current form and implemented, these provisions would facilitate violations of the right to freedom of expression as they would allow the prosecution and criminalization of persons for the lawful exercise of their right to hold and impart opinions and ideas. As a result, they would also have a wider chilling effect for society at large on its enjoyment of the right to freedom of expression, as enshrined in international human rights law.

2.1 The Right to Freedom of Expression and its Permissible Restrictions Under Human Rights Law

As a party to the ECHR[35] and the ICCPR,[36] both of which enshrine the right to freedom of expression, the UK is required to guarantee to all persons within its territory or subject to its jurisdiction, the freedom and right to hold opinions and to seek, receive, and impart information and ideas of all kinds, orally, in print or art form or through other media, without the interference of public authorities.

As the European Court of Human Rights has made clear, the right of freedom of expression

> constitutes one of the essential foundations of a democratic society and one of the basic conditions for its progress and for each individual's self-fulfilment. Subject to paragraph 2 of Article 10 [relating to lawful restrictions of the right], it is applicable not only to "information" or "ideas" that are favourably received or regarded as inoffensive or as a matter of indifference, but also to those that offend, shock or disturb. Such are the demands of that pluralism, tolerance and broadmindedness without which there is no "democratic society".[37]

The European Court of Human Rights has also clarified that even "fighting words" may be protected by the right to freedom of expression.[38]

Domestic and international human rights law recognize that freedom of expression is not an absolute right. There are permissible grounds for the imposition of lawful restrictions on the exercise of the right to freedom of expression. The permissible restrictions, however, are to be strictly construed. Accordingly, any restriction on the exercise of the right to freedom of expression must be prescribed by law, and be necessary in a "democratic society" for one of the expressly set out grounds identified by human rights law which include, *inter alia*, "in the interests of national security . . . or public safety [and] for the prevention of disorder or crime . . .".

To qualify as a measure "prescribed by law" any legal provision restricting the exercise of the right to freedom of expression must be "accessible and unambiguous", narrowly drawn and precise enough so that individuals subject to the law can foresee whether a particular action is unlawful.[39] The European Court of Human Rights clarified in *Sunday Times v United Kingdom*, that:

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[35] The ECHR, in Article 10 states:
"Article 10—Freedom of expression
1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises.
2. The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary."

[36] The ICCPR in Article 19 states:
"1. Everyone shall have the right to hold opinions without interference.
The ICCPR in Article 19 states:
1. Everyone shall have the right to hold opinions without interference.
2. Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice.
3. The exercise of the rights provided for in paragraph 2 of this article carries with it special duties and responsibilities. It may therefore be subject to certain restrictions, but these shall only be such as are provided by law and are necessary:
(a) For respect of the rights or reputations of others;
(b) For the protection of national security or of public order *(ordre public)*, or of public health or morals."

[37] *Sürek and Özdemir* v. Turkey, Judgment of the European Court of Human Rights of 8 July 1999, at para 57.

[38] See, eg *Arslan v. Turkey*, Judgment of the European Court of Human Rights of 8 July 1999, in particular the Concurring Opinion of Judges Palm, Tulkens, Fischbach, Casadevall and Greve.

[39] See Principle 1.1. of the Johannesburg Principles on National Security, Freedom of Expression and Access to Information, Freedom of Expression and Access to Information, UN Doc E/CN.4/1996/39 (1996), which were developed by a group of international experts on human rights and media law from around the world, are considered authoritative on the subject and have been cited and commended by a range of UN and regional bodies and mechanisms. A copy of the Johannesburg Principles is attached to this document in Appendix III.
Principle 1.1. states:
"Prescribed by Law
(a) Any restriction on expression or information must be prescribed by law. The law must be accessible, unambiguous, drawn narrowly and with precision so as to enable individuals to foresee whether a particular action is unlawful.
(b) The law should provide for adequate safeguards against abuse, including prompt, full and effective judicial scrutiny of the validity of the restriction by an independent court or tribunal."

> In the Court's opinion, the following are two of the requirements that flow from the expression "prescribed by law". Firstly, the law must be adequately accessible: the citizen must be able to have an indication that is adequate in the circumstances of the legal rules applicable to a given case. Secondly, a norm cannot be regarded as a "law" unless it is formulated with sufficient precision to enable the citizen to regulate his conduct: he must be able—if need be with appropriate advice—to foresee, to a degree that is reasonable in the circumstances, the consequences which a given action may entail. Those consequences need not be foreseeable with absolute certainty: experience shows this to be unattainable. Again, whilst certainty is highly desirable, it may bring in its train excessive rigidity and the law must be able to keep pace with changing circumstances. Accordingly, many laws are inevitably couched in terms which, to a greater or lesser extent, are vague and whose interpretation and application are questions of practice.[40]

In addition, any curtailment of the right to freedom of expression must both pursue one of the prescribed legitimate aims, and must be "deemed necessary in a democratic society" to protect that legitimate aim, such as the prevention of imminent violence. In order to meet the criterion of being "necessary in a democratic society", the restriction must be both rationally connected to the aim for which it is being introduced and must be proportionate. Proportionality in this context refers to the fact that the restriction must do no more than is absolutely necessary to meet the legitimate aim and that the nature and severity of any penalty imposed for a breach of the said restriction must also be proportionate.[41]

To meet the "necessity"/proportionality test, including in relation to criminalization of the making or dissemination of statements which encourage terrorism, it must be shown that the person accused intended to incite an act of violence (terrorist offence) and that the statement caused a clear and present danger that such an offence would be committed.[42]

As detailed below, Amnesty International considers that the provisions in Part 1 of the Terrorism Bill, as currently drafted, do not fulfil the requirements of the above-described permissible restrictions on the right to freedom of expression under international law.

2.1.1 Encouragement of Terrorism

The 6 October 2005 draft of Clause 1 of Part 1 of the Terrorism Bill 2005, entitled "Encouragement of Terrorism", if enacted in its current form, would criminalize a person who publishes a statement (or causes another to publish it on their behalf) if, at the time, s/he knows or believes that those in the public who receive it are likely to understand the statement as a direct or indirect encouragement to commit, prepare or instigate "acts of terrorism".

Amnesty International considers that this provision does not meet the required criterion of being prescribed by law. It relies on the definition of "acts of terrorism" in the Terrorism Act 2000, which as noted above, the organization considers vague and overbroad. Additionally, it is likely that any person subject to this provision would have difficulty in trying to establish what any person who might receive the statement anywhere in the world might reasonably believe. Furthermore, what purports to be a clarification of "statements that are likely to be understood by members of the public as indirectly encouraging the commission or preparation of acts of terrorism" fails to meet the requirements of precision and clarity of the criminal law. In particular, the explanation offered—that the offence extends to statements that "glorify the commission or preparation (whether in the past or in the future generally)" of terrorist acts, from which the members of the public who receive them "could reasonably be expected to infer that what is being glorified is being glorified as conduct that should be emulated in existing circumstances"— is equally broad and inaccessible.

[40] Judgment of 26 April 1979, Series A, No.30; 2 EHHR 245 (1979–80).

[41] See, eg, the Judgments of the European Court of Human Rights in the cases of *Sener v Turkey*, Judgment of 18 July 2000 and *Arslan v Turkey*, Judgment of 8 July 1999.

[42] See, eg, Article 5 of the European Convention for the Suppression of Terrorism, set out at footnote 44 below. The European Court of Human Rights has also made clear, in the course of its reviewing cases of persons convicted for authoring or disseminating of statements alleged by the government concerned to encourage or incite acts of violence qualified as terrorism, that in determining whether a restriction of the right to freedom of expression is proportionate and necessary in a democratic society in pursuit of one of the legitimate aims it will have regard to a variety of factors including: whether the person intended to inflame or incite to violence; whether there was a real and genuine risk ('clear and present danger') that the statement might actually inflame or incite violence; the nature and severity of the penalty. See eg, *Arslan v Turkey*, Judgment of the European Court of Human Rights of 8 July 1999, including the Concurring Opinion of Judges Palm, Tulkens, Fischbach, Casadevall, and Greve and the separate Concurring Opinion of Judge Bonello. See also, Principle 6 of the Johannesburg Principles.
"Principle 6: Expression That May Threaten National Security
Subject to Principles 15 [General Rule on Disclosure of Secret Information] and 16 [Information Obtained Through Public Service], expression may be punished as a threat to national security only if a government can demonstrate that:
(a) the expression is intended to incite imminent violence;
(b) it is likely to incite such violence; and
(c) there is a direct and immediate connection between the expression and the likelihood or occurrence of such violence."

Amnesty International also considers that this provision fails to meet the required criterion of "necessity in a democratic society", given its failure to address squarely the element of intent and to criminalize the publication of a statement "encouraging terrorism" only if there is a direct and immediate connection between the expression and the likelihood or occurrence of such violence.[43]

In particular, Amnesty International is concerned about the way in which the provision addresses the element of intent. The organization notes that, as written, the provision does not squarely place on the state the burden of proving that the person who published (or caused another to publish) the statement intended to encourage or glorify terrorism. Rather the 6 October 2005 draft of this provision focuses on whether the accused knew, believed or had reason to believe that at least some of those who would receive the statement are likely to understand it as encouraging terrorism. In fact, the provision seems to reverse the burden of proof on the key element of intent: it states that it is a defence for the accused to show that he or she only published the statement in the course of provision or use of a service provided electronically or that the statement neither expressed his or her views nor had his or her endorsement, and that it was clear that it did not express his or her views.

Furthermore, Amnesty International considers that the provision, as drafted, takes insufficient account of whether the publication of the statement created a real or genuine risk of incitement to "terrorism".

Such a sweeping provision in criminal law, punishable by up to seven years in prison, would be clearly contrary to the very principle of freedom of expression and have a chilling effect on individuals seeking to lawfully exercise their right to freedom of expression.

2.1.2 Dissemination of Terrorist Publications

Clause 3 of Part 1 of the 13 September draft of the Terrorism Bill 2005 seeks to criminalize the dissemination of "terrorist publications". A person is liable under this provision for disseminating (free of charge or for money, and whether permanently or lending) or possessing with the view to its being disseminated, a "terrorist publication". Terrorist publications are defined as those whose content either:

— "constitutes a direct or indirect encouragement or other inducement to the commission, preparation or instigation of acts of terrorism" [by being likely to be understood as such by at least some of the persons to whom it is likely to be available] or,

— "constitutes information of assistance [explained as meaning capable of being useful] to in the commission or preparation of 'terrorist acts' and likely to be understood by at least some to whom it is available as wholly or mainly for such purpose."

Amnesty International considers that this provision too fails to meet the criterion "prescribed by law" required for permissible restrictions of the right to freedom of expression. The provision is broad and sweeping. It refers back to, and relies on, the definition of "terrorism" set out in the Terrorism Act 2000.

Its sweepingly broad content is also evident in the fact that it criminalizes the dissemination of publications which contain information that may be capable of being useful in the commission or preparation of a "terrorist act" and are understood by at least some to have been made available mainly for that purpose. This, in Amnesty International's view, casts the net too widely.

Amnesty International also is concerned about the way Clause 3 addresses the element of intent. In the same way as described above in reference to Clause 1, Amnesty notes that Clause 3 may be read in such a way as to reverse the burden of proof on the element of intent. The provision does not appear to squarely place on the state the burden of proving that the person who disseminated the information did so for the purpose of encouraging or otherwise inducing another to commit an "act of terrorism". Rather, Clause 3 places the burden on an accused to show (as a defence) that she or he had: no intent to provide or make available assistance to any person committing or preparing to commit an act of terrorism, or; no reasonable grounds for suspecting that the material she or he disseminated or possessed with a view to its dissemination was a "terrorist publication", or; that the publication neither expressed the views of the accused nor had their endorsement.

Considering that the provisions of Clause 3 of Part 1 of the 13 September 2005 draft of the Terrorism Bill fail to meet the criteria of being "prescribed by law" and proportionate to pursue one of the prescribed aims, the organization believes that enactment of the offence as drafted would be an overbroad and

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[43] The recently adopted Council of Europe Convention on the Prevention of Terrorism, which the UK signed on the day of its adoption and opening for signature on 16 May 2005, makes clear the elements of intent, and the causal relationship between the publication of the statement and the danger that a terrorist offence may be committed. Article 5 of this Convention, requiring states parties to criminalize public provocation to commit a terrorist offence, states:
"Article 5—Public provocation to commit a terrorist offence
1. For the purposes of this Convention, "public provocation to commit a terrorist offence" means the distribution, or otherwise making available, of a message to the public, *with the intent to incite the commission of a terrorist offence, where such conduct,* whether or not directly advocating terrorist offences, *causes a danger that one or more such offences may be committed.*
2. Each Party shall adopt such measures as maybe necessary to establish public provocation to commit a terrorist offence, as defined in paragraph 1, when committed *unlawfully and intentionally,* as a criminal offence under its domestic law."
(emphasis added)

unlawful restriction of the right to freedom to impart information, a component of the right to freedom of expression. Amnesty International therefore believes that the implementation of Clause 3 of Part 1 would facilitate violations of that fundamental right.

3. Clause 17: Grounds of Proscription

In the light of the concerns described above about Clause 1 of Part 1 of the Terrorism Bill as amended on 6 October 2005, Amnesty International is also concerned about the related provision in Clause 17 of Part 2 of the 13 September draft of the Terrorism Bill which permits the proscription of any organization whose activities include the "glorification, exaltation or celebration of the commission, preparation or instigation (whether in the past, in the future or generally) of acts of terrorism or are carried out in a manner that ensures that the organisation is associated with statements glorifying, exalting or celebrating the commission, preparation or instigation of such acts".

Given the vague and overbroad definition of glorification, etc. of terrorism, Amnesty International considers that this provision, if enacted in its current form, would violate the internationally and domestically guaranteed right to freedom of association, and may lead to the criminalization of people for their legitimate exercise of this right.

4. Extension of the Maximum Time-limit of Detention in Police Custody Without Charge or Trial: Internment in Anything But Name

Clause 19 (Extension of period of detention by judicial authority) and Clause 20 (Grounds for extending detention) of the draft Bill outline provisions which, if enacted, would permit an extension of the maximum time limit allowed under the anti-terrorism legislation for the detention, in police custody, without charge or trial, of people purportedly suspected of involvement in terrorism from 14 days to up to three months.

The organization notes that the judicial scrutiny of extensions is simply a review of the reasons adduced by the police of the need for such extensions; already under existing provisions it is not particularly onerous for the police to convince the judiciary of a need for extending the period of detention.

In addition, Amnesty International is concerned that the provisions regarding judicial supervision of detention with respect to people detained under anti-terrorism provisions are already significantly weaker than under ordinary legislation. Under ordinary legislation, the maximum period of detention without charge is four days, with further 36-hour and 24-hour extensions being granted by a judicial authority after the initial 36 hours.

In this regard, Amnesty International notes that anybody held on suspicion of having committed an extremely serious offence such as murder would, under the ordinary criminal justice system, be held without charge for a maximum period of four days. On the other hand, anybody held on suspicion of having committed an offence under anti-terrorism provisions could be held for more than 20 times longer.

Amnesty International opposes unreservedly the proposed extension of the already long maximum period of detention during which people can be held under anti-terrorism legislation by the police without charge. People are entitled to be charged promptly and tried within a reasonable time in proceedings which fully comply with internationally recognized fair trial standards, or to be released. Arguably, therefore, the existing power allowing for people purportedly suspected of involvement in terrorism to be detained in police custody without charge for up to 14 days before charge or release already violates one's right to be informed promptly of any charges against oneself.[44]

Prolonged detention without charge or trial undermines the right to a fair trial which includes the presumption of innocence, including the right to silence, the right to be promptly informed of any charges, freedom from arbitrary detention, and the right to be free from torture or other ill-treatment.

In light of its long-standing experience in monitoring the right to a fair trial worldwide, Amnesty International has found that prolonged periods of pre-charge detention provide a context for abusive practices which can result in detainees making involuntary statements, such as confessions. The organization considers that the likelihood of suspects making self-incriminatory statements or other types of admissions or confessions increases with the length of time people are held for interviewing:or otherwise:in police custody. Oppressive or otherwise coercive treatment in order to obtain confessions is unlawful under domestic and international human rights law, and undermines the suspect's right to fair trial. In addition, prolonged detention in police custody without charge could have the unintended effect of increasing the likelihood of statements obtained from the suspect being deemed inadmissible as involuntary at trial, precisely because of the coercive or otherwise oppressive nature inherent in such detention and questioning during which the said statements would have been obtained.

[44] Article 5:Right to liberty and security:of the ECHR requires in paragraph 5(2) that:
"Everyone who is arrested shall be informed *promptly,* in a language which he understands, of the *reasons for his arrest* and of *charge against him.*" (emphasis added)

Amnesty International is further concerned that the proposed extension would lead to other abusive practices, including detaining people without the intention or realistic prospect of bringing charges against them, in a way which would effectively amount to internment in all but name.

Amnesty International is also concerned at reports that the authorities are already using the existing powers as a blank cheque for holding people without charge or trial for up to 14 days. The organization's concerns about the scope for abuse in detaining people, without in fact having reasonable suspicion of their involvement in a criminal offence: a key component of, and safeguard giving effect to, the right to liberty under domestic and international human rights law[45]—have not been allayed by the briefing note attached to the letter by Andy Hayman, Assistant Commissioner (Metropolitan Police), to the Home Secretary of 6 October 2005. The said briefing note provides an explanation which purports to justify the need for an extension of the maximum police custody time limit. Amnesty International considers that whatever the justification provided, no such draconian incursion into the fundamental right to liberty could be lawful.

Since the 1970s, and mainly in the context of the conflict in Northern Ireland, the great majority of people who have been arrested under anti-terrorist and emergency measures have been subsequently released without charge. Once again, Amnesty International is concerned that the implementation of Clauses 19 and 20 would result in the alienation of certain communities, who would consider that they were being targeted because of their real or perceived ethnic or religious identity, and that the purpose of prolonged detention was not to bring charges against them, but in order to obtain information.

In this regard, Amnesty International notes, *inter alia*, the 2003 Concluding observations of the Committee on the Elimination of Racial Discrimination upon its examination of the UK's sixteenth and seventeenth periodic reports under the International Convention on the Elimination of all Forms of Racial discrimination:

> While acknowledging the State party's national security concerns, the Committee recommends that the State party seek to balance those concerns with the protection of human rights and its international legal obligations. In this regard, the Committee draws the State party's attention to its statement of 8 March 2002 in which it underlines the obligation of States to "ensure that measures taken in the struggle against terrorism do not discriminate in purpose or effect on grounds of race, colour, descent, or national or ethnic origin".[46]

Moreover, the discriminatory application of the anti-terrorism powers were highlighted by the parliamentary Joint Committee for Human Rights, in its July 2004 report,

> We also note that there is mounting evidence that the powers under the Terrorism Act are being used disproportionately against members of the Muslim community in the UK. According to the Metropolitan Police Service data, the stop and search rates for Asian people in London increased by 41% between 2001 and 2002, while for white people it increased by only 8% over the same period. We are concerned that the strikingly disproportionate impact of the Terrorism Act powers on the Muslim community indicates unlawful use of racial profiling in the exercise of these powers, contrary to basic norms prohibiting discrimination on grounds of race or religion.[47]

12 October 2005

Appendix I—Excerpts from the draft Terrorism Bill of 13 September 2005

3. Dissemination of terrorist publications

(1) A person commits an offence if he:

(a) distributes or circulates a terrorist publication;

(b) gives, sells or lends such a publication;

(c) offers such a publication for sale or loan;

(d) transmits the contents of such a publication electronically;

(e) makes available to others (whether electronically or otherwise) a facility for enabling them to obtain, read, listen to or look at such a publication, or to acquire it by means of a gift, sale or loan; or

[45] Article 5—Right to liberty and security—of the ECHR requires in paragraph 5(1)(c):
"1. Everyone has the right to liberty and security of person. No one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law:
...
(c) the lawful arrest or detention of a person effected for the purpose of bringing him before the competent legal authority *on reasonable suspicion of having committed an offence* or when it is reasonably considered necessary to prevent his committing an offence or fleeing after having done so; . . . " (emphasis added).

[46] Concluding observations of the Committee on the Elimination of Racial Discrimination, CERD/C/63/CO/11, 10 December 2003, para 17.

[47] Joint Committee On Human Rights—Eighteenth Report, Session 2003–04, July 2004, paragraph 46.

(f) has such a publication in his possession with a view to its becoming thesubject of conduct falling with any of paragraphs (a) to (e).

(2) For the purposes of this section a publication is a terrorist publication, in relation to conduct falling within subsection (1)(a) to (f), if matter contained in it constitutes, in the context of that conduct either:

(a) a direct or indirect encouragement or other inducement to thecommission, preparation or instigation of acts of terrorism; or

(b) information of assistance in the commission or preparation of such acts.

(3) In the context of conduct falling within subsection (1)(a) to (f), matter contained in a publication constitutes a direct or indirect encouragement or other inducement to the commission, preparation or instigation of acts of terrorism if, and only if, it is such that it is likely to be understood as such an encouragement or other inducement by some or all of the persons to whom it is or is likely to be available in consequence of that conduct.

(4) In the context of conduct falling within subsection (1)(a) to (f), matter contained in a publication constitutes information of assistance in the commission or preparation of acts of terrorism if, and only if:

(a) it is information that is capable of being useful in the commission or preparation of such acts; and

(b) it is likely to be understood, by some or all of the persons to whom it is or is likely to be available in consequence of that conduct, as contained in that publication wholly or mainly for the purpose of being so useful.

(5) For the purposes of this section the question whether a publication is a terrorist publication in the context of particular conduct must be determined:

(a) as at the time of that conduct; and

(b) having regard both to the contents of the publication as a whole and to the circumstances in which that conduct occurs.

(6) It is irrelevant for the purposes of this section whether—

(a) the encouragement or other inducement mentioned in subsection (3), or

(b) the usefulness mentioned in subsection (4), is in relation to one or more particular acts of terrorism, to acts of terrorism of a particular description or to acts of terrorism generally.

(7) In proceedings against a person for an offence under this section it is a defence for him to show—

(a) that he had not examined the publication in respect of which he is charged; and

(b) that he had no reasonable grounds for suspecting that it was a terrorist publication.

(8) In proceedings against a person for an offence under this section in respect of any conduct falling within subsection (1)(a) to (f) it is a defence for him to show—

(a) that he engaged in that conduct only for the purposes of or in connection with the provision by him of a service provided electronically;

(b) that the publication to which the conduct related, so far as it was a terrorist publication by virtue of subsection (3), neither expressed his views nor had his endorsement;

(c) that it was clear in all the circumstances that the publication, so far as it was a terrorist publication by virtue of that subsection, neither expressed his views nor had his endorsement; and

(d) that the conduct in relation to that publication, so far as it was a terrorist publication by virtue of subsection (4), was not intended by him to provide or make available assistance to any person in the commission or preparation of acts of terrorism.

(9) A person guilty of an offence under this section shall be liable—

(a) on conviction on indictment, to imprisonment for a term not exceeding seven years or to a fine, or to both;

(b) on summary conviction in England and Wales, to imprisonment for a term not exceeding 12 months or to a fine not exceeding the statutory maximum, or to both;

(c) on summary conviction in Scotland or Northern Ireland, to imprisonment for a term not exceeding 6 months or to a fine not exceeding the statutory maximum, or to both.

(10) In relation to an offence committed before the commencement of section 154(1) of the Criminal Justice Act 2003 (c 44), the reference in subsection (9)(b) to 12 months is to be read as a reference to six months.

(11) In this section, "publication" means an article or record of any description that contains any of the following, or any combination of them—

(a) matter to be read;

(b) matter to be listened to;

(c) matter to be looked at or watched;

and references in this section to what is contained in an article or record include references to anything that is embodied or stored in or on it and to anythingthat may be reproduced from it using apparatus designed or adapted for the purpose.

(12) In this section, "article" includes anything for storing data;

"lend" includes let on hire, and "loan" is to be construed accordingly;

"record" means a record so far as not comprised in an article, including a temporary record created electronically and existing solely in the course of, and for the purposes of, the transmission of the whole or a part of its contents.

17. Grounds of proscription

In section 3 of the Terrorism Act 2000 (proscription of organisations), after

subsection (5) insert—

"(5A) The cases in which an organisation promotes or encourages terrorism for the purposes of subsection (5)(c) include any case in which activitiesof the organisation—

(a) include the glorification, exaltation or celebration of the commission, preparation or instigation (whether in the past, in the future or generally) of acts of terrorism; or

(b) are carried out in a manner that ensures that the organisation is associated with statements glorifying, exalting or celebrating the commission, preparation or instigation of such acts.

(5B) The reference in subsection (5A) to statements is a reference to communications of any description, including communications without words consisting of sounds or images or both."

Detention of Terrorist Suspects

19. Extension of period of detention by judicial authority

(1) Schedule 8 to the Terrorism Act 2000 (c 11) (detention of terrorist suspects) is amended as follows.

(2) In sub-paragraph (1) of each of paragraphs 29 and 36 (applications by a superintendent or above for a warrant extending detention or for the extension of the period of such a warrant), for the words from the beginning to "may" substitute—

"(1) Each of the following.

(a) in England and Wales, a Crown Prosecutor,

(b) in Scotland, a procurator fiscal,

(c) in Northern Ireland, the Director of Public Prosecutions for Northern Ireland,

(d) in any part of the United Kingdom, a police officer of at least the rank of superintendent, may".

(3) In sub-paragraph (3) of paragraph 29 (period of extension to end no later than seven days after arrest)—

(a) for "Subject to paragraph 36(3A)" substitute "Subject to sub-paragraph (3A) and paragraph 36"; and

(b) for "end not later than the end of" substitute "be".

(4) After that sub-paragraph insert—

"(3A) A judicial authority may issue a warrant of further detention in relation to person which specifies a shorter period as the period for which that person's further detention is authorised if—

(a) the application for the warrant is an application for a warrant specifying a shorter period; or

(b) the judicial authority is satisfied that there are special circumstances that would make it inappropriate for the specified period to be as long as the period of seven days mentioned in sub-paragraph (3)".

(5) For sub-paragraphs (3) and (3A) of paragraph 36 (period for which warrants may be extended) substitute—

"(3) Subject to sub-paragraph (3AA), the new specified period shall be the period which:

(b) ends with whichever is the earlier of—

(i) the end of the period of seven days beginning with that time; and

(ii) the end of the period of three months beginning with the relevant time.

(3A) The time referred to in sub-paragraph (3)(a) is—

(a) in the case of a warrant specifying a period which has not previously been extended under this paragraph, the end of the period specified in the warrant, and

(b) in any other case, the end of the period for which the period specified in the warrant was last extended under thisparagraph.

(3AA) A judicial authority may extend or further extend the period specified in a warrant by a shorter period than is required by subparagraph (3) if—

(a) the application for the extension is an application for anextension by a period that is shorter than is so required; or

(b) the judicial authority is satisfied that there are special circumstances that would make it inappropriate for the period of the extension to be as long as the period so required."

(6) For paragraph 37 (release of detained person) substitute—

"37 (1) This paragraph applies where—

(a) a person ("the detained person") is detained by virtue of a warrant issued under this Part of this Schedule; and

(b) his detention is not authorised by virtue of section 41(5) or (6) or otherwise apart from the warrant.

(2) If it at any time appears to the police officer or other person in charge of the detained person's case that any of the matters mentioned in paragraph 32(1)(a) and (b) on which the judicial authority last authorised his further detention no longer apply, he must—

(a) if he has custody of the detained person, release him immediately; and

(b) if he does not, immediately inform the person who does have custody of the detained person that those matters no longer apply in the detained person's case.

(3) A person with custody of the detained person who is informed in accordance with this paragraph that those matters no longer apply in his case must release that person immediately."

20. Grounds for extending detention

(1) In Schedule 8 to the Terrorism Act 2000 (c 11), in paragraph 23(1) (grounds on which a review officer may authorise continued detention), after paragraph (b) insert—

"(ba) pending the result of an examination or analysis of any relevant evidence or of anything the examination or analysis of which is to be or is being carried out with a view to obtaining relevant evidence;".

(2) In sub-paragraph (1) of paragraph 32 of that Schedule (grounds on which a judicial authority may authorise further detention), for the words from "to obtain" to "preserve relevant evidence" substitute "as mentioned in subparagraph(1A)".

(3) After that sub-paragraph insert—

"(1A) The further detention of a person is necessary as mentioned in thissub-paragraph if it is necessary—

(a) to obtain relevant evidence whether by questioning him or otherwise;

(b) to preserve relevant evidence; or

(c) pending the result of an examination or analysis of any relevant evidence or of anything the examination or analysis of which is to be or is being carried out with a view to obtaining relevant evidence."

(4) In paragraph 23(4) (meaning of "relevant evidence"), for "sub-paragraph (1)(a) and (b)" substitute "this paragraph".

Appendix II—Amendment of 6 October 2005

DRAFT OF A BILL TO

Make provision for and about offences relating to conduct carried out, or capable of being carried out, for purposes connected with terrorism; to amend enactments relating to terrorism; to amend the Intelligence Services Act 1994 and the Regulation of Investigatory Powers Act 2000; and for connected purposes.

Be it enacted by the Queen's most Excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows:—

PART 1—OFFENCES

Encouragement etc. of terrorism

1 Encouragement of terrorism

(1) A person commits an offence if—

(a) he publishes a statement or causes another to publish a statement on his behalf; and

(b) at the time he does so—

(i) he knows or believes, or

(ii) he has reasonable grounds for believing,

that members of the public to whom the statement is or is to be published are likely to understand it as a direct or indirect encouragement or other inducement to the commission, preparation or instigation of acts of terrorism or Convention offences.

(2) For the purposes of this section the statements that are likely to be understood by members of the public as indirectly encouraging the commission or preparation of acts of terrorism or Convention offences include every statement which—

(a) glorifies the commission or preparation (whether in the past, in the future or generally) of such acts or offences; and

(b) is a statement from which those members of the public could reasonably be expected to infer that what is being glorified is being glorified as conduct that should be emulated in existing circumstances.

(3) For the purposes of this section the questions what it would be reasonable to believe about how members of the public will understand a statement and what they could reasonably be expected to infer from a statement must be determined having regard both—

(a) to the contents of the statement as a whole; and

(b) to the circumstances and manner in which it is or is to be published.

(4) It is irrelevant for the purposes of subsections (1) and (2)—

(a) whether the statement relates to the commission, preparation or instigation of one or more particular acts of terrorism or Convention offences, of acts of terrorism or Convention offences of a particular description or of acts of terrorism or Convention offences generally; and

(b) whether any person is in fact encouraged or induced by the statement to commit, prepare or instigate any such act or offence.

(5) In proceedings against a person for an offence under this section it is a defence for him to show—

(a) that he published the statement in respect of which he is charged, or caused it to be published, only in the course of the provision or use by him of a service provided electronically;

(b) that the statement neither expressed his views nor had his endorsement (whether by virtue of section 3 or otherwise); and

(c) that it was clear, in all the circumstances, that it did not express his views and (apart from the possibility of his having been given and failed to comply with a notice under subsection (3) of that section) did not have his endorsement.

(6) A person guilty of an offence under this section shall be liable—

(a) on conviction on indictment, to imprisonment for a term not exceeding 7 years or to a fine, or to both;

(b) on summary conviction in England and Wales, to imprisonment for a term not exceeding 12 months or to a fine not exceeding the statutory maximum, or to both;

(c) on summary conviction in Scotland or Northern Ireland, to imprisonment for a term not exceeding the statutory maximum, or to both.

(7) In relation to an offence committed before the commencement of section 154(1) of the Criminal Justice Act 2003 (c. 44), the reference in subsection (6)(b) to 12 months is to be read as a reference to 6 months.

APPENDIX III—THE JOHANNESBURG PRINCIPLES ON NATIONAL SECURITY, FREEDOM OF EXPRESSION AND ACCESS TO INFORMATION, FREEDOM OF EXPRESSION AND ACCESS TO INFORMATION[48]

Introduction

These Principles were adopted on 1 October 1995 by a group of experts in international law, national security, and human rights convened by ARTICLE 19, the International Centre Against Censorship, in collaboration with the Centre for Applied Legal Studies of the University of the Witwatersrand, in Johannesburg.

[48] U.N. Doc. E/CN.4/1996/39 (1996).

The Principles are based on international and regional law and standards relating to the protection of human rights, evolving state practice (as reflected, *inter alia*, in judgments of national courts), and the general principles of law recognized by the community of nations.

These Principles acknowledge the enduring applicability of the Siracusa Principles on the Limitation and Derogation Provisions in the International Covenant on Civil and Political Rights and the Paris Minimum Standards of Human Rights Norms In a State of Emergency.

Preamble

The participants involved in drafting the present Principles:

Considering that, in accordance with the principles proclaimed in the Charter of the United Nations, recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world;

Convinced that it is essential, if people are not to be compelled to have recourse, as a last resort, to rebellion against tyranny and oppression, that human rights should be protected by the rule of law;

Reaffirming their belief that freedom of expression and freedom of information are vital to a democratic society and are essential for its progress and welfare and for the enjoyment of other human rights and fundamental freedoms;

Taking into account relevant provisions of the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights, the UN Convention on the Rights of the Child, the UN Basic Principles on the Independence of the Judiciary, the African Charter on Human and Peoples' Rights, the American Convention on Human Rights and the European Convention on Human Rights;

Keenly aware that some of the most serious violations of human rights and fundamental freedoms are justified by governments as necessary to protect national security;

Bearing in mind that it is imperative, if people are to be able to monitor the conduct of their government and to participate fully in a democratic society, that they have access to government-held information;

Desiring to promote a clear recognition of the limited scope of restrictions on freedom of expression and freedom of information that may be imposed in the interest of national security, so as to discourage governments from using the pretext of national security to place unjustified restrictions on the exercise of these freedoms;

Recognizing the necessity for legal protection of these freedoms by the enactment of laws drawn narrowly and with precision, and which ensure the essential requirements of the rule of law; and

Reiterating the need for judicial protection of these freedoms by independent courts;

Agree upon the following Principles, and recommend that appropriate bodies at the national, regional and international levels undertake steps to promote their widespread dissemination, acceptance and implementation:

Principle 1: Freedom of Opinion, Expression and Information

(a) Everyone has the right to hold opinions without interference.

(b) Everyone has the right to freedom of expression, which includes the freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his or her choice.

(c) The exercise of the rights provided for in paragraph (b) may be subject to restrictions on specific grounds, as established in international law, including for the protection of national security.

(d) No restriction on freedom of expression or information on the ground of national security may be imposed unless the government can demonstrate that the restriction is prescribed by law and is necessary in a democratic society to protect a legitimate national security interest. The burden of demonstrating the validity of the restriction rests with the government.

Principle 1.1: Prescribed by Law

(a) Any restriction on expression or information must be prescribed by law. The law must be accessible, unambiguous, drawn narrowly and with precision so as to enable individuals to foresee whether a particular action is unlawful.

(b) The law should provide for adequate safeguards against abuse, including prompt, full and effective judicial scrutiny of the validity of the restriction by an independent court or tribunal.

Principle 1.2: Protection of a Legitimate National Security Interest

Any restriction on expression or information that a government seeks to justify on grounds of national security must have the genuine purpose and demonstrable effect of protecting a legitimate national security interest.

Principle 1.3: Necessary in a Democratic Society

To establish that a restriction on freedom of expression or information is necessary to protect a legitimate national security interest, a government must demonstrate that:

(a) the expression or information at issue poses a serious threat to a legitimate national security interest;

(b) the restriction imposed is the least restrictive means possible for protecting that interest; and

(c) the restriction is compatible with democratic principles.

Principle 2: Legitimate National Security Interest

(a) A restriction sought to be justified on the ground of national security is not legitimate unless its genuine purpose and demonstrable effect is to protect a country's existence or its territorial integrity against the use or threat of force, or its capacity to respond to the use or threat of force, whether from an external source, such as a military threat, or an internal source, such as incitement to violent overthrow of the government.

(b) In particular, a restriction sought to be justified on the ground of national security is not legitimate if its genuine purpose or demonstrable effect is to protect interests unrelated to national security, including, for example, to protect a government from embarrassment or exposure of wrongdoing, or to conceal information about the functioning of its public institutions, or to entrench a particular ideology, or to suppress industrial unrest.

Principle 3: States of Emergency

In time of public emergency which threatens the life of the country and the existence of which is officially and lawfully proclaimed in accordance with both national and international law, a state may impose restrictions on freedom of expression and information but only to the extent strictly required by the exigencies of the situation and only when and for so long as they are not inconsistent with the government's other obligations under international law.

Principle 4: Prohibition of Discrimination

In no case may a restriction on freedom of expression or information, including on the ground of national security, involve discrimination based on race, colour, sex, language, religion, political or other opinion, national or social origin, nationality, property, birth or other status.

II. RESTRICTIONS ON FREEDOM OF EXPRESSION

Principle 5: Protection of Opinion

No one may be subjected to any sort of restraint, disadvantage or sanction because of his or her opinions or beliefs.

Principle 6: Expression That May Threaten National Security

Subject to Principles 15 and 16, expression may be punished as a threat to national security only if a government can demonstrate that:

(a) the expression is intended to incite imminent violence;

(b) it is likely to incite such violence; and

(c) there is a direct and immediate connection between the expression and the likelihood or occurrence of such violence.

Principle 7: Protected Expression

(a) Subject to Principles 15 and 16, the peaceful exercise of the right to freedom of expression shall not be considered a threat to national security or subjected to any restrictions or penalties. Expression which shall not constitute a threat to national security includes, but is not limited to, expression that:

(i) advocates non-violent change of government policy or the government itself;

(ii) constitutes criticism of, or insult to, the nation, the state or its symbols, the government, its agencies, or public officials 3, or a foreign nation, state or its symbols, government, agencies or public officials;

(iii) constitutes objection, or advocacy of objection, on grounds of religion, conscience or belief, to military conscription or service, a particular conflict, or the threat or use of force to settle international disputes;

(iv) is directed at communicating information about alleged violations of international human rights standards or international humanitarian law.

(b) No one may be punished for criticizing or insulting the nation, the state or its symbols, the government, its agencies, or public officials, or a foreign nation, state or its symbols, government, agency.

Expression, whether written or oral, can never be prohibited on the ground that it is in a particular language, especially the language of a national minority.

Principle 10: Unlawful Interference With Expression by Third Parties

Governments are obliged to take reasonable measures to prevent private groups or individuals from interfering unlawfully with the peaceful exercise of freedom of expression, even where the expression is critical of the government or its policies. In particular, governments are obliged to condemn unlawful actions aimed at silencing freedom of expression, and to investigate and bring to justice those responsible.

III. RESTRICTIONS ON FREEDOM OF INFORMATION

Principle 11: General Rule on Access to Information

Everyone has the right to obtain information from public authorities, including information relating to national security. No restriction on this right may be imposed on the ground of national security unless the government can demonstrate that the restriction is prescribed by law and is necessary in a democratic society to protect a legitimate national security interest.

Principle 12: Narrow Designation of Security Exemption

A state may not categorically deny access to all information related to national security, but must designate in law only those specific and narrow categories of information that it is necessary to withhold in order to protect a legitimate national security interest.

Principle 13: Public Interest in Disclosure

In all laws and decisions concerning the right to obtain information, the public interest in knowing the information shall be a primary consideration.

Principle 14: Right to Independent Review of Denial of Information

The state is obliged to adopt appropriate measures to give effect to the right to obtain information. These measures shall require the authorities, if they deny a request for information, to specify their reasons for doing so in writing and as soon as reasonably possible; and shall provide for a right of review of the merits and the validity of the denial by an independent authority, including some form of judicial review of the legality of the denial. The reviewing authority must have the right to examine the information withheld.

Principle 15: General Rule on Disclosure of Secret Information

No person may be punished on national security grounds for disclosure of information if (1) the disclosure does not actually harm and is not likely to harm a legitimate national security interest, or (2) the public interest in knowing the information outweighs the harm from disclosure.

Principle 16: Information Obtained Through Public Service

No person may be subjected to any detriment on national security grounds for disclosing information that he or she learned by virtue of government service if the public interest in knowing the information outweighs the harm from disclosure.

Principle 17: Information in the Public Domain

Once information has been made generally available, by whatever means, whether or not lawful, any justification for trying to stop further publication will be overridden by the public's right to know.

Principle 18: Protection of Journalists' Sources

Protection of national security may not be used as a reason to compel a journalist to reveal a confidential source.

Principle 19: Access to Restricted Areas

Any restriction on the free flow of information may not be of such a nature as to thwart the purposes of human rights and humanitarian law. In particular, governments may not prevent journalists or representatives of intergovernmental or non-governmental organizations with a mandate to monitor adherence to human rights or humanitarian standards from entering areas where there are reasonable grounds to believe that violations of human rights or humanitarian law are being, or have been, committed. Governments may not exclude journalists or representatives of such organizations from areas that are experiencing violence or armed conflict except where their presence pose a clear risk to the safety of others.

IV. RULE OF LAW AND OTHER MATTERS

Principle 20: General Rule of Law Protections

Any person accused of a security-related crime involving expression or information is entitled to all of the rule of law protections that are part of international law. These include, but are not limited to, the following rights:

(a) the right to be presumed innocent;

(b) the right not to be arbitrarily detained;

(c) the right to be informed promptly in a language the person can understand of the charges and the supporting evidence against him or her;

(d) the right to prompt access to counsel of choice;

(e) the right to a trial within a reasonable time;

(f) the right to have adequate time to prepare his or her defence;

(g) the right to a fair and public trial by an independent and impartial court or tribunal;

(h) the right to examine prosecution witnesses;

(i) the right not to have evidence introduced at trial unless it has been disclosed to the accused and he or she has had an opportunity to rebut it; and

(j) the right to appeal to an independent court or tribunal with power to review the decision on law and facts and set it aside.

Principle 21: Remedies

All remedies, including special ones, such as habeas corpus or amparo, shall be available to persons charged with security-related crimes, including during public emergencies which threaten the life of the country, as defined in Principle 3.

Principle 22: Right to Trial by an Independent Tribunal

(a) At the option of the accused, a criminal prosecution of a security-related crime should be tried by a jury where that institution exists or else by judges who are genuinely independent. The trial of persons accused of security-related crimes by judges without security of tenure constitutes a prima facie violation of the right to be tried by an independent tribunal.

(b) In no case may a civilian be tried for a security-related crime by a military court or tribunal.

(c) In no case may a civilian or member of the military be tried by an *ad hoc* or specially constituted national court or tribunal.

Principle 23: Prior Censorship

Expression shall not be subject to prior censorship in the interest of protecting national security, except in time of public emergency which threatens the life of the country under the conditions stated in Principle 3.

Principle 24: Disproportionate Punishments

A person, media outlet, political or other organization may not be subject to such sanctions, restraints or penalties for a security-related crime involving freedom of expression or information that are disproportionate to the seriousness of the actual crime.

Principle 25: Relation of These Principles to Other Standards

Nothing in these Principles may be interpreted as restricting or limiting any human rights or freedoms recognized in international, regional or national law or standards.

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7. Submission from Amnesty International, Europe and Central Asia Programme, to the JCHR's inquiry into counter-terrorism policy and human rights

"Compromising human rights cannot serve the struggle against terrorism."

UN Secretary-General Kofi Annan, March 2005

Since the "war on terror" was declared by the US government in 2001, the UK authorities have mounted a sustained attack on human rights, the independence of the judiciary and the rule of law.

Their immediate response to 11 September 2001 was to introduce anti-terrorism legislation, even though the UK already had some of the most draconian anti-terrorism laws in the world. Two new Acts were passed, each containing sweeping provisions that contravene human rights law and whose enactment has given rise to serious human rights violations.[49] Then, after the London bombings in July 2005, additional ill-conceived and dangerous measures were proposed. Amnesty International considers that these measures are inconsistent with the UK's obligations under domestic and international human rights law and that, if enacted, they would lead to serious human rights violations.[50]

Some of the persons purportedly suspected of involvement in terrorism detained in the UK under anti-terrorism laws introduced post 9/11 have been thrown into a Kafkaesque world. A number of foreign nationals, whom the UK authorities recognized could not be forcibly removed from the country owing to its international obligations, were interned for years in harsh conditions on the basis of secret intelligence the details of which are withheld from them and which, therefore, they have been unable to refute.

When, in December 2004, the Law Lords ruled their detention unlawful because it was unjustifiably discriminatory, the government found new ways of restricting their liberty—first by imposing so-called "control orders", introduced in hastily passed legislation, and then by imprisoning the majority of them under immigration powers pending deportation on national security grounds. At no point have any of these persons been found guilty in a court of law in the UK of an offence in connection with the purported allegations of involvement in terrorism. Indeed, the UK authorities have stated before the courts that in respect of those who were interned there is insufficient evidence to support a criminal charge. Nonetheless, the UK authorities maintain their claim that these persons are a "threat to national security". Many of them, and their families, have suffered serious deterioration of their mental and physical health. The cumulative effects of the UK authorities' actions against these people amount to persecution.

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[49] See, *inter alia*, *United Kingdom: Briefing on the Terrorism Bill*, AI Index: EUR 45/43/00, published in April 2000; *United Kingdom—Summary of concerns raised with the Human Rights Committee*, AI Index: EUR 45/024/2001, published in November 2001; "*Amnesty International's Memorandum to the UK Government on Part 4 of the Anti-terrorism, Crime and Security Act 2001*", AI Index: EUR 45/017/2002; and *United Kingdom—Rights Denied: the UK's Response to 11 September 2001*, AI Index: EUR 45/016/2002, both published in September 2002; *United Kingdom—Justice perverted under the Anti-terrorism, Crime and Security Act 2001*; published in 11 December 2003, AI Index: EUR 45/029/2003; and *UK: Reaction to the UK Prime Minister's statement of 5 August 2005 concerning a "comprehensive framework for action in dealing with the terrorist threat in Britain"*, AI Index: EUR 45/031/2005, published on 11 August 2005.

[50] See *United Kingdom—Amnesty International's briefing on the draft Terrorism Bill 2005*, AI Index: EUR 45/038/2005, published in October 2005. Amnesty International has already sent this briefing to the members of the Joint Committee on Human Rights.

Some of the other people who are also currently detained awaiting deportation on national security grounds have actually been acquitted at a trial in the UK of the terrorism-related offences for which they stood accused.

The government's dismissive attitude towards human rights in the "war on terror" has been witnessed in other areas too. The authorities have begun attempts which, if successful, would flout the absolute ban on torture or other ill-treatment by circumventing it. The authorities have taken steps to deport people to countries where they are at risk of torture or other ill-treatment by claiming that they would be absolved from their obligations not to do so under domestic and international law by relying on the successful conclusion of memoranda of understanding with the governments of countries to which the UK intends to forcibly return these people.

UK agents, particularly intelligence officials, have been implicated in interrogations of suspects who have been allegedly tortured abroad by US personnel, and in the unlawful transfer, a.k.a. "renditions" of people to the custody of US forces at Bagram Airbase, Afghanistan and Guanta[acute]namo Bay, Cuba where torture or other ill-treatment have been alleged to have been used routinely. Following submissions from the UK government, the Court of Appeal of England and Wales ruled in August 2004 that "evidence" extracted through torture or ill-treatment was admissible in court proceedings in the UK provided that UK agents were neither directly involved or connived in the torture. This gave torturers abroad the UK's stamp of approval. An appeal of this judgment is pending.

For more than 40 years, Amnesty International has monitored steps taken by governments to protect the "security of the state" all over the world, including in the UK. Amnesty International's research shows that counter-terrorism policies and measures have led to laws and practices that stifle dissent and opposition, and allow state agents to commit human rights abuses such as unlawful killings, torture, arbitrary detention and unfair trial with impunity. Those affected frequently include members of the wider population not involved in illegal activity.

Evidence of this in the UK has been increasingly apparent, with peaceful protesters who have been subjected to police action under legislative provisions originally introduced to purportedly counter terrorism. There is also concern that the frequent linking by the authorities of the "terrorist threat" with "foreigners" and "Muslim extremists" is encouraging xenophobia, racism and faith-hate crimes.

It is unclear how any of the measures announced by the UK government since 7 July would have stopped the London bombers, who were all British. Many have pointed out that it was not gaps in the criminal justice system that failed to prevent the bombings. It was lack of intelligence that the attack was being planned.

There is a very real danger that a range of the proposed additional measures will further alienate the very communities the government needs on its side. If this happens, there is even less likelihood of good intelligence emerging and even less chance that the civilian population in the UK will not suffer further violent attacks.

Creating a Shadow Criminal Justice System

On 11 September 2001 the ink was barely dry on the Terrorism Act 2000, a law that introduced a dangerously vague and broad definition of terrorism, and brought into permanent statutory form numerous provisions identical or similar to offences grounded in that definition which had been enshrined in so-called "temporary" emergency legislation in the UK over the previous three decades at least.[51]

The Anti-terrorism, Crime and Security Act 2001 (ATCSA), rushed through the UK Parliament in barely a month, introduced indefinite internment of foreign nationals—who could not be forcibly removed from the UK—on the basis of secret intelligence which may include information obtained through torture abroad. These provisions, under Part 4 of the Act, were discriminatory, draconian and unlawful—and a disturbing echo of the internment laws of the early 1970s that proved so counter-productive in the context of the conflict in Northern Ireland.

Part 4 of the ATCSA was ruled unlawful by the Law Lords in late 2004. The government responded with yet more legislation, the Prevention of Terrorism Act 2005 (PTA), which broke the spirit, if not the letter, of the Law Lords' ruling. It gives a government minister, not the judiciary, unprecedented powers to issue "control orders" to restrict the liberty, movement and activities of people purportedly suspected of involvement in terrorism, again on the basis of secret "evidence". The restrictions violate a wide range of human rights, including the rights to freedom of thought, conscience and religion, freedom of expression, freedom of assembly and association, freedom of movement, the right to a fair trial and the right to liberty. They have also had a detrimental impact on the human rights of the families of those subject to those orders.

Amnesty International calls for the repeal of the PTA. The imposition of such orders is tantamount to a government minister "charging", "trying" and "sentencing" a person without any regard to fair trial guarantees that are standard in criminal cases.

[51] These provisions were enshrined in the Emergency Provisions Act, which was first introduced in 1973 and the Prevention of Terrorism Act, which was first introduced in 1974.

After the London bombings in July 2005, which happened just a few months after the PTA had been enacted, the government said that new anti-terrorism measures were needed once again. On 5 August the Prime Minister announced a 12-point plan, every element of which signalled further assaults on human rights, particularly for those identified as Muslims, foreign nationals, and asylum-seeker.

In October, a new Terrorism Bill was published. This contains further sweeping and vague provisions that undermine the rights to freedom of expression and association, the right to liberty, the prohibition of arbitrary detention, the rights to the presumption of innocence and fair trial.

One proposal is to introduce a crime that involves the "glorification of terrorism". Such terms are broad, vague and subjective. They have no legal clarity and can therefore be used arbitrarily to restrict human rights, including freedom of expression.

The Bill also proposes extending from 14 days to three months the period that people purportedly suspected of involvement in terrorism can be held without charge in police custody—more than 20 times the period allowed for holding people on suspicion of murder—thereby, in effect, reintroducing internment. Two former Law Lords have condemned this proposal. Lord Steyn called it "exorbitant and unnecessary" and pointed out that it would be unlawful under the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR).[52] Lord Lloyd described the proposal as "intolerable".[53]

In another move, the UK authorities are reportedly consulting on the introduction of a power to close down places of worship where "extremists" operate, if religious leaders or the trustees fail to curb "extremism". Amnesty International considers that if the authorities reasonably suspect people of an offence they should charge them with a recognizably criminal offence and try them in fair proceedings. In addition, the proposed power would be a disproportionate action which would affect whole communities and may amount to collective punishment, religious persecution and discrimination—all of which are unlawful. It is also unclear how such power would be effective given that the so-called "extremists" could simply find another venue in which to congregate.

Ominously, since 7 July senior government officials, including the Prime Minister, have made statements that amount to an attack on the independence of the judiciary. The government has intimated that if the courts do not heed its expressed policies to forcibly remove people from the UK, including to countries where they may risk torture, it will amend the Human Rights Act 1998—which enshrined in domestic law most of the human rights guaranteed under the ECHR—to ensure that it gets its way.

Any criminal justice system that adheres to international human rights law will only allow people to be punished if they have been promptly charged with a recognizably criminal offence and tried and convicted in fair and transparent proceedings. Many of the new measures introduced or proposed by the UK authorities since September 2001 involve punishment, whether it be deprivation of liberty, or deportation of people against whom there is insufficient evidence to support a criminal charge. Such course of action brings the law and those charged with its enforcement into disrepute; it is neither fair, nor just, nor lawful—and soon results in the loss of public confidence.

Creeping Acceptance of Torture

The government's apparent disregard for human rights law when framing anti-terrorism legislation has been reflected in its various attempts to undermine the ban on torture or other ill-treatment—a universally accepted prohibition which guarantees a fundamental human right.

A principle inherent to the absolute prohibition of torture or other ill-treatment is that no one should ever be sent to a country where they would be at risk of torture or ill-treatment—the principle known as non-*refoulement*. Yet the government has repeatedly tried to find ways to circumvent this principle in order to deport people it deems are a risk to national security but against whom it maintains not to have sufficient evidence to support criminal charges.

In August 2005 the UK concluded a Memorandum of Understanding (MoU) with Jordan which forms the basis on which the UK authorities are taking steps to forcibly return people to that country. The UK authorities are currently trying to negotiate further "diplomatic assurances" with other countries in the Middle East and North Africa.

Such "diplomatic assurances" are not worth the paper they are written on. By definition, such assurances are only needed from countries where torture is practised. Why should anyone trust the word of officials whose governments have already committed themselves—by ratifying international treaties—to prohibiting torture. And yet, these countries routinely resort to torture and deny doing so.

The UK has also been implicated in the US practice known as "rendition"—the illegal and often secret transfer of alleged terrorist suspects from one country to another without due process, including to countries where torture is rife. There is mounting evidence that countries known to practise torture have been specifically selected to receive certain suspects for interrogation in an attempt to distance the USA from the abuse. This is outsourcing torture.

52 "Former law lord attacks PM's record on human rights", *The Independent*, 11 October 2005.

53 Panorama, *BBC*, 9 October 2005.

Torture is wrong and illegal wherever it happens and whoever does it. Any government that exports suspects to be tortured does not escape responsibility for that torture. The ban on sending anyone to a country where they may be tortured is as absolute as the ban on torture itself.

The creeping acceptance of torture abroad by the UK authorities took a disturbing twist in August 2004 when the Court of Appeal of England and Wales ruled that ”evidence” obtained through torture abroad would not only be admissible in proceedings in the UK, but could be relied upon. The only caveat was that UK officials should not have connived or taken part in the torture.

Amnesty International condemned the ruling and said that the Court of Appeal had shamefully abdicated its duty to uphold human rights and the rule of law. The Council of Europe's Commissioner for Human Rights noted in June 2005, "To use evidence obtained under torture is to condone an entirely indefensible practice."[54] An appeal against the ruling was pending before the Law Lords at the time of writing.

Treatment of Alleged Terrorist Suspects in the UK

Once any government begins to "sacrifice" human rights in the name of security, it is not long before individuals pay the price.

Under anti-terrorism legislation introduced since September 2001, people have been interned for years in harsh conditions never knowing if they would ever be charged, tried or released. As a result, they have suffered damage to their physical and psychological health.

Amnesty International considered that their conditions of detention amounted to cruel, inhuman and degrading treatment. This conclusion was echoed by the UN Committee against Torture and the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment.

In July 2005, after police shot dead Jean Charles de Menezes, a Brazilian man on his way to work in London, it emerged that a "shoot to kill" policy had been authorized for police confronting anyone they believed was about to detonate a bomb. There were crucial delays in initiating an independent inquiry into the killing, and allegations have emerged of an early attempt at a cover-up by the police.

There is no provision in international law for "shoot to kill" policies. All law enforcement agencies should be guided at all times by the principles of necessity and proportionality when using force. Every effort must be made to apprehend rather than kill—lethal force must never be used as an alternative to apprehension. Amnesty International has called for a prompt, thorough, independent, impartial and effective investigation into the killing of Jean Charles de Menezes and for anyone suspected of unlawful conduct to be brought to justice in fair proceedings.

Undermining Human Rights Abroad

The UK government has also tried to circumvent its obligations under international and domestic human rights law in relation to the actions of its officials and troops abroad.

Its record in relation to the human rights scandal of the US detention centre at Guantánamo Bay, Cuba, has been shameful. For two years government ministers claimed no knowledge of the appalling abuses being suffered there. Only after intense pressure was exerted by human rights organizations and relatives of Guantánamo detainees did the government finally act to seek the release of the UK nationals. However, it has continued to fail to make adequate representations on behalf of UK residents who are still languishing there in orange jumpsuits. It has also failed miserably in its duty to mount a serious protest against the litany of human rights abuses being suffered by the hundreds of men who remain in Guantánamo without any hope of justice.

Moreover, UK intelligence officers took advantage of the legal limbo and the coercive detention conditions at Guantánamo Bay—and reportedly at other locations, including Bagram Airbase in Afghanistan, to conduct interrogations. Such interrogations took place without any of the normal safeguards, such as having a lawyer present, thereby circumventing both domestic and international human rights law. UK officials have also taken part in, witnessed or effectively condoned the interrogation under duress of UK detainees in the custody of the USA and other countries.

As described above, information obtained by such illegal methods has been ruled admissible in the UK and, it is feared, may have formed part of the secret "evidence" used by the government to justify the incarceration of people suspected of involvement in terrorism.

In November 2004, the UN Committee against Torture recommended that the UK government "should ensure that the conduct of its officials, including those attending interrogations at any overseas facility, is strictly in conformity with the requirements of the Convention [against Torture] and that any breaches of the Convention that it becomes aware of should be investigated promptly and impartially, and if necessary the State party should file criminal proceedings in an appropriate jurisdiction".

[54] *Report by Mr Alvaro Gil-Robles, Commissioner for Human Rights, on his visit to the United Kingdom, 4-12 November 2004*, CommDH(2005)6, 8 June 2005, p. 12.

An approach that undermines human rights law and standards has also been apparent in relation to UK troops in Iraq. In response to well-substantiated allegations that during the period of occupation, UK troops had committed serious human rights violations in Iraq, including unlawful killing and torture or other ill-treatment, the UK authorities asserted that human rights law did not bind its armed forces in Iraq.

Amnesty International considers that the UK is bound by its international obligations insofar its armed forces and other agents exercise effective control over place or people. These obligations include, among others, relevant provisions of ECHR, the International Covenant on Civil and Political Rights and the Convention against Torture.

These obligations are therefore directly applicable to the conduct of UK troops in Iraq. In light of this, the UK is obliged to ensure the initiation of prompt, competent, thorough, independent, impartial and effective investigations into alleged human rights abuses by UK forces.

The UK is also in breach of international and domestic human rights law through the role it is playing in the internment without charge or trial of at least 10,000 people in Iraq. UK officials sit, along with US and Iraqi officials, on the Joint Detention Review Board, which reviews the cases of all those interned by members of the Multinational Force in Iraq (in most cases, by US troops). UK troops are themselves holding around 10 "security internees" in Iraq without charge or trial, including at least one person who holds both UK and Iraqi citizenship.

Stirring Up Racism

The UK government has done little in practice to allay fears among the country's three million Muslims, as well as human rights activists and many others, that the "war on terror" is anti-Muslim and anti-foreigner, and that racial tensions will be exacerbated as a result.

The ATCSA was blatantly discriminatory against foreigners and was eventually ruled to be unlawful on this basis. Government policies and speeches have persistently linked Muslims, asylum-seekers and foreigners with "the terrorism threat". The Minister for Counter Terrorism, Hazel Blears, even warned that Muslims must face up to the reality that the police would target them in "stop and search" operations because of the threat from an extreme form of Islam.

The impact of such speeches and policies is felt on the streets by people from Muslim and other ethnic minority communities. Between September 2001 and July 2004 there reportedly was a 302 per cent increase in the number of people of Asian origin being stopped and searched by police.[55] Since 2001, and particularly since 7 July 2005, a significant rise in the number of racist and faith-based attacks against individuals, homes and places of worship has been reported.

In his June 2005 report on the UK, the Commissioner for Human Rights of the Council of Europe said his discussions with representatives of the Muslim community revealed concerns over the growing Islamaphobia. "Recent legislative changes relating to the prevention of terrorism had, they claimed, not only resulted in the discriminatory treatment of individual Muslims but also contributed to raising anti-Islamic sentiments."

Human Rights and Security

The Council of Europe's Commissioner also stated that the UK had shown a tendency to "consider human rights as excessively restricting the effective administration of justice and the protection of the public interest." He added that "it is perhaps worth emphasizing that human rights are not a pick and mix assortment of luxury entitlements" and that "their violation affects not just the individual concerned, but society as a whole; we exclude one person from their enjoyment at the risk of excluding all of us."[56] His words have been recently echoed by others in the Council of Europe, including those of its Secretary General and the President of its Parliamentary Assembly.

The global impact of the UK's approach to human rights and the "war on terror" is immense. The UK is a key member of many influential organizations—the UN Security Council (as one of five permanent members), the EU (currently as President), the G8, the Council of Europe and the Organization for Security and Co-operation in Europe. It has been the main ally of the USA in the wars in Afghanistan and Iraq, and has stood by its partner notwithstanding widespread evidence of gross human rights abuses, including allegations of war crimes, by US forces. It has also joined forces with the USA in framing the debate about human rights and international security.

An example of its influence has been its role in promoting the criminalization of "incitement to terrorism" throughout the world, including through tabling the recently adopted Security Council resolution on "incitement to commit a terrorist act or acts" and its support for the recently adopted Council of Europe

[55] Report by Islamic Human Rights Commission.

[56] *Report by Mr Alvaro Gil-Robles, Commissioner for Human Rights, on his visit to the United Kingdom, 4–12 November 2004*, CommDH(2005)6, 8 June 2005, p6.

Convention on the Prevention of Terrorism. A pattern has emerged whereby the UK announces tough counter-terrorism measures that run counter to human rights standards, which other countries then say they need. The UK in turn uses such statements to support its initial proposals.

However, security and human rights are not alternatives; they go hand in hand. Respect for human rights is the route to security, not an obstacle to it. The route to security is through respect for human rights, not violations. As the UN Secretary-General has stressed: "While we certainly need vigilance to prevent acts of terrorism . . . it will be self-defeating if we sacrifice other key priorities—such as human rights—in the process".

Amnesty International's message is simple. The UK government must respond to attacks on human rights by defending, respecting and protecting human rights. Any other course of action is wrong, unlawful and counter-productive. Amnesty International adds its voice to others who have underscored that bad laws make everyone less safe.

14 October 2005

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8. Submission from the Association of University Teachers (AUT) on the Terrorism Bill

I am writing to you about the Government's Terrorism Bill and the possible implications it will have on academic freedom in higher education. As you may expect, there are increasing concerns amongst our members—over 48,000 lecturers, researchers and academic-related staff across the UK's universities and colleges—about the provisions in the Bill. To that end, I have attached a short briefing note which sets out our main areas of concern.

As you will see from the document, we are keen to find a way in which the legislation could be amended so as to protect academic freedom. The provisions which we believe may infringe academic freedom are those concerned with the Encouragement and glorification of terrorism, Dissemination of terrorist publications and Training for terrorism. In broad terms it would seem that this could be achieved either by excluding educational activity in universities from a number of the provisions or by tightening the relevant clauses to include "intent".

10 October 2005

Annex

THE TERRORISM BILL AND ACADEMIC FREEDOM

AUT represents 48,000 university staff including academics, lecturers, researchers and academic-related staff. Our interest in and concerns with the Government's Terrorism Bill relate to the impact of the proposed legislation on the ability of academics, lecturers and researchers in our universities and colleges to both teach and research while safe in the knowledge that their academic freedom is protected.

OVERVIEW

Our concern is to protect academic freedom and to ensure that academics, lecturers and researchers do not find themselves unknowingly or unwittingly in breach of the law. We do not want to see entirely legitimate debate and academic discourse curtailed, nor the ability to study and educate undermined. In short, we will not be able to defeat terrorism if we are unable to study and learn more about its causes, its methods and the motivations of those who engage in such activities. As it stands, the Terrorism Bill will undermine exactly that.

We are sure that the Government does not intend to criminalise perfectly legitimate forms of academic enquiry in both teaching and research, either directly or indirectly. Therefore we are looking to find positive ways forward which protect academic freedom while allowing the Government to legislate in this area.In that spirit we believe the following proposals as they stand may have an unintended impact on academic freedom—

- Encouragement and glorification of terrorism.
- Dissemination of terrorist publications.
- Training for terrorism

In particular, we believe that many academics could fall foul of the legislation, not because they are seeking to incite anyone to take part in terrorist activities but because they are seeking to further our understanding of such acts and of those who carry them out. Without the need to prove that someone "intends" to further the cause of terrorism, we run a huge risk that entirely legitimate forms of academic enquiry will be criminalised. In each section below we highlight a practical example of the kind of academic activity that we are concerned about.

We believe these concerns are sufficiently serious to warrant further examination of the proposed legislation by the government. We believe that two courses lay open during the passage of the Bill:

(a) The introduction of an exemption from this legislation for those undertaking legitimate academic activity, or

(b) The strengthening of the provisions on encouragement, glorification, dissemination and training to include "intention".

1. *Encouragement and glorification of terrorism*

We welcome the changes to the original clauses in the draft Bill as described in the Home Secretary's letter of 6 October. In particular, the removal of the provision for a Government list of historical "conduct or events" that are deemed unacceptable is something we warmly welcome. The very idea that the state could legislate on a historical interpretation of past activities deeply concerned the academic community.

We also welcome as a step in the right direction, the Home Secretary's removal of clause 2 and the tightening of the conditions in which someone could be prosecuted for glorification of terrorism. However we still believe that as currently drafted the glorification provision is too broad and as such may criminalise academics.

We wish to see the legislation redrafted in order to ensure that the legitimate study of controversial historical events, terrorist activity, the motivation of those who use terrorist means and the use of violence for political ends, is not curtailed as an unintended consequence of the Government's desire to restrict terrorist activities.

Our main concern here is for those academics who are engaged in teaching potentially sensitive subjects including controversial areas of history, the development of political theory or current global political events. Specific areas of study could include—

— An examination of violence in the context of Middle East politics.

— The ethics of animal vivisection, the animal rights movement and the use of both non-violent and violent action by those involved.

— The current political situation in Zimbabwe and the opposition to the regime.

It is highly likely that in the course of being taught such a module, students are required to read, listen to or watch texts and statements that do indeed glorify terrorism or could be seen to encourage it. The purpose of such activity would of course be to further their—and our—understanding of the relevant historical event or strain of political thinking. The purpose or intent would most certainly not be to encourage them to carry out such acts themselves.

However, as currently drafted, the legislation would mean that the lecturer would have committed an offence if s/he had reasonable grounds to believe that one of their students was "likely to understand it as a direct or indirect encouragement or other inducement to the commission, preparation or instigation of acts of terrorism or Convention offences". In other words the lecturer does not have to think one of their students is a terrorist themselves, only that one of his students may interpret what they are saying as being an encouragement to terrorism. The potential for this to close down the range of views expressed and controversial opinions explored in the course of academic teaching is frightening.

We believe this part of the proposed legislation needs to be redrafted in order to protect academic freedom.

2. *Dissemination of terrorist publications*

We have deep concerns about clause 2 of the Bill and for very similar reasons to those set out above. Namely, that in the course of a legitimate form of academic teaching or indeed research, academics may find themselves running the risk of prosecution even if their intentions were utterly benign. This could arise from the handing out to students of primary or secondary source materials which themselves constitute encouragements to terrorism. Likewise the reproduction of such materials in a research paper or dissertation could again potentially fall foul of the legislation.

For example, it may be that a philosophy lecturer teaching a module on the ethics of forms of political activity asks their students to study and critically analyse a text in which the case for violent direct action is espoused. Up until now such activity has been viewed as entirely legitimate and of paramount importance to our understanding of the nature of political activity. However, under the proposed legislation, such an activity could land the lecturer in serious trouble. It may well be that a student in the seminar room does actually go on to believe in and then possibly carry out violent political action. As currently drafted, the legislation would render the lecturer open to prosecution.

This provision could have serious implications for the entirely legitimate use of primary and secondary sources which may seem to justify violence. This would be a fundamental attack on the ability of academics—and their students—to study, challenge and examine difficult opinions and strains of thought. This would represent a grave threat to our health as a democracy, to academic freedom itself and would undermine the pursuit of knowledge and greater understanding in our society.

3. *Training for terrorism*

Clause 6 in the Bill relates to Training for terrorism. Once again, we do not question the Government's intentions behind this clause. However we are concerned that, as currently drafted, entirely innocent academic activity could be deemed criminal and the lecturer engaged in them subject to prosecution.

One particular concern here is the implications, for example, for those scientists working in our universities whose area of expertise includes working with noxious substances, the focus of subsection (4). What we do not want to see is a legislative framework which places the onus on these individual academics to police their own students and therefore, if they fail to do so properly, to leave them open to prosecution.

It is the concept in subsection (1)(b) of "suspects" that concerns us because we believe it is too broadly written. Using this legislation to cover situations where a lecturer "knows" their student may be intending to use the chemicals they are working with for terrorist activity is entirely legitimate. However placing the onus on the lecturer to assess whether or not they have *any suspicion at all* about any of their students is, we believe, unworkable and potentially counterproductive.

We believe the fundamental bond of trust between a lecturer and their students along with the freedom of academic enquiry, would be potentially restricted if all lecturers in certain academic fields of study were in effect forced to spy upon their students. They would have to make a subjective judgment about whether they have any suspicion that any of their students may use their knowledge at some point in the future to commit a terrorist act. We believe this to be too broadly written.

Academics do indeed have the same responsibility as any other citizen to report and prevent crime. However they should not be given the further role of spying—under threat of prosecution—on their students.

Again, we look to the Government to amend this clause so as to protect legitimate and valuable academic activity.

4. *Impact on community and race relations on campuses*

Underlying much of this debate is the impact on community and race relations within our universities and colleges. We believe there is a serious danger that the impact of the above provisions will be to undermine relations on campuses by introducing a culture of suspicion in which subjective judgments have to be made about the intentions of both staff and students. This is likely to be of particular concern for black and minority ethnic staff and students, especially those from a Muslim background.

For example, what exactly will be a cause for suspicion about a chemistry student? Their political views? Their religion? The strength of their religious convictions? The student society they are a member of? The fact that they ask too many questions? And what is a lecturer supposed to do if they do have their suspicions, legitimate or otherwise: refuse to teach the rest of the class unless that student leaves the room?

Likewise, how many lecturers will feel forced to tone down the content of their teaching out of fear that one or more of their students may misunderstand their "playing devil's advocate" for their real views on, for example, the ethical justification for violent political action? How long will it be before a student takes great exception to their tutor expressing contrary views on, say the Middle East crisis, and decides to report them to the police for glorifying terrorism?

These are real and genuine concerns that need to be considered by all Parliamentarians during the passage of the Government's Terrorism Bill.

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9. Submission from British Irish Rights Watch on the Terrorism Bill

1. Introduction

1.1 British Irish Rights Watch (BIRW) is an independent non-governmental organisation that has been monitoring the human rights dimension of the conflict, and the peace process, in Northern Ireland since 1990. Our services are available, free of charge, to anyone whose human rights have been violated because of the conflict, regardless of religious, political or community affiliations. We take no position on the eventual constitutional outcome of the conflict.

1.2 We welcome this opportunity to make a submission to the Joint Committee on Human Rights' call for evidence on the Terrorism Bill.

1.3 Although BIRW's remit does not include international terrorism, our experience in Northern Ireland is relevant to some of the provisions of the Terrorism Bill, which we therefore comment upon in this submission.

1.4 As a general comment, BIRW is concerned at the deluge of legislation aimed at combating terrorism which has been produced since 9/11. Terrorism is not overcome by outlawing it. Those who have launched the series of terrorist attacks around the world are not deterred by anti-terrorism laws. The more we react to terrorism by passing repressive laws, the more we bring about the very reactions the terrorists are seeking. There is a very real danger of manufacturing martyrs to the cause if people are convicted of ill-defined offences, or wrongfully convicted, or sent back to countries that practise torture. The July 2005 attacks on London by "home grown" terrorists showed that people can be recruited who are not themselves direct victims of repressive laws or actions, but who identify with those victims or fear that they may become such victims. Governments tend to legislate to prove that they are "doing something" about a problem, but such knee-jerk reactions have no real impact on terrorism—if anything, they fan the flames. The government would be better advised to study the causes of terrorism, especially of the home grown variety, and to come up with positive rather than negative measures that will make the United Kingdom more inclusive and thus less likely to spawn terrorists.

1.5 Furthermore, many of the offences created by the Bill already exist, so much of it is redundant.

2. Encouragement of Terrorism [Clause 1]

2.1 This proposed offence is so vague as to be meaningless. It is virtually impossible to prove that someone "knows or believes", still less "has reasonable grounds for believing" anything. It is harder still to prove that someone publishing a statement knows or believes what the general public's understanding of that statement will be, especially when that understanding can encompass indirect threats. The proposal dissolves into thin air when it posits the idea that no-one need in fact have been encouraged or induced to commit any offence [Clause 1(3)].

2.2 Moreover, this Clause makes unacceptable inroads into the right to freedom of expression. It seems to us that, if this law were to be passed, it would become illegal for someone to say, for example, that the invasion of Iraq was wrong and the Iraqi people are justified in resisting the invasion. While BIRW naturally takes no position on the war in Iraq, we do believe strongly in the right of people in a democracy to speak their minds. Stifling freedom of expression merely ensures that we do not understand our enemies or what we are up against. We agree with Voltaire's maxim that, however much we may disagree with what someone says, we would die for their right to say it. Once that principle is abandoned, democracy is dead.

2.3 In any case, this Clause is unnecessary. The following offences already exist:

- to invite support for a proscribed terrorist organisation[57];
- to "encourage, persuade or endeavour to persuade any person to murder any other person";[58]
- to "counsel or procure" any other person to commit any indictable offence;[59]
- to "solicit or incite" another person to commit any indictable offence;[60]
- to incite another person to commit an act of terrorism wholly or partly outside the UK;[61] and
- to conspire with others to commit offences outside the UK.[62]

3. Glorification of Terrorism [Clause 2]

3.1 One person's terrorist is another person's freedom-fighter. Many people around the world, including the British during the Second World War, have used identical tactics to those adopted by terrorists in the legitimate defiance of tyranny. Successive United Kingdom governments sanctioned collusion by the security forces with both republican and loyalist paramilitaries in Northern Ireland which resulted in the loss of many lives which might otherwise have been saved. Whether an act is an act of terrorism depends on who is defining it; no objective definition exists. The difficulty with defining terrorism is that, instead of describing an act, it describes the motivation of a person carrying out any of a range of acts, many of which, absent the terrorist motive, are perfectly harmless and legal. To give an example from Northern Ireland, a woman who buys a pair of rubber gloves to protect her hands while doing the washing up is behaving perfectly legally. If, on the other hand, she buys them to protect her hands while making a bomb, she commits an offence. The problem for the police and the courts, is how to prove that the mere act of purchasing the gloves was illegal.

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[57] Terrorism Act 2000, s 12

[58] Offences against the Person Act 1861, s 4.

[59] Accessories and Abettors Act 1861, s 8.

[60] DPP v Armstrong (Andrew) [2000] Crime LR 379 DC.

[61] Terrorism Act 2000, s 59.

[62] Criminal Law Act 1977, s 1A.

3.2 Under this Clause, any Irish person who expresses support for any act of republican or loyalist terrorism in the past 20 years would be committing an offence and could face up to five years in jail. Such a situation would scarcely assist the still-fragile peace process. Indeed, we suspect and fear that no such prosecution would ever be made in relation to the conflict in Northern Ireland, but that this Clause would be used against the Muslim community, raising the spectre of racism and creating an atmosphere of mistrust and resentment which plays straight into the hands of the terrorists.

3.3 This Clause also offends against the right to freedom of expression. Of course the glorification of acts of violence is offensive, but banning it does more harm than good.

4. Dissemination of Terrorist Publications [Clause 3]

4.1 One of the commonest mistakes made by governments seeking to legislate against terrorism is to assume that governments are always benign. In reality, most human rights abuses are perpetrated by governments, as report after report by the United Nations testify. Were a tyrannical government ever to gain power in the UK, would those who believe in democracy find themselves on the receiving end of this Clause? In the hopes that that is an unlikely hypothesis, do we really want to step onto the slippery slope of banning books?

4.2 Banning the publication of terrorist publications is in any case futile, given the existence of the internet.

4.3 While it may be possible to make a case for banning literature that describes how to kill and maim people, the interaction of this Clause with those on the encouragement and glorification of terrorism could lead to draconian consequences, and would again violate the right to freedom of expression.

4.4 The definition of a publication is so wide that a map of the street plan of Belfast, or the London telephone directory, could in theory be described as a terrorist publication for the purposes of this Clause.

4.5 Clause 3 (4) (b) refers to information that is "likely to be understood" as being useful for terrorist purposes. We doubt that the courts will find it easy to develop any sensible way of interpreting such a vague concept.

5. Training for Terrorism [Clause 5]

Once again, the difficulty of defining terrorism objectively rears its head.

Under this Clause, a chemistry professor who suspects one of his or her students may be studying chemistry because the student wants to become a terrorist commits an offence. Do we really want to live in a society where teachers feel obliged to vet their pupils, or where teachers go to jail for up to 10 years because a court decides they must have harboured suspicions about a pupil?

6. Attendance at a Place Used for Terrorist Training [Clause 6]

6.1 The test of someone "not reasonably failing to understand" that a place is being used to train terrorists is another subjective, unworkable test. With such a law on the statute books, might not any sensible person avoid setting foot in premises where martial arts were taught? Or pharmacy? Or civil engineering?

6.2 This Clause demonstrates at its most obvious the difficulties of legislating against terrorism. It took years before anyone realised that GP Harold Shipman was a mass murderer, yet he killed his victims under the noses of relatives and medical and other staff. It is one thing to target those who set out to learn the dark arts of terrorism, but prosecuting innocent people who happen to have attended a building where other people where trained in terrorism, on an assumption about what they must have understood, is oppressive.

7. Radioactive and Nuclear Devices and Offences [Clauses 7–10]

7.1 We understand that the Nuclear Material (Offences) Act 1983 already covers the offences set out in Clauses 7 to 9.

7.2 While we recognise that threatening to explode a nuclear device [Clause 9] is a potentially serious crime, we are aware of a case where an Irishman who threatened to assassinate the American President during a visit to Japan was sectioned under the Mental Health Act and prosecuted, despite the fact that he was suffering from a severe personality disorder and had no means of visiting Japan, let alone carrying out an assassination. In a democracy, courts should be able to take account of the likelihood of a defendant being able to carry out the threat in determining how serious the crime may have been.

7.3 So far as trespass is concerned, we would be concerned to see an extension of the scope of the already wide-ranging provisions on criminal trespass. We fear that people wanting to protest against the building of a civil nuclear reactor in their area might fall foul of Clause 10.

8. Penalties [Clauses 11 and 12]

8.1 An increase in the maximum penalty for possession for terrorist purposes to 15 years [Clause 11] is draconian. In Northern Ireland, we know of many cases where people who have been found to be in possession of weapons or explosives were either innocently looking after items for friends, not realising what those items were nor that the friend was involved in terrorism, or had no idea that such items had been hidden on their premises. Proving such a negative is very difficult, especially when others are unwilling to incriminate themselves in order to prove the other person's innocence.

8.2 A maximum sentence of life imprisonment for threatening a nuclear attack [Clause 12] is objectionable unless it is modified to take account of the person's capacity to actually carry out that threat.

9. Interpretation of Part 1 of the Bill [Clause 16]

9.1 The definition of terrorism, borrowed from s.1 of the Terrorism Act 2000, is too wide. That definition reads, in part:

"1.—(1) In this Act "terrorism" means the use or threat of action where—

(a) the action falls within subsection (2),

(b) the use or threat is designed to influence the government or to intimidate the public or a section of the public, and

(c) the use or threat is made for the purpose of advancing a political, religious or ideological cause.

(2) Action falls within this subsection if it—

(a) involves serious violence against a person,

(b) involves serious damage to property,

(c) endangers a person's life, other than that of the person committing the action,

(d) creates a serious risk to the health or safety of the public or a section of the public, or

(e) is designed seriously to interfere with or seriously to disrupt an electronic system.

(3) The use or threat of action falling within subsection (2) which involves the use of firearms or explosives is terrorism whether or not subsection (1) (b) is satisfied."

9.2 First, the term "serious violence" is problematic. It is not, of course, a scientific description or a term of art, and there is a danger that one judge's or jury's act of serious violence would be another's minor misdemeanour. Is an act which could have potentially very serious consequences, such as planting a bomb, an act of serious violence if the bomb does not detonate and no-one is hurt? Or would that qualify as a "threat" of serious violence, although it is in fact an act? The definition of serious violence is made extremely elastic by incorporating "serious disruption of an electronic system". This could elevate a hoax telephone call that brings traffic to a standstill into an act of terrorism. Children in Northern Ireland have been known to commit such acts frequently.

9.3 We are particularly concerned about the inclusion of crimes against property within the definition. This broadens the concept of terrorism way beyond the previous definition in the Prevention of Terrorism Act (Temporary Provisions) Act 1989, which was:

> "the use of violence for political ends, [including] any use of violence for the purpose of putting the public or any section of the public in fear".

9.4 The inclusion of threats within the definition is also of concern. Before anyone is convicted on the basis of a threat they have made, a careful assessment is needed of a number of factors, including:

(a) whether s/he intended to carry out the threat;

(b) whether the recipient of the threat was put in any real fear;

(c) whether the maker of the threat was capable of carrying it out; and

(d) whether s/he would in fact have done so.

There is, in our submission, a great distance between an actual act of terrorism that is easily recognisable as such whatever the definition and the vague notion of threatening such an act.

9.5 Similarly, the concept of intimidation is vague and open to many interpretations. We have special difficulty with the idea of intimidating the public, and even greater problems with the intimidation of a section of the public. If some group uses violence—or merely threatens violence—with the object of intimidating the public, it is surely the use or threat of violence which matters, since measuring the group's capacity to intimidate the public or the public's susceptibility to being intimidated is highly problematic. As for a section of the public, how large or small does a portion of "the public" have to be to qualify as a "section"? Is a group of mothers who threaten a paedophile who moves into their area committing an act of terrorism? These objections also apply to the definition of "the public" in Clause 16.

9.6 Finally, the phrase "political, religious or ideological cause" is very broad indeed. If serious violence includes disruption, is a group of animal welfare supporters who sit down in front of a lorry full of veal crates therefore terrorists?

9.7 The objective of most actual terrorism is usually the overthrow of the state, or at least the status quo, although loyalist violence in Northern Ireland has been considered, by its supporters if no-one else, as pro-state. That being so, it is crucial that a democratic state does not over-react to terrorism or the threat of terrorism, or mistake justifiable acts of civil disobedience for terrorism, because to make any of these errors can catapult a state out of democracy and into despotism. As a lesser consequence, these errors can cause the state to react in ways that bring the law into disrepute, thus making it more difficult to uphold the rule of law. In either case, the state runs the risk of acting in such a way as to create the very situation the terrorists are seeking to achieve. It is for this reason that the definition of terrorism is so important. The definition in the Terrorism Act 2000 is so broad and diffuse that it runs the risk of creating crimes without real victims, an outcome which would bring the law into disrepute and undermine the rule of law.

10. Grounds of Proscription [Clauses 17 and 18]

10.1 It follows from what we have said above about the proposed offence of glorifying terrorism [Clause 2] that we oppose the inclusion of glorification of terrorism as a ground for proscription.

10.2 Proscribing organisations and prosecuting their members drives them underground and increases their allure for certain people. Membership is difficult to prove and prosecutions on such a basis are open to abuse, especially in the light of the provisions contained in ss 108 and 109 of the Terrorism Act 2000. These provide that evidence from a senior police officer will be enough to convict someone of membership of a prescribed organisation, and suspects' silence under police questioning will be taken as corroborative of that evidence. Proscription may breach the right to freedom of expression and to freedom of association.

11. Extension of Period of Detention by Judicial Authority [Clauses 19 and 20]

11.1 BIRW is fundamentally opposed to the extension of detention without trial to a period of up to three months. The grounds for such detention would be:

"(a) to obtain relevant evidence whether by questioning him or otherwise;

(b) to preserve relevant evidence; or

(c) pending the result of an examination or analysis of any relevant evidence." [Clause 20 (3)]

A person should not be arrested without reasonable grounds,[63] and it is not acceptable to arrest someone first and then seek the grounds which should have been established before the arrest. If proper groundwork has been done before an arrest, then there should be no need for prolonged detention before charge. It would be wholly unacceptable to question a suspect for three months. The police already have sufficient powers of search and seizure that it ought not to be necessary to imprison a person for three months in order to prevent him or her form destroying evidence. Nor is it acceptable to detain someone for so long pending the outcome of forensic or other tests.

11.2 Detention without charge for three months is the equivalent of a six months' prison sentence with time off for good behaviour. Such a long period of detention undermines the presumption of innocence and violates Article 5 (3) of the European Convention on Human Rights, which provides that detained persons should be produced promptly before a court. A three-month detention period would require a derogation from the Convention, in our view, which could not possibly be justified, despite the bombings in London last July, as there is no state of emergency threatening the life of the nation, as proscribed in Article 15.

12. All Premises Search Warrants [Clause 21]

In view of the extensive search powers already contained in Schedule 5 of the Terrorism Act 2000, and the specific "all premises" warrant provisions in ss 113 and 114 of the Serious Organised Crime and Police Act 2005, the provisions in this proposed Clause seem redundant.

13. Search, Seizure and Forfeiture of Terrorist Publications [Clause 22]

In view of the extremely broad definition of a terrorist publication in Clause 3, the threshold for issuing a warrant—reasonable grounds for suspicion—seems far too low. A search for the range of materials covered by Clause 3 would be likely to be extremely disruptive to a person's office or home, and completely disproportionate to the right to privacy and family life protected by Article 8 of the European Convention on Human Rights.

14. Stop and Search Powers [Clauses 23 and 24]

As with so much else in this Bill, we fear that these extensions to existing powers will act as a stalking horse for other areas of the law, beyond terrorism, and will be used ultimately, for instance, against those engaged in legitimate domestic protest.

[63] Police and Criminal Evidence Act 1984, s 24, as amended by the Serious.

15. Conclusion

This Bill is unlikely, in our view, to do anything but make a bad situation worse. It creates vague offences which undermine fundamental human rights and freedoms, whilst contributing little or nothing to defence against terrorism. Faced with outrages like the July 2005 bombings in London, it is all too easy to over-react and to put in place repressive and devise laws that undermine the very democracy we are seeking to defend. We hope that the Joint Committee on Human Rights will advise the government not to go ahead with the Terrorism Bill, but instead to seek positive ways to reinforce our society so that it becomes a place less likely to breed terrorism or to become a target for it.

October 2005

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10. Futher submission from British Irish Rights Watch to the JCHR's inquiry into counter-terrorism policy and human rights

Introduction

British Irish rights watch is an independent non-governmental organisation that monitors the human rights dimension of the conflict and the peace process in Northern Ireland. Our services are available free of charge to anyone whose human rights have been affected by the conflict, regardless of religious, political or community affiliations, and we take no position on the eventual constitutional outcome of the peace process.

We welcome this opportunity to make a submission to the Joint Committee on Human Rights concerning counter-terrorism policy and human rights. We have only commented on the human rights implications of developments in counter-terrorism policy in the UK which fall directly under the remit of BIRW.

This submission comments upon:

- Unacceptable behaviour;
- Deportation, diplomacy and article 3 of the European Convention on Human Rights;
- Exclusion;
- Pre-trail courts;
- Special judges;
- Intercept evidence;
- Extended detention;
- Establishing a judicial role in the investigation of terrorist crimes;
- Reconciling human rights and national security;

Unacceptable Behaviour;

British Irish rights watch is concerned by the list of unacceptable behaviours which may be used by the Home Secretary as grounds for deporting non-UK nationals. These measures, like those outlined in the draft Terrorism Bill, are very wide, and hence open to broad interpretation. Subsequently, there are limits on the safeguards which could be put in place to prevent the misinterpretation of such behaviour. Would a Sinn Féin MP, who said he did not regret the bombing of the Conservative conference in Brighton in 1984, be guilty of glorifying terrorism?[64]

British Irish rights watch does not believe that these measures are a productive or efficient method of preventing terrorism. By setting boundaries on freedom of expression, the government appears to be legislating on the definition of legitimate and illegitimate speech. Such judgements are essentially objective. For instance, some view the IRA as freedom fighters, who used their limited means to take on the British state to gain a united Ireland. For others, the IRA are terrorists, whose use of violence and targeting of civilians debase any legitimate political claims.

Freedom of expression is a cornerstone of UK democracy. The discussion, analysis and debate of a wide range of views contributes to the development of democracy and consensus on key issues. If this debate is fenced off, then extremist views have no counter-weight, consensus is lost, and democracy severely undermined. One motivation of the July 7 suicide bombers was a sense of alienation and isolation from the UK mainstream. Rather than pushing such individuals further toward the fringes, the Government should be seeking to engage individuals and communities of all political, religious, economic and social persuasions in the democratic process.

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[64] Conor Murphy, MP for Newry and Armagh, told a Conservative Party fringe meeting that he did not regret the bombing of the 1984 conference in which five people died, just that people had been driven to violence. *I don't regret bombing, says Sinn Fein MP.* Daily Telegraph. 10 October 2005 and *Murphy's comments deserve our contempt.* Newsletter. 11 October 2005.

By proscribing certain individuals and sources of information, the Government runs the risk of "glamorising" the very elements of society it is trying to contain. The caché of extremism increases as it is pushed further towards the margins; where those punished for their views take on the role of "martyrs for the cause".

BIRW is concerned by Charles Clarke's statement: "A database of individuals around the world who have demonstrated these unacceptable behaviours will be developed and will be available to entry clearance and immigration officers."[65] As noted later in this submission, the standards of democracy, freedom of speech and treatment of prisoners vary across the world. As a result, individuals may be placed on the database in their home countries, for behaviour which in the UK would not be deemed unacceptable. This may further impact then upon an individual's ability to claim refugee status or seek asylum should they be forced to flee their home country. This database amounts to legislating outside our jurisdiction; where the "fight against terror" is enabling the UK government to influence the internal politics of other states, in ways which may offend against the right to self-determination.

BIRW urge the Joint Committee to encourage the Government to re-think the grounds for deportation, and scrap the list of "unacceptable behaviours".

DEPORTATION, DIPLOMACY AND ARTICLE 3 OF THE ECHR

British Irish RIGHTS WATCH are strongly opposed to the use of torture, and have actively campaigned for its abolition. We are hence alarmed by the proposed new powers for the deportation of non-UK nationals.

British Irish RIGHTS WATCH is seriously concerned by the "Memorandum of Understanding" the Government has signed with Jordan, to regulate the treatment of individuals deported from the UK to Jordan. We do not believe that such agreements with Jordan, nor any other country on the Government's list, are a suitable measure for protecting the rights of individuals from torture.[66] Although Jordan is a signatory to the UN Convention against Torture, consistent allegations of the practice of torture and other cruel, inhuman or degrading treatment or punishment have been made by both individuals and human rights groups—in particular, to elicit information from those suspected of belonging to extremist Islamic organisations or prisoners detained on grounds of national security.[67] For instance, Jordan is known to use sleep deprivation and suspension, i.e. hanging from the limbs, among other techniques.[68]

British Irish RIGHTS WATCH believe that diplomatic assurances in themselves indicate a full awareness that torture in detention is at least a possibility and at worst, a reality. The practice of deporting individuals, who have sought asylum in the UK, to countries which practice torture is surely akin to the practice of torture by the UK Government itself.

British Irish RIGHTS WATCH also believe that diplomatic assurances protect only the few who are subjected to extradition under these agreements. They do not seek to improve the general conditions of detention in such countries, nor to aid in the end of torture on a local or national level. This indicates the UK's disregard for both human rights generally, and international obligations to proscribe torture as a service to humanity—"obligation *erga omnes*".[69]

British Irish RIGHTS WATCH believe that the deportation of non-UK nationals, suspected of terrorism, on the basis of diplomatic assurances, directly conflicts with Article 3 of the European Convention on Human Rights (no-one shall be subjected to torture). If the UK is to adopt practices which conflict with Article 3, which is, of course, non-derogable, it will be tantamount to a back-door, illegal derogation.

British Irish RIGHTS WATCH wholeheartedly agree with the UN Special Rapportuer on Torture who criticised the UK's attempts to ignore its human rights obligations. In particular, Manfred Nowak has commented on how plans such as these reflect a wider tendency across Europe to avoid international obligations, and that diplomatic assurances should not be used as a means to avoid these obligations."[70] BIRW also agrees with the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT), which states:

[65] *Tackling terrorism—behaviours unacceptable in the UK.* Press release, Home Office. 24 August 2005. http://www.homeoffice.gov.uk/about-us/news/news-tackling-terrorism?version = 1

[66] The Government's list of countries, with whom they are negotiating similar Agreements, include Algeria, Lebanon and Morocco. *UK Detention Plan Amounts to Punishment Without Trial.* 16 September 2005. Human Rights Watch. www.hrw.org/english/docs/2005/09/16/uk11751.htm

[67] See Human Rights Watch, Amnesty International and Arab Organisation for Human Rights.

[68] *Examples of Torture or other Cruel, Inhuman, or Degrading Treatment Condemned in the U.S. State Department's 2003 Country Reports on Human Rights Practices. Human Rights Watch. http://www.hrw.org/campaigns/torture/methods/stress duress.htm*

[69] The International Court of Justice recognized, "[t]he prohibition in international law of acts, such as those alleged in this case (on torture), is an obligation erga omnes which all states have a legal interest in ensuring is implemented." Cited in *The International Law of Torture: From Universal Proscription to Effective Application and Enforcement.* Harvard Human Rights Journal. Spring 2001. Vol 14.

[70] *Diplomatic Assurances not an adequate safeguard for deportees, UN Special Rapportuer against Torture warns.* Press release. 23.08.05. http://www.unhchr.ch/huricane/huricane.nsf/view01/9A54333D23E8CB81C1257065007323C7?opendocument

> "It has been advanced with some cogency that even assuming those authorities do exercise effective control over the agencies that might take the person concerned into their custody . . . ... there can be no guarantee that assurances given will be respected in practice. If these countries fail to respect their obligations under international human rights treaties, ratified by them, . . . why should one be confident that they will respect assurances given on a bilateral basis in a particular case?"[71]

British Irish RIGHTS WATCH draw the Joint Committee's attention to the recent adoption of the *Twenty Guidelines on Forced Return* by the Committee of Ministers. The guidelines attempt to find a balance between the protection of individuals and the rights of states to control the entry and residence of non-state nationals in their country. Guideline 2 for instance states that individuals subject to a removal order should not face the risk of death, torture or inhuman or degrading treatment or punishment, be that a risk from non-state actors or the state authorities themselves.[72] The guidelines go onto address the remedy available against a removal order, and state:

> "In the removal order, or in the process leading to the removal order, the subject of the removal order shall be afforded an effective remedy before a competent authority or body composed of members who are impartial and who enjoy safeguards of independence. The competent authority or body shall have the power to review the removal order, including the possibility of temporarily suspending its execution."[73]

While BIRW acknowledge that the Council of Ministers have only issued guidelines and not legally binding instructions, it is not unreasonable to suggest that the UK Government should try and follow such guidelines as closely as possible. We agree with the CPT when it states: "It should also be emphasised that prior to return, any deportation procedure involving diplomatic assurances must be open to challenge before an independent authority, and any such challenge must have a suspensive effect . . . ."[74] This appears particularly pertinent when considering the proposed legislation. We draw the Joint Committee's attention to the following : where the "Home Secretary is personally applying his power to exclude individuals from the UK, there is no statutory right of appeal [our emphasis] . . .".[75] There is a right of appeal however, when an individual is being deported by other Home Office Ministers, or the principles are applied by Immigration/Entry Clearance officers.[76] British Irish RIGHTS WATCH believe that the right to appeal should be available regardless of who made the decision to deport. In high profile cases, political expediency has the power to undermine the human rights of individuals.[77]

British Irish RIGHTS WATCH urge the Joint Committee to encourage the Government to consider its obligations under the European Convention on Human Rights and other international human rights instrument, and not to return individuals to states where they may face death, torture, or cruel and inhuman treatment or punishment.

Exclusion

The proposed exclusion orders again ignore the negative experiences of counter-terrorism measures in Northern Ireland; where exclusion orders banned individuals from travelling to Great Britain from Northern Ireland. Such orders amounted to a form of internal exile, where individuals were denied their right to travel within the territory from which their citizenship existed. Exclusion orders not only affected those on whom they were served. Family ties and friendships were disrupted; holiday and other travel were prevented when it meant travelling through Great Britain (as is necessary for many trips from Northern Ireland); children's schooling and job opportunities for all members of the family were adversely affected. There was no right of appeal against an exclusion order, and such orders breached not only Article 12 of the Universal Declaration of Human Rights (no one shall be subjected to arbitrary interference with his privacy, family, home or correspondence....), but the Treaty of Rome, which allows for freedom of movement for European citizens to seek work, and the rules of natural justice.

BIRW, drawing on its experience of exclusion orders in Northern Ireland, urges the Joint Committee to ask the government not to utilise such measures in the UK.

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[71] *15th General Report on CPT's Activities (2004-05)*. European Committee on the Prevention of Torture and Inhuman or Degrading Treatment or Punishment. 22.09.05 www.cpt.coe p. 14

[72] Paraphrased from. *Twenty Guidelines on forced return*. Council of Ministers. May 2005. www.coe.int p. 12.

[73] *Twenty Guidelines on forced return*. Council of Ministers. May 2005. www.coe.int p.20

[74] *15th General Report on CPT's Activities (2004–05)*. European Committee on the Prevention of Torture and Inhuman or Degrading Treatment or Punishment. 22.09.05 www.cpt.coe p. 14

[75] *Exclusion or deportation from the UK on non-conducive grounds: Consultation document*. 24.08.05. www.number-10.gov.uk

[76] *Exclusion or deportation from the UK on non-conducive grounds: Consultation document.* 24.08.05. www.number-10.gov.uk

[77] Omar Mohammed Bakri has dual Syrian and Lebanese nationality, but has indefinite leave to remain in the UK after gaining political asylum in the 1980s. He is a controversial, radical Islamic preacher, who came to prominence through his work with an extremist Islamic group, al-Muhajiroun, and his failure to condemn the bombings in London on 7 July. The Government exluded him from returning to the UK from Lebanon, where he was on vacation, on the grounds of his alleged incitement and glorification of terrorism. *Cleric Bakri barred from Britain* and *"No tears shed" on Bakri UK ban.* 12.08.05. BBC News.

Pre-trial Courts

British Irish rights watch has previously addressed the issue of pre-trial courts in a submission to the Joint Committee on the Convention on Torture. As a result, an abridged version of the relevant section is set out below.

> Changes to court procedures
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> The Prime Minister Blair's recently announced pre-trial process for those suspected of terrorist activity is a cause of great concern for British Irish rights watch.[78] The new process would allow "secret" evidence to be examined before a juryless court to see if it justified the continued detention of an individual. The proposed courts are similar to Diplock courts used in Northern Ireland. Introduced in 1973 to ostensibly end intimidation of jurors by paramilitaries, Diplock courts sat without jurors and the standard for the admissibility of confession evidence was lower. The absence of a jury in Diplock courts had several key impacts upon due process and the right to a fair trial. Firstly, the judge became the tryer of both fact and law. The rules allowing the judge to draw adverse inferences from a suspect's silence under police questioning or failure to testify in his own defence make further inroads into the judge's ability to remain an impartial arbiter. Secondly, the lack of a jury had a deadening effect on the defence; barristers often tailored their arguments to the judge in question, rather than to the wider case. The impact was that on appeal, it was difficult for judges to explore points which had been previously omitted. The lower standard of admissibility for confession evidence saw the judge operating as judge and jury became particularly problematic. The result was a high conviction rate yet numerous claims of miscarriages of justice. The lower standard of evidence and the absence of a jury directly contravenes the right to a fair trial, both of which are proposed with secret courts.
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> The new courts will consider "secret evidence", the nature of which will not be made available to the defendant. Media reports indicate that some of this evidence may include telephone taps (though this has yet to be officially confirmed).[79] BIRW is concerned attempts to introduce such courts into the UK under emergency legislation are illegitimate and represent a gross undermining of human rights. BIRW is also disappointed that while Diplock Courts are being abolished in Northern Ireland under the repeal of emergency laws, the proposed new courts will be introduced in Northern Ireland.[80]

British Irish rights watch call on the Committee to protect the right to a fair trial, a right which would be denied under this proposed legislation.

Special Judges

British Irish rights watch is confused by the use of the term 'special judges' as cited in Tony Blair's speech of 5 August 2005. We ask the Committee to seek clarity from the Government on what is meant by this term, and what the implications of the introduction of "special judges" will be on the judiciary.

In Northern Ireland, we saw the development of a cartel of special judges—there are only 11 judges in the Diplock Court system. As a result, judges become "case-hardened"; and lawyers tailored their arguments to fit their perceptions of the individual judges' personalities and even prejudices. The absence of a jury can also directly increase the chances of the right to a fair trial being undermined.

Use of Intercept Evidence

Given that terrorists can avail themselves of the benefits of modern technology, on the face of it there is an argument for giving the prosecution equality of arms. However, careful attention needs to be paid to the human rights implications of covert surveillance, in particular its impact on the privilege against self-incrimination, which forms an important element of the right to a fair trial. Care also needs to be exercised in targeting suspects for such surveillance, because of its impact on the right to privacy, not only of the suspects but of third parties.

If intercepted communications are to be allowed in evidence, then so too must information about how such evidence was obtained, in order that the defence may challenge evidence that was gathered improperly. The use of intercepted material which is shrouded in secrecy because of an alleged need to protect sources and methods is not acceptable.

The use of telephone intercepts should be the subject of keen safeguards; with a rigorous system for approval. BIRW believe that such intercepts should be used for the minimum amount of time necessary and therefore be subject to regular review. The aim should be to remove them at the earliest opportunity.

[78] Mr Blair announced on 5 August 2005 that the Government is investigating the introduction of new court procedures including a pre-trial process. Mr Blair also announced a desire to extend the detention time of suspects. These measures will only apply to those suspected of terrorist activities/involvement/incitement. *Prime Minister's Press Conference.* 05.08.05. www.number-10.gov.uk

[79] *Secret Terror courts considered.* BBC News 09 August 2005

[80] *Ulster to get secret courts.* Belfast Telegraph. 10 August 2005

A system which enables individuals to find out if their telephones or other means of communication, such as email, are tapped, and to subsequently challenge such surveillance, should be put in place and must be robust and transparent.

BIRW also has concerns regarding the use of intercept evidence which could potentially compromise a suspect's right to confidential access to a lawyer. The use of evidence gained by listening to such conversations would be disproportionately advantageous to the prosecution, and again undermine the right to a fair trial. In our view, intercepted communications between suspects and their lawyers should never be admissible as evidence.

BIRW asks the Joint Committee to seek assurances from the Government that should intercept evidence be admissible in court, then a robust and transparent system of monitoring and evaluation will be created to oversee its use.

Extended Detention

British Irish RIGHTS WATCH is opposed to the extension of the time an individual can be held without charge. We already view the current legislation with regard to terrorist suspects as being on the boundary of human rights compliant policing.[81] Detention of three months without charge can have serious psychological and social implications for both the detainee and their family. The fact that detainees may not be aware of the charges or evidence against them, may have similar effects. These factors also undermine the fundamental principles of the British legal system such as the presumption of innocence, and the right to a fair trial. The justification of such an extension is to enable the police to gather more evidence—British Irish RIGHTS WATCH believe that such evidence should be in place before arrest so as to prevent protracted detention or the holding of innocent individuals. We would point to the existing mechanism of suspects being charged and then placed on remand, which, until this point, have provided an adequate method of balancing an individual's human rights with those of the community.

The policy of internment, used in Northern Ireland during the 1970s, had many of the effects noted above. Internment was introduced by the last Prime Minister of Northern Ireland, Brian Faulkner to combat the IRA, and involved the mass arrest of IRA suspects. However, those in charge of implementing the policy relied on out-of date intelligence and a proportion of those arrested and detained were completely innocent. Allegations of torture, cruel and degrading treatment began to emerge, and contributed to an upsurge in violence in Northern Ireland. More significantly, individuals who did actually pose a threat to the security of the UK had "slipped through the net" before the raids took place. Internment ultimately failed because it did not respect the civil liberties and human rights of one section of society. By directly and solely targeting Catholics/nationalists/republicans, it sent a clear message about the value of the human rights of that community. This was combined with the extent to which the UK government was prepared to go to elicit information (use of torture), and an inability to admit at an early stage, that internment was an unsuccessful policy.

BIRW encourages the Joint Committee to oppose prolonged detention without trial.

Establishing a Judicial Role in the Investigation of Terrorist Crimes

BIRW is concerned by the establishment of an inquisitorial system, which would enable judges to play a role in the investigation of terrorist crimes. The appendage of such a role onto an adversarial common law system, such as exists in the UK, would be problematic. One cannot view this proposal in isolation from the other aspects of the legislative package, for instance, special courts and the use of intercept evidence.

Undoubtedly terrorism is a very serious crime. However, there is no justification for the removal or restriction of the due process rights of individuals who have been accused of such offences; especially as the sentences for terrorist offences are so severe. BIRW believe it is imperative that terrorist suspects are accorded the same due process rights, especially with regard to access to legal advice and facilities for preparing their defence, as any other criminal suspect.

BIRW asks the Joint Committee to remind the Government of the importance of equal due process rights for all suspects.

[81] Terrorist suspects can be held for up to seven days without charge in contrast to 96 hours or four days for ordinary criminal suspects.

Reconciling Human Rights and National Security

As this submission, and the our previous submission regarding the Terrorism Bill, have indicated BIRW remains concerned that the tension between human rights and national security is seen to be at breaking point. The UK is not an autocratic state. However, increasingly harsh legislation is detaching us from the values to which we subscribe—freedom of speech, tolerance, democracy and political moderation. By subsuming our own social and political values, in the name of national security, we allow the terrorists to win.

Repressive laws do not prevent terrorism or eradicate it. If we treat terrorists differently from other criminals because of the motive for their crimes, we only create miscarriages of justice and martyrs to the cause.

Terrorism is not usually mindless. Attacks may be unannounced; their consequences may be unspeakable; they may be morally indefensible; we may not understand them; and we may disagree with them profoundly; but they are usually done for a reason, however misguided. Very often that reason has its foundations in ignorance, poverty, or injustice, or some combination of the three. Those who turn to terrorism may be fanatics or bigots, but it is important for the targets of terrorism to be objective and honest when addressing the inevitable cry of the victims, "Why us?"

Although governments often seek to portray themselves as neutral in combating terrorism, they are never so in fact. Governments' role is to defend the state and maintain the status quo—this is far from being a neutral role. In our experience in Northern Ireland, successive governments and the agents for whose actions they are responsible (principally the civil service, the army, the police and the intelligence service) have not only pursued their own agenda, but in some cases have actively colluded with paramilitaries in that pursuit. Far from hastening the end of the conflict, such policies have deepened and prolonged it. Many lives have been lost, which could and should have been saved.

BIRW's experience of Northern Ireland suggests that only three mechanisms can effectively combat terrorism. The first is preventative, and therefore preferable: the collection of accurate intelligence and the proper use of that intelligence to prevent attacks. The second is deterrent: the effective detection of crime. The third is the most valuable of all: political resolution. Potentially repressive legislation, and powers and measures such as those proposed are not, in our view, likely to succeed in combating terrorism.

BIRW urges the Joint Committee to encourage the Government to maintain the balance between national security and human rights protection.

October 2005

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11. Submission from The British Psychological Society to the JCHR's inquiry into counter-terrorism policy and human rights

The British Psychological Society welcomes the opportunity to contribute to the inquiry by the Joint Committee on Human Rights into the subject of counter-terrorism policy and human rights.

Our comments will address both developments in counter-terrorism policy in the UK since 7 July 2005, including the measures discussed by the Prime Minister at his press conference on 5 August 2005, and the provisions of the Terrorism Bill (as published on 12 October 2005). We would also like to draw the Joint Committee's attention to our previous submissions in these areas.

We believe that our particular area of expertise is most appropriately focused on the issues of 'encouraging and glorifying' terrorism. These issues arise in both the proposed powers of the Home Secretary and the provisions of the draft Terrorism Bill. We also wish to comment on the extension of the period of detention by judicial authority.

We note that the Terrorism Bill published on 12 October 2005 (and announced by the Home Secretary, Charles Clarke on 6 October 2005), includes several amendments from previous versions. The original specific offence (Section 2 of the previous draft) of "glorification of terrorism" has been deleted. This is welcome, but we note that "glorification" remains within the new Section 1 of the Bill. The issues of psychological perspectives on "glorification", "intent", "incitement" and "encouragement" therefore remain worthy of discussion.

General Comments

Psychology has a wealth of evidence regarding processes of persuasion and social influence (e.g. Cialdini, 2001). A critical conclusion from this literature is that influence is not purely in the hands of the source or promulgator of information. Rather, the potential for influence lies in the nature of the relationship between the source and target, and in the wider context within which the relationship exists (Abrams & Hogg, 1990).

The Terrorism Bill

The offences listed in the provisions of the Terrorism Bill are very broad and cover issues that can clearly be distinguished in psychological terms.

The list:

Encouragement of terrorism

1 Encouragement of terrorism

2 Dissemination of terrorist publications

(3 Application of ss 1 and 2 to internet activity etc.)

(4 Giving of notices under s 3)

Preparation of terrorist acts and terrorist training

5 Preparation of terrorist acts

6 Training for terrorism

(7 Powers of forfeiture in respect to offences under s 6)

8 Attendance at a place used for terrorist training

Offences involving radioactive devices and materials and nuclear facilities and sites

9 Making and possession of devices or materials

10 Misuse of devices or material and misuse and damage of facilities

11 Terrorist threats relating to devices, materials or facilities

12 Trespassing etc. on civil nuclear sites

covers five psychologically different issues: Acts (items 9, 10, 11, and 12), Preparation, training or practical support for such acts (items 2—in part, 5, 6, and 8) , Encouragement of acts through the dissemination of publications or otherwise (items 1 and 2—in part) and Glorification of terrorism (elements of items 1 and 2).

We wish to make a number of points specifically relating to issues 1 and 2.

In general terms, many of the terms used in the draft Bill are either vaguely defined or have multiple meanings. Observers may well disagree as to the meaning of terms such as "encourage", "incite", "glorify" and even "information". In particular, for psychologists, terms such as "encouragement" or "incitement" refer to the speaker's intentions and to the likely or possible effects of statements on the audience. It is very difficult to judge—and certainly to judge beyond reasonable doubt—what a person intended and what the effects of any statements may be. When the known disputes (even at the level of the United Nations) about the definition of "terrorism" itself are also considered, the possibility for judicial inconsistency is great.

Dissemination of Information vs Encouragement

The draft Bill, as it stands, deals with two different issues in Section 2—the provision of information and the encouragement of terrorism. Thus, Section 2(2)b deals with "information of assistance in the commission or preparation" etc, whereas Section 2(2)a deals with "direct or indirect encouragement". These should be separated.

The elements of Section 2 that deal with dissemination of information as encouragement and glorification—subject to our other caveats below—should be clearly distinguished from those elements of Section 2 that deal with dissemination of information of practical utility. These two issues are different in psychological terms.[82]

Encouragement and Glorification

The issues of "encouragement" and "glorification" of terrorism are essentially psychological. These are combined in Section 1 as a single offence, (we presume), because they are believed materially to increase the likelihood of terrorist acts being committed. They are, therefore, psychological in their mode of action—they are offences because of the psychological effect they might have on others. Encouragement and glorification are, however, very different from each other.

[82] McKnight, Sechrest and McKnight (2005) recommend that psychologists should avoid comment on matters of political policy or opinion in the absence of direct evidence from psychological science. For this reason, although there are many legal and civil rights issues about the legal powers in relation to issues 5—12 which will be of great interest to psychologists who work with the victims of abuses of human rights and which have a psychological dimension, the British Psychological Society believes that these are issues best commented upon by others at present.

Encouragement

Psychological evidence on social influence (Cacioppo & Petty, 1986) and older work on obedience and conformity (Asch, 1951, Milgram, 1974) suggests that social pressure from peers or by figures of authority—may sometimes increase the probability of conformity to an instruction or group norm, even when this is antisocial or involves negative behaviour. The boundary between "instruction" and "encouragement" is a fine one. If a group opinion leader says "I think we should" do something, that is likely to be adopted as a norm, and to be a "prescriptive" norm (see Cialdini, 2001, also Abrams, Marques, Bown & Henson, 2000). Personal relationships between the encourager and the actor (House, 1981) and the personal authority of the encourager (Milgram, 1974) are also highly pertinent.

"Encouragement" *per se*, however, is not guaranteed to lead to a particular act being committed (we know that encouragement to give up smoking does not lead to a smoke-free nation). This is especially true if the encouragement comes from a minority source (e.g. one person advocating extremist action in the context of the wider peer group resisting such action). The fact that influence from groups has much more impact than influence from lone individuals suggests that convicting individuals may be extremely difficult because, if they have been at all effective, they will have had the support of others, and therefore would be highly unlikely to be solely responsible for the encouragement.

Psychologists would argue that such encouragement is a relatively weak, and certainly indirect, influence on final behaviour. Given the complexities of defining the mechanism that makes attempted encouragement actually encouraging, the decision to outlaw "encouragement" seems likely to be almost impossible to implement on a reasonable basis.

As well as the considerable variability in individual skills at persuasion, group-based norms, and individuals' vulnerability to persuasion, psychology has identified a large number of perceptual and decision stages that will be required before a potentially encouraging source of influence causes a person to act in a particular way. General statements of encouragement—in the contexts of widespread public condemnation of terrorism—are likely to very ineffectual, and indeed may even have the reverse effect (as attested to by research on thought suppression—Bargh, 1992).

It follows that caution should be exercised if an offence of "encouragement" is to be retained. Moreover, in such a case, it follows that care should be taken to ensure that "encouragement" refers to a direct communication to a potential actor, and that the communication must have a specific and explicit goal. If a clause such as Section 1(1)b were to be retained, therefore, it should be amended to remove the words "or indirect"—to leave the issue of direct communication alone.

Intent

The issue of intent (which we believe is also commented upon by other respondents) is important here. In psychological terms, as outlined above, there is a clear difference between general, indirect statements—the impact of which on a potential actor could only be via their attitudes and beliefs concerning (in this case) terrorism, and specific, direct, statements to a potential actor—the impact of which could indeed alter their behaviour.

In addition to focusing Section 1 on "direct" encouragement, therefore, the British Psychological Society welcomes the fact that Section 1 of the draft Bill includes the requirement that, for an offence to be committed, the person must "know or believe, or have reasonable grounds for believing, that members of the public to whom the statement is or is to be published are likely to understand it as a direct [...] encouragement or other inducement to the commission, preparation or instigation of acts of terrorism or Convention offences" (grammar changed and "or indirect" deleted).

We are not lawyers, and therefore do not know whether this wording constitutes a test of "intent". Psychologically, however the twin issues of a "direct" communication in the "knowledge or belief" that the recipient will understand this to be an encouragement to action are important. We recommend that the Bill be drafted to ensure such a distinction between the expression of (contemptible) views to a general audience and the intentional and direct encouragement of terrorist acts. In addition, however, we assume that the purpose is to refer to an expectation on the part of the communicator that the act of encouragement or persuasion would actually be effective. A person who makes a highly controversial speech may do so more to provoke a counter reaction from their enemies than to encourage specific acts among followers or other members of their own groups.

Glorification

The justification for outlawing "glorification" (in Section 1(2)a and elsewhere) is understandable, but in psychological terms is meaningless without a proper context.

Whereas encouragement is a direct communication to a potential actor, "glorification" is an indirect communication. It is fair to say that "glorification" may (or is intended to) alter the collective or individual belief systems or attitudes of other people such that the resulting change in their views concerning terrorism may increase the likelihood of the acts being committed. Again, psychological science (especially the theories of reasoned action and planned behaviour) tells us that the adoption of certain attitudes does indeed make

some acts more likely. However, this is only true if these attitudes are held more strongly than counterveiling attitudes and there are no stronger sources of influence from social norms, and there are sufficiently weak practical barriers to action.

Therefore, there are very important caveats here. The linkage of actions covered by this Bill to terrorist acts is tenuous. Thus, acts (9-12) are directly associated with terrorism. Preparation for such acts (5-8) is clearly closely allied to the acts themselves. Encouragement, even direct encouragement, is one further stage removed. Glorification is further removed still. Glorifying (exalting or celebrating) terrorism does not impact on a potential actor directly—in the manner that encouragement can. Importantly, the same words, phrases or images may glorify (and potentially encourage) emulation by people who already sympathise with the perpetrator's values and goals, but may result in rejection and opposition from those who do not. Therefore, a critical issue is not just the content, but also the intergroup context within which a supposedly glorifying episode takes place (Abrams & Hogg, 1990). In addition, glorification of one's own group does not necessarily imply hostile acts towards others (Brewer, 1993, Mummendey & Wenzel, 1999). Therefore, it could be argued that exalting terrorists does not necessarily imply any specifiable inducement of others to engage in terrorist acts. Without the personal and authoritative links that would render the behaviour of the individual "direct" "encouragement" as outlined above, psychological science would strongly suggest that glorification of terrorism would merely add to the generality of public views on terrorist acts that would be a partial influence on behaviour. It would be extremely difficult to establish any direct or unalterable causal link to acts of terrorism.

For these reasons, the British Psychological Society strongly welcomes the Home Secretary's decision to delete earlier Section 2 from the draft Bill.

However, several points remain. First, Section 1(1)b(ii) should be amended to refer only to 'direct' encouragement (and the same issue should be addressed elsewhere in the Bill—Section 1(2), Section 2(2)a, Section 2(3), Section 2(4), Section 3(7)a, Section 3(8)). Second, we would wish to ensure that the term "glorification" does not appear anywhere in the Bill (Section 1(2)a and 1(2)b, Section 2(4)a and 2(4)b, Section 3(8)a and 3(8)b, Section 20(2), Section 21).

Extension of Period of Detention by Judicial Authority

Section 23 of the Bill extends the period of detention for terrorist suspects without charge to three months. In previous submissions in regard to anti-terrorism provisions, the British Psychological Society (2004) commented on the potentially damaging consequences of both indeterminate detention and the nature of any interrogation or treatment experienced during detention on detainees' mental health. While we recognise the distinction between indeterminate detention and the provision of a three-month period of detention by judicial authority, the British Psychological Society is also concerned to protect the health of people thus detained. The Joint Committee may wish further to consider the appropriateness of this period, and may wish to consider whether legal provisions and practical safeguards are necessary to protect the mental health of detainees.

Additional matters

(i) Home Secretary's powers of exclusion or deportation

In the Prime Minister's press conference on 5th August 2005 the grounds for the exercise of the Home Secretary's powers of exclusion or deportation were described as:

> "The new grounds will include fostering hatred, advocating violence to further a person's beliefs, or justifying or validating such violence."

The psychological issues pertaining to 'fostering, advocating justifying or validating' violence echo those relating to "encouraging and glorifying" terrorism above.

(ii) Deportation of non-UK Nationals Suspected of Terrorism on the Basis of Diplomatic Assurances

The British Psychological Society is unambiguously opposed to torture in all forms. We have recently adopted a declaration repudiating torture and the involvement of psychologists in torture. We therefore cannot condone the possibility that non-UK nationals might be deported to countries where they may be at risk of torture and other abuses of human rights.

We note that the Prime Minister commented that "The assurances given by the receiving nation are adequate for their courts, and these countries are also of course subject to the European Convention on Human Rights and apply it directly in their own law."

Non-Governmental Organisations report routine human rights abuses in a number of the countries at issue. In many cases these abuses are perpetrated by junior officials and this may well occur without the direct and specific instigation of the Head of Government. We recommend that the Joint Committee examines closely the mechanisms proposed by which those countries will ensure that individual persons deported from the UK will not in fact be tortured.

There are practical psychological reasons for questioning whether torture would serve any useful intelligence purpose. Arrigo (2004), among other comments, pointed out that up to 95% of the victims of torture fail to comply with the demands of the torturer under even the most extreme pressure, and there are convincing psychological reasons to believe that the practical effectiveness of torture has been much over-emphasised—the justifications for torture being more likely to be revenge on the one hand and an instinctive desire to do 'all one can' in the face of a terrorist threat.

For all these reasons, the UK Government should avoid all temptations to permit any person to be under any threat of torture.

(iii) The measures Announced by the Prime Minister at his Press Conference on 5 August

The British Psychological Society has less to comment in these respects.

We note that the Prime Minister stated that "anyone who has participated in terrorism, or has anything to do with it anywhere will be automatically refused asylum in our country". We note that the phrase "has anything to do with it anywhere" is extremely loose, and hope that the procedures themselves will be much tighter.

We do not feel particularly well qualified to comment on other aspects of the Prime Minister's statement.

(iv) Intercept Evidence in Criminal Trials

Although interesting, the British Psychological Society does not feel qualified to comment in detail in respect to these proposals. We agree with other commentators who have stressed the importance of any evidence in criminal cases being open to being tested in court.

(v) A Judicial Role in the Investigation of Terrorist Crimes

Although interesting, the British Psychological Society does not feel qualified to comment in detail in respect to these proposals.

(vi) The Overall Social and Political Context in which Human Rights Standards are Understood and Applied by the Courts, the Government and others, and in which the Requirements of Security are Reconciled with those Standards

As we have stated elsewhere (British Psychological Society, 2004), we believe that a commitment to the promotion and protection of Human Rights should be a priority for government. Psychological science offers a valid basis for the consideration of Human Rights (Kinderman, 2001; Doise, 2003). From this perspective, human rights are seen as normative social representations embedded in institutional juridical definitions—the codification of how we collectively understand our relationships and obligations to each other.

In this context, we believe that it is reasonable to expect some limitations on freedom in return for security—such compromises appear part of everyday life and seem entirely consistent with ordinary interpersonal relationships. However, it is fair to say that such limitations would be appropriate if they are proportional to the threat or danger involved. From a psychological perspective, it is important that the provisions such as those in the draft Terrorism Bill are perceived as proportionate to the threat.

Moreover, people actively appraise their personal circumstances, developing and testing "models" of the world (eg Johnson-Laird, 1985). They do not act as automata, but actively formulate individual evaluative belief systems. When discussing the perceived proportionality of the security response to threats of terrorism in respect to personal liberty, it is necessary not only that this proportionality is objectively established, or established in the opinion of the security services and politicians, but is also that the general public understand and accept that such a case for proportionality has been made.

In respect to both the UK population and the world community, one final psychological issue is to consider how any UK legislation and extra-legislative procedures will be interpreted by others. For legislation to be effective it has to be seen to be fair. Great care needs to be taken to ensure that consensually valued principles of fair procedure (regardless of outcomes) are applied equally to potential terrorists and to others. If a particular group feels that unfair procedures are applied uniquely to them, it is highly likely that they will become resentful, disgruntled and potentially seek to overturn the procedures by legitimate or illegitimate means (Tyler and Blader, 2002; Wright & Taylor, 1998). Commentators have suggested that some communities (especially black and minority ethnic communities, Muslim and other faith communities and Asian, East African, Arab and other Muslim countries, etc) feel under attack at present. It has been commented that some measures intended to address terrorism in Northern Ireland in the early 1970s may have acted as a "recruiting sergeant" for armed groups. We would hope that the Government has conducted a psychologically-informed "cost / benefit analysis", weighing up the likelihood of these measures reducing the risk of terrorism versus increasing people's sense of injustice and thus increasing the likelihood of radicalisation.

24 October 2005

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12. Submission from Campaign Against Criminalising Communities (CAMPACC) to the JCHR's inquiry into counter-terrorism policy and human rights

We regard the government's proposed "anti-terror" legislation as totally incompatible with basic human rights, especially the rights to free association, free speech and liberty from unfair detention.

These new proposals would extend the current powers based on the Terrorism Act 2000, which redefined terrorism more broadly to include simply the threat of violence to property in an attempt to influence a government, anywhere in the world. That broad definition encompasses many normal political activities in this country and any resistance to oppressive regimes abroad. The Terrorism Act 2000 and its two successors have been used to suppress domestic dissent against oppression, by intimidating, detaining and even criminalising many people as "terror suspects", sometimes simply for a vaguely defined "association" with so-called terrorism. The current powers have already been designed and used for a political agenda—suppressing human rights to free association, free speech and liberty from unfair detention.

The latest proposals would intensify and extend the injustice of the current powers. In particular:

1. Two new crimes: any statements which amount to the "direct or indirect encouragement" of terrorist acts or statements which "glorify, exalt or celebrate" such acts. Reasons: The ordinary criminal law already prohibits efforts to incite violent crimes or conspiracy to organise crimes. The new "terrorist" crimes would be used to intimidate, silence and persecute merely verbal support for resistance against oppressive regimes—or even verbal support for domestic political activities which may fit the broad definition of terrorism. Such statements may include, for example, mere expressions of support for legal defence or "solidarity" statements for peace protestors accused of damage at military bases.
2. Banning groups which "glorify" terrorist acts. Reasons: The Terrorism Act 2000 has already been used in a politically biased way, by banning many groups abroad which resist oppressive regimes, wherever those groups' activities fit the broad definition of terrorism. The new power would help extend the current bans to UK-based organisations which "glorify terrorism" as broadly defined under the 2000 Act. Overall this would mean further criminalising political dissent against UK foreign policy, for example, opposition to the Iraq War or to the Israeli occupation of Palestinian land. Of course, regimes allied to the UK government are never classified as terrorist, much less UK military activities abroad.
3. A new crime of disseminating "terrorist publications". Reasons: Already the Terrorism Act 2000 has been used to prosecute a Turkish-language magazine as "terrorist property", even though it is legally sold in Turkey and simply reports on political developments there. This prosecution illustrates how current "anti-terror" powers are used to promote UK foreign policy objectives, not to protect us from violence. The new crime would further suppress dissent, without needing to demonstrate any link with a banned organisation. It is a serious attack on freedom of speech; even if unsuccessful in court, prosecutions could be highly disruptive to political dissent.
4. Detention without charge (of terror suspects) would be extended from 14 days to three months. Reasons: Already the 14-day maximum detention period has been used as a substitute for a proper criminal investigation, instead intimidating and stigmatising people as "terror suspects". An even longer period would amount to internment in all but name, thus violating the principle of *habeas corpus*. Such long detention would be used to extract real or imaginary "information" to justify detention of yet more "terror suspects".

For all those reasons, we oppose renewal or extension of any "anti-terror" powers, especially those newly proposed by the government. The new powers would extend the already excessive "anti-terror" laws and their inherent injustice. The ordinary criminal law is adequate to protect us from violence. "Anti-terror" laws designed and used mainly to protect oppressive regimes abroad and UK foreign policy objectives.

7 October 2005

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13. Submission from Campaign Against Criminalising Communities (CAMPACC) Student Group to the JCHR's inquiry into counter-terrorism policy and human rights

Introduction

There is no such thing as a risk free society. That risk is inherent to the concept of freedom is a basic truism, but one that seems to have been marginalised in the wake of the atrocities that took place on 11 September 2001. If we are to be free in any meaningful sense, we cannot have laws that impose too stringent a limit on freedom without them being absolutely necessary, yet this is the direction in which the post 9/11 anti-terror legislation has taken us and which post 7/7 legislation may exacerbate.

It is important to note, that as savage as those crimes were, they remain exactly that, crimes. Crime has always existed, but despite this, society as a whole has understood that civil liberties—the protection of the individual from arbitrary government interference and coercrcion—are the mark of progression and are too important to subsume to the danger of crime.

The New Proposals

The offence of indirectly inciting terrorism

The definition of this is extremely broad, and it is already an offence to incite or solicit another to commit an offence.

Also, the Terrorism Act 2000 made permanent those so-called "emergency" powers that were introduced during the Irish troubles of the 1970s and 1980s.

The TA 2000 already gives the Government the power to proscribe an organisation, something that they have recently done to a number of organisations (10 October 2005). Once an organisation has been proscribed, it becomes a criminal offence to be a member of said organisation, and to solicit support for it. So are these crimes really necessary?

Such broad offences may infringe upon the guarantees set out in the European Convention on Human Rights (ECHR), such as freedom of expression (Article 10) and freedom of assembly (Article 11). The Convention stipulates that any restrictions on the rights contained within have to be proportionate to the reason that the right is being interfered with. These wide, sweeping offences may offend this principle of proportionality, as laid down in *R* v *Secretary of State for the Home Department ex parte Daly* [1998].

A new crime of disseminating "terrorist publications"

This offence is extremely broad, and does not require any intention to incite others to commit terrorist acts. It also infringes upon an individuals freedom of expression, as guaranteed by Article 10 ECHR, and potentially an individual's freedom of conscience, thought and religious belief, guaranteed by Article 9 ECHR.

It would become an offence to possess or distribute any terrorist publication. A terrorist publication is one that is a direct or indirect encouragement to commission acts of terrorism, punishable by up to seven years imprisonment. The vague term of "encouragement" is worrying, and the lack of intention required may lead to legitimate political writings and publications been classed as terrorist material. This potentially stifles legitimate political debate amongst minority communities in the UK, according to what the Government of the time declares is "permissible". This offence is too broad, and too much emphasis is placed upon prosecutorial discretion.

Detention without charge of terror suspects extended from 14 days to three months

This, put plainly, is internment, which the House of Lords in December 2004 ruled was illegal and contrary to Article 5 ECHR, the right to liberty and security (see *A and others* v *Secretary of State for the Home Department* [2004] UKHL 56).

The Government already has powers in the Prevention of Terrorism Act 2005 that allow it to impose control orders of varying degrees of magnitude on both UK and foreign nationals alike. These powers are controversial, but the question has to be asked, if the police wish to hold someone for longer then the 14 day maximum currently allowed by law (and rarely used by police), then surely an application for a control order would be preferable then a situation where an individual may be held without charge for three months, and then released due to lack of evidence.

Since 11 September 2001, there have been increased reports of Islamophobia and racial discrimination against the Muslim community. Detention of Muslim suspects for up to three months without charge will only serve to push the Muslim community further away from the Government and police, further damaging community relations. The example of Northern Ireland shows that to defeat extremism, the community itself must want rid of it. Extending powers of detention for up to three months will be counter productive.

The example of Northern Ireland

Internment

The policy of internment proved to be a "huge mistake"[83], serving only to promote terrorism and misery as Lord King, a former attorney general responsible for overseeing internment, pondered "How many deaths and scars and how much human tragedy flowed from the decision to impose that system of executive action in Northern Ireland"?[84]

Practised from 1971–75, the test for internment without trial was proof 'beyond a reasonable doubt' a far stricter test than the proposed for PTA 2005, but one which nevertheless resulted in many miscarriages of justice.[85] Moreover, internment was seen as deeply damaging to relations with nationalist republican communities who were left with the impression that Britain was "authoritarian and unprincipled" with the side effect of "encouraging a lot of young men to join the ranks of the IRA".[86]

It is quite bewildering, that despite our first hand experience of the negative results of a policy of detainment without trial, that we are so rushed to continue. More so when one considers that the test for internment has plummeted from "beyond a reasonable doubt" to a mere "reasonable suspicion". Of course, it remains to be seen how the courts and the Home Secretary interpret this, but no doubt we face a very serious threat of another internment disaster.

The rule of law should be objective and firm. It is supposed to remain strong against the inconsistencies and political tendencies of the executive and the intelligence agencies. In removing this protection, the individual stands ready to lose much without adequate protection from the law.

[83] Law versus Terrorism: Can Law Win, in *European Human Rights Law Review 2005* volume 1, pp17.

[84] Lord King of Bridgewater, former Minister of defence and Attorney General for Northern Ireland, in Hansard column 1041.

[85] Lord Thomas of Gresford, Hansard, column 844.

[86] Law versus Terrorism: Can Law Win, in *European Human Rights Law Review 2005* volume 1, pp17.

That is not to say that the executive and the intelligence services are not filled with people of integrity. However, historically there is much to indicate that they have made grave mistakes that have caused much harm.

The Justification for Legislation

The governments approach has been to defend "anti-terrorism" legislation as essentially the lesser evil. The argument tends to take the line that the danger facing our way of life, our values of freedom democracy and human rights, is so great and so evil, that the government of the day, they are entitled to defend the nation in a way that may well involve committing evil acts ourselves. In doing so, we may well dispose of what may have been perceived to be our fundamental principles, but this is justified in the face of a threat that is repeatedly described as "qualitatively different".[87]

While this approach is by no means new amongst liberal democracies[88], it does seem to represent a regretful step backwards in their development. Firstly it shamelessly harnesses the power that such terms as "evil" have on the general population. As CA Gearty explains:

> One of the primary achievements of the international legal order has been to remove such tendentious and highly inflammatory absolutist talk from the conduct of nation states. We do not need to live in post-modernist times to know that evil is in the eye of the beholder, and that unleashing "necessary evils" on the world is a recipe for anarchy.

Talk of necessary evils abounds in parliamentary debate on terrorism legislation. It is very much at the forefront of our legislatures mind, but is it the right approach to be taking?

When those seen in a position of responsibility use such language, the nation itself interprets this as a cue to act without restraint. A quick glance at the statistics of attacks against Muslims indicates this.

Moreover, the government's argument is essentially an attack on the very notion of human rights as it seeks to reintroduce the idea that national utility should govern policy and override individual dignity. It is easy to imagine any number of scenarios where a 'greater good' may be enjoyed by the population if only basic fundamental rights were suspended. Of course this thinking leads to unspeakable horrors, such as the slaughter of the mentally and physically handicapped in Nazi Germany as a necessary evil for the sake of genetic purity.

Of course our government's actions are not nearly as bad as this, but there reliance on the concept of necessary evils indicates that we are embarking on a slippery slope to unspeakable horrors. As Gearty suggests:

> "limited evils quickly give way to greater ones; roughing up becomes torture, beatings become killings, deliberate humiliation becomes sadistic perversion. We know enough about sociology to understand that that the road to egregious human rights abuses invariably starts with a few limited and purportedly efficacious darts into a qualified barbitary, that an Abu Ghraib is bound to follow once you talk of the evil of your opponents and suspend law."

The alternative is obvious. To simply remain with the principles and attitudes that our legal system has produced over centuries of reform and work. This means moving away from the provocative language of evil and hatred that is thankfully absent from the law in general. Instead, there is no reason why we cannot return to the language of legality and proportionality, to the standards of universal justice applied fairly to all.

THE ALTERNATIVE

Promoting England's Criminal Justice System

The alternative to this quagmire is obvious. To remain with the principles and attitudes, forged over centuries of reform and work, which have culminated in England's much respected mainstream criminal justice system, with its adequate checks and balances and safeguards against injustice.

As noted earlier, there is no internationally accepted definition of terrorism. The reasoning behind this is the belief that prohibited violence can be condemned without reference to the motive behind the violence[89]. There is no reason why this cannot be done domestically. The criminal law is so broad in scope as to encapsulate anything deserving of being a crime, as a crime. Part of the reason why control orders and Part IV of ATCSA are weak is that it attempts to seek out and effectively punish those who are not criminals in any meaningful sense. If they were they would be prosecuted under the one of the "huge amount" of offences

[87] For examples of why the threat is "qualitatively different" see Charles Clarke's unevidenced assertions in the debate on PTA

[88] The United Kingdom government used this argument for internment in Northern Ireland and often in justifying its continued imperial presence in nations that desired otherwise. Most strikingly however, it was the argument used by the United States for using the atom bomb in Japan and indeed Britain when destroying Dresden.

[89] Warbick C, "The Principles of the European Convention on Human Rights and the Response of States to Terrorism", *European Human Rights Law Review,* 2002, 3, pp287-314

in both the criminal law and anti-terror legislation. There is not enough evidence to do this, so by definition, there cannot be enough evidence to deprive them of their civil rights. To do so is an anathema to the principles of natural justice and our legal framework.

Amendments to the law

That is not to say that there should not be a tightening up of legislation, rather that legislation must focused in more productive ways and particularly on improving methods of detection that do not interfere with civil liberties. For instance, Liberty has suggested a relaxation on the laws on intercept communications being used as evidence, a suggestion that has received support from both the police and the Newton committee[90]. Both have emphasised that surveillance and intelligence are the standard way of dealing with suspicious individuals. There is no reason why this is not sufficient for potential terrorists.

The only other argument against prosecution in the ordinary court system is the problem of revealing the identity of witnesses and intelligence agency methods. In such cases, where deemed absolutely necessary, a security cleared judge could be empowered to authorise concealing the identity of a witness and even, in extreme situations, to build up potential cases that would then be tried by other judges under standard criminal conditions.

If this is not enough to control the threat, then there is an interesting alternative; to make a declaration of war against the group alleged and treat the potential terrorists as prisoners of war. This would at least allow us to remain within our international obligations, whilst not corrupting our domestic legal system. It is a possibility that has considerable support.

CONCLUSION

To my knowledge there is not one piece of hard evidence to suggest that the new legislation would provide more protection than would have ordinarily been provided through mainstream law or by utilising the methods at the disposal of modern security services. Conversely, there are volumes of scholarly work outlining in detail the harm these measures have caused. If Al Qaeda is indeed a sophisticated terrorist organisation, it is undoubtedly effortless for them to get round the measures or to replace certain individuals. Insofar as efficacy or upholding civil liberties is concerned, both measures score very low indeed.

Moreover, we should dispel from our minds the notion that terrorists will attack us because we are "soft on terrorism". This simply does not make sense. Consider nations that have the most barbaric "anti terror" legislation, such as Israel which permit torture, collective punishment and internment, and yet it continues to be deeply troubled by it or take the example of the East German Government, which had files on a quarter of the population but were unable to prevent their own demise[91].

No terrorist has ever attacked on the basis that the nation they challenge has the right to a fair trial or are deemed innocent until proven guilty. The causes of terrorism are more complex and should be dealt with in a more intelligent way and certainly in a less harmful one. For a law to be effective, it not only means that it must be workable, but that the very nature of the legislation itself as disproportionate or likely to cause harm to the innocent may well outweigh any good intended. If civil liberties are to be sacrificed, it must be for a tangible reason that will have meaningful results in overcoming the problems at hand.

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14. Submission from Human Rights Watch on the Draft Terrorism Bill

"But let us be clear about this: while the State has the right to employ to the full its arsenal of legal weapons to repress and prevent terrorist activities, it may not use indiscriminate measures which would only undermine the fundamental values they seek to protect."—Walter Schwimmer, Secretary General, Council of Europe[92]

INTRODUCTION

Human Rights Watch condemns all acts of terrorism as a direct assault on the fundamental values of human rights, democracy and the rule of law.[93] However it is precisely in the aftermath of such atrocities as the London bombings in July that the strength of these values is tested, and the greatest vigilance is required. In order to preserve those values, it is vital that any new measures proposed in the legitimate fight against terrorism must fully respect international human rights standards.

[90] Paragraph 6

[91] Paragraph 88 of the Newton Committee report

[92] Preface to the Guidelines on human rights and the fight against terrorism adopted by the Committee of Ministers on 11 July 2002 at the 804th meeting of the Ministers' Deputies, Directorate General of Human Rights, December 2002.

[93] See, for example, Human Rights Watch, UK: Nothing Can Justify London Bombings, 7 July 2005 [online], http://hrw.org/english/docs/2005/07/07/uk11294.htm

This briefing considers the draft Terrorism Bill published on 15 September 2005. It is a preliminary briefing to assist members of those parliamentary Committees considering the measures prior to a final Bill being formally introduced. As it is only a preliminary briefing we concentrate on offences criminalizing free expression (clauses 1 and 2) and the proposal for extending pre-charge detention (clauses 19 and 20).

These far-reaching provisions are to be introduced in the fifth major piece of anti-terrorist legislation in five years. The offences of "provocation" (cl.1) and "glorification" (cl.2) criminalize speech-related conduct that is only peripherally connected to acts of terrorism. Human Rights Watch is of the opinion that these offences are neither necessary nor adequately defined, thereby posing a significant breach of the fundamental right of freedom of expression under Article 10 of the European Convention on Human Rights (ECHR). At the same time we consider that the extended detention period before charge of up to three-months is wholly arbitrary and disproportionate, not justified on the evidence and is likely to be as counter-productive as internment was in Northern Ireland.

Human Rights Watch takes the view that the full integration of all citizens and residents into society is an important long-term prophylactic against radicalization. That depends upon an open debate, tolerance and full respect for universal human rights and the rule of law. Measures that breach human rights norms may deliver short-term security, but in the long-term, they are likely to erode confidence among minority communities, undermining their willingness to cooperate with the police and security service, and creating a fertile ground for messages of hate.In making these submissions we have taken account of a number of international instruments relating to human rights and anti-terrorist measures. These include the 1995 Johannesburg Principles on National Security, Freedom of Expression and Access to Information,[94] the 2002 Council of Europe's Guidelines on human rights and the fight "against terrorism,[95] and United Nations Security Council resolution 1456, which emphasizes that—

> States must ensure that any measure taken to combat terrorism comply with all their obligations under international law, and should adopt such measures in accordance with international law, in particular international human rights, refugee, and humanitarian law.[96]

Our analysis reflects the United Kingdom's obligations under international human rights law, as enumerated in the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR) and the International Covenant on Civil and Political Rights (ICCPR). It also takes into account the four guiding principles set out by Lord Lloyd in his review of anti-terrorism legislation published in 1996, which remain highly relevant when assessing new legal measures in this area.[97]

Clause 1—Encouragement of Terrorism

Human Rights Watch has serious concerns about the proposed new criminal offence contained in clause 1 of the bill. Clause 1 makes it an offence for a person to publish a statement when he or she "knows or believes, or has reasonable grounds for believing" that members of the public to whom the statement is published are likely to understand it as a "direct or indirect" encouragement or other inducement to commit a terrorist act. It carries a sentence of imprisonment of up to seven years on conviction.

This clause is intended to implement article 5 ("public provocation to commit a terrorist offence") of the Council of Europe's Convention on the Prevention of Terrorism adopted on 3 May 2005 and signed by the UK on 16 May 2005 and signed by the UK on May 16 2005.[98] The Convention requires states parties to "adopt such measures as may be necessary to establish public provocation to commit a terrorist offence. . . when committed unlawfully and intentionally, as a criminal offence under its domestic law."[99] Under the Convention, the offence is committed when a public message "with the intent to incite the commission of a terrorist act" causes a danger that such an offence may be committed.[100] The message may either directly or indirectly advocate terrorist offences.

In so far as this covers an offence of direct incitement the UK laws are already sufficiently in place as we show below. In terms of an offence of indirect incitement the real difficulty lies in assessing where the boundary lies between this and the legitimate voicing criticism as is acknowledged in the Explanatory Report to the Convention.[101]

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94 Adopted on 1 October 1995 by a group of experts in international law, national security, and human rights.

95 Adopted by the Committee of Ministers on 11 July 2002 at the 804th meeting of the Ministers' Deputies.

96 UN Security Resolution 1456 (2003).

97 Inquiry into Legislation against Terrorism (Cm:3420, London 1996), para 3.1: "(i) Legislation against terrorism should approximate as closely as possible to ordinary criminal law and procedure; (ii) Additional statutory offences and powers may be justified, but only if they are necessary to meet the anticipated threat. They must then strike the tight balance between the needs of security and the rights and liberties of the individual; (iii) The need for additional safeguards should be considered alongside any additional powers; (iv) The law should comply with the UK's obligations under international human rights law."

98 The treaty has yet to enter into force. As of 6 October 2005, the treaty had 20 signatories, but no state had ratified the treaty. (Six ratifications are required for it to enter into force).

99 Council of Europe Convention on the Preyention of Terrorism, Article 5(2).

100 Council of Europe Convention on the Prevention of Terrorism, Article 5(1).

101 see para 92 [Online] http://conventions.coe.int?Treaty/EN/Reports/Html/196.htm

In assessing this fine line, it is important to recognize the special status enjoyed by freedom of expression under the ECHR, particularly as it is seen as a prerequisite for the enjoyment of many of the other rights and freedoms. As the European Court of Human Rights (ECtHR) has said—

> Freedom of expression constitutes one of the essential foundations of a democratic society and one of the basic conditions for its progress and for each individual's self-fulfillment.[102]

As a consequence, any proposed restrictions must be subjected to very close scrutiny as to whether the measure is both "necessary" and "proportionate" so as to comply with the grounds on which this right may be limited under article 10(2).

The ICCPR also requires that restrictions on free expression be shown to be "necessary."[103] In considering the limitations of free expression under the ICCPR, it is important to take note of the analysis of the United Nations Human Rights Committee, the body which supervises state compliance with the treaty. In its General Comment on freedom of expression, the Committee emphasized that "when a State party imposes certain restrictions on the exercise of freedom of expression, these may not put in jeopardy the right itself."[104]

Not shown to be necessary

According to the ECtHR the question of whether a restriction on free speech is "necessary" must be convincingly established as a matter of general principle.[105] The situation is that there are a plethora of existing offences available in the context of incitement in the UK. Some are terrorist-specific such as the offence of incitement of terrorist violence made illegal under section 59 of the Terrorism Act 2000. Others are to be found in the ordinary criminal law where the offence of incitement is common—ranging from a general offence of incitement to commit an indictable offence to the offence of incitement to murder. Making linguistic changes by using "encouragement" and "inducement" rather than "incitement" does not show that the proposed new offence is necessary. Indeed, both a commonsense understanding of these words and the way in which they were variously used in the discussions preceding the Convention on the Prevention of Terrorism, suggests that they cover the same or sufficiently similar behavior so as to come within the existing offence of incitement under the 2000 Act. This is certainly so in relation to a direct offence of incitement.

The government has yet to explain why existing criminal offences are not sufficient to meet the threat posed by speech which incites violence or other criminal acts. They have also not produced evidence showing how existing offences are operating in practice. In this context it is worth noting that a minister of Islam known as "Sheikh Faisal" was recently convicted of offences of soliciting murder under section 4 Offences against the Person Act 1861 and the public order offence of racial hatred. He was accused of creating a number of inflammatory audio tapes urging Muslims to fight and kill, among others, Jews, Christians, Americans, Hindus and other "unbelievers".[106] Sheikh Abu Hamza has been charged with similar offences, including solicitation to murder of non-Muslims, incitement to racial hatred.[107] Both prosecutions suggest that the law is sufficient to cover speech that incites violence.

As the Newton Committee of Privy Counsellors noted in their review of the Anti-Terrorism, Crime and Security Act 2001, the difficulties with sustaining prosecutions for terrorism offences in the United Kingdom are primarily related to matters of evidence rather than the gaps in the criminal law.[108] The Newton Committee did not identify any of the proposed new "speech" offences as being necessary. In 2004, the Joint Committee on Human Rights (ICHR) reached a similar view, arguing that the evidential see above problem in terrorism prosecutions "is unlikely to be helped by the creation of still more criminal offences."[109] In evidence to the JCHR, the Director of Public Prosecutions said that there is already "an amount of legislation that can be used in the fight against terrorism" and that the existing criminal law "covers a huge swathe of activity that could be described as terrorist". It is also notable that the Home Office February 2004 consultation paper, Counter-terrorism Powers: Reconciling Security and Liberty in an Open Society, did not itself identify a need for these new offences.

Offence lacks legal certainty

It is a well-established principle that laws must be of such certainty and legal precision that people are able to regulate their conduct to avoid infringement. This principle of legality under article 7 ECHR is confirmed by the Commissioner for Human Rights, Alvaro Gil-Robles, in commenting on the draft article 5 [then article 4] of the Convention on the Prevention of Terrorism. He said that "if the Article were

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102 Ceylan v. Turkey 1999, para 2.

103 ICCPR, article 19(3).

104 UN Human Rights Committee, General Comment 10—Freedom of expression (Art 19), 29 June 1983.

105 Sunday Times v UK (No 2) 1992 14 EHRR 123.

106 R v El-Faisal [2004]EWCA Crim 456

107 Stewart Tendler, "Abu Hamza accused of inciting hate and murder," The Times (London), October 20, 2004 ;online], http:/ Iwww.timesonline.co.uk/article/O,,2-1319188,00.html

108 Report (2003–04) HC 100)

109 Review of Counter-terrorism Powers, 18th Report of Session 2003–04.

incorporated as it stands in the States Parties' domestic law, it would be particularly difficult to predict the circumstances in which a message would be considered as public provocation to commit an act of terrorism and those in which it would represent the legitimate exercise of the right to express and idea or voice criticism freely."[110] As a line of cases before the ECtHR confirms, this is even more important in the area of free expression where it is essential for any democracy to ensure that controversial or shocking ideas, including criticisms and points of view be neither inhibited nor prohibited.[111] We believe that this is exactly what has happened in the drafting of the offence of encouraging terrorist acts. It lacks sufficient clarity to know what behavior constitutes the offence, and thus violates the principle of legality under the ECHR.

Overly broad

The new offence is overly broad. The breadth of the proposed offences is closely related to the definition of "terrorism" as it is this that triggers the offence in the first place. As newly defined in the Terrorism Act 2000, "terrorism" includes the use or threat of action including "serious damage to property" that is "designed to influence the government or to intimidate the public or a section of the public," and "made for the purpose of advancing a political, religious or ideological cause."[112] As written, the definition encompasses far more than obvious terrorist conduct such as participating in bombing and hijacking and could be read to apply to certain sorts of industrial action or unauthorized public demonstrations which cause significant economic loss.[113] Indeed it is so wide that on its margins it dispenses with the need for violence and focuses on such matters as creating "a serious risk to the health and safety of the public" and "actions designed seriously to interfere with or seriously to disrupt an electronic system." It has therefore the potential to reach many forms of non-violent direct action as well.

No intention required

As presently drafted it is only necessary to show that a person "knows or believes" or "has reasonable grounds for believing" that a statement is likely to be taken as an encouragement to an act of terrorism. Even putting aside the unusual, if not curious, mix of a subjective ("knows or believes") and an objective test ("has reasonable grounds for believing"), it is clear that the question of a person's specific intention is irrelevant.

The absence of an intent requirement is contrary to article 5 of the Convention for the Prevention of Terrorism, where it is a condition that the offence of provocation be committed "intentionally" in order for criminal liability to apply.[114] It is also contrary to the ordinary requirements of criminal law that specific intent is an essential ingredient to the commission of offences considered so serious as to warrant a maximum prison sentence of seven years or more. It is incumbent on the government therefore to show why this offence is any different. Human Rights Watch considers that it is against the fundamental principles of criminal responsibility that people are at risk of losing their liberty for a substantial period not because of what they intend as to the effect that their words may have but solely because of what they believe others may make of those words. This is further emphasized by the fact that "members of the public" is defined in the Bill as including anyone in the world.[115] Without the requirement of intent, editorialists who discuss the phenomenon of terrorism in controversial terms, without having any intent of endorsing it or inducing others to engage in it, might find themselves liable because of the actions of their readers thousands of miles.

The lack of a specific intent requirement is directly contrary to assurances from the UK government that the new offence would require intent. On 20 July 2005, the Home Secretary, Charles Clarke, told Parliament: "So direct incitement, when it is done with the intention of inciting others to commit acts of terrorism—that is an important qualification—will become a criminal offence." Similarly, the Lord Chancellor, Lord Falconer, in dismissing concerns in a BBC News interview that the new offence of indirect incitement could prevent honest discussion said: "The proposal is that indirect incitement should consist of statements made with the intention of encouraging other people to commit terrorist acts."[116]

No causal link to violence required

The other requirement for the offence of provocation in article 5 of the Convention is that the result of the statement must be to cause a danger that a terrorist act might be committed. This establishes the importance of a causal link between a statement deemed to be provocative and the act that is to be prevented. Although it is recognized that in most circumstances the prospect of violent crime is fairly remote from the act of provocation or encouragement complained of, the danger that it might be caused is the factor that ultimately justifies its criminalization.

[110] Opinion of the Commissioner for Human,Rights, Alvaro Gil-Robles, on the draft Convention on the Prevention of Terrorism, Strasbourg, 2 February 2005, BCommDH(2005)1, para 28.

[111] See, for example, Lingens v Austria, 8 July 1986, HUDOC Ref.000000108.

[112] Terrorism Act 2000, section I.

[113] It is notable that protestors at the recent Labour Party conference were detained under the Terrorism Act 2000.

[114] See also paras 80 and 99 of the Explanatory Report confirming the need for "intention".

[115] See cl.16(3) of the Bill.

[116] BBC News interview, 17 July 2005.

As presently drafted this causal link is only that "members of the public" to whom the statement is published "are likely to understand" it as an encouragement to a terrorist act. There is no need to show that any person is in fact so "encouraged" by the statement. Causality is further attenuated in that "members of the public" can include anyone in the world depending on how the statement is published.In particular the causal link in the new offence fails the imminence test as set down in the Johannesburg Principles—principles that have been endorsed and followed by many international institutions including the UN's Human Rights Committee. Principle 6 requires that there is a direct and immediate connection between the expression and the likelihood of such violence occurring.

Clause 2: Glorification of Terrorism[117]

Clause 2 provides that it is an offence for a person to make a statement that "glorifies, exalts or celebrates" the commission of any terrorist act (whether in the past, in the future or generally) in circumstances where "it would be reasonable for members of the public. . . to assume that the statement expresses the views of that person". It carries a maximum term of five years imprisonment on conviction.

This proposed offence attracts the same objections as clause 1 and, in some respects, with more force. It is again incumbent on the government to show that the offence is necessary given existing offences. These include not only the offence of incitement to terrorism (see above) but also the offence of displaying support in public for a proscribed organization under section 13 of the 2000 Act—which, in contrast to the five-year maximum prison sentence proposed for the clause 2 offence, carries a maximum sentence of six-months imprisonment.

In its terminology this offence falls within the category of an *apologie du terrorisme* offence. This category of offence is addressed in a study by a working party of the Council of Europe, the ad hoc Committee of Experts on Terrorism (CODEXTER).[118] The Committee set out to examine the incidence and experience of national provisions criminalizing the public expression of praise, support, and justification of terrorist crimes in order to analyze the potential risk of a restriction of fundamental freedoms. The results show that the majority of states have so far been able to do without a specific *apologie du terrorisme* offence, with only three countries (Denmark, France and Spain) having such a provision but arising from a general *apologie* to crime offence that is already integrated into their domestic law.While the subsequent Convention on the Prevention of Terrorism indudes an offence of "public provocation to commit a terrorist offence" to cover direct and indirect incitement to terrorism, it is clear from the explanatory report to the Convention that the aim of article 5 is to "make indirect incitement a criminal offence."[119] The Convention does not use the phraseology to be found in a typical *apologie du terrorisme* offence. There is no evidence to suggest that it requires an *"apologie du terrorisme"* offence. Indeed, some states parties to the Convention have explicitly understood it not to do so. The UK cannot therefore seek to rely on the Convention to justify the introduction such an offence.

While the drafting is similarly imprecise to that of the clause 1 offence, the consequences are likely to be more serious given the difficulties with separating this kind of *apologie* speech and acceptable free speech. This is confirmed in responses to the CODEXTER survey mentioned above when a number of countries acknowledged that making *"apologie du terrorisme"* a specific crime is the more problematic because of the possibility of infringing human rights. For example, the Netherlands in its reply explicitly states that in its country *"apologie du terrorisme"* is not a specific criminal offence at this moment, nor is the creation of such an offence envisaged since that would seriously infringe the constitutional freedom of expression".

Despite these problems and the qualification of the proposed offence as a serious crime by the length of the prison sentence, there is no requirement of specific intent on the part of the statement-maker. Not only is this contrary to article 5 of the Convention on the Prevention of Terrorism but it is also out of line with the *"apologie du terrorisme"* laws in most of the few countries where it is already an offence. For example, in Spain the crime of *apologie* is only a crime of provocation when, by its nature and circumstances, it amounts to intended "indirect incitement", that is, a statement that is specifically intended to cause its audience to take unlawful action. The statement is considered the exercise of free expression when these conditions are not fulfilled. In Denmark the public expression of approval (including appreciation and recognition) of terrorist acts is an offence but only where it can be shown that the person intended to contribute to the execution of a concrete terrorist offence.

Unlike clause 1, in the Government's proposal there is no attempt to create a nexus between the glorifying statement and the actual risk that an offence is likely to be committed. Those objections mentioned above therefore apply with even more force. It is highly questionable whether creating such a serious offence can ever be justified in the absence of a causal link to the act that is being sought to be prevented.

[117] This analysis was being finalized at the time of the Home Office announcement on 6 October that the offence of "glorification" is now to be incorporated into clause 1 as a form of "indirect encouragement." This change does not, in our view, overcome the objections detailed in this section of the briefing. It has still not been shown why it is necessary to introduce an *"apologie du terrorisme"* offence in UK law and, contrary to some media statements, "intention" is still not required for an offence to be committed. The absence of an intent requirement means that the offence remains incompatible with the requirements of the Council on Europe Convention on the Prevention of Terrorism.

[118] *"Apologie du terrorisme"* and "incitement to terrorism"—Situation in member and observer states to the Council of Europe.

[119] Council of Europe Convention on the Prevention of Terrorism, Explanatory Report, Article 5, paragraph 98.

Human Rights Watch also considers that the new offence is likely to violate the freedom of expression under the ECHR. In a series of cases, the ECtHR has held that speech criticizing democracy and calling for the imposition of Sharia law[120] or containing separatist propaganda[120] cannot legitimately be subject to restriction provided that it does not incite violence.

Likely Impact of Proposed Criminal Offences

On the media

Both new speech offences are likely to have an impact on the media, whether through self-censorship, or the prosecution of journalists or editors. To put it at its most obvious, it is questioned, for example, whether transmitting a statement of a terrorist as happened with one of the London bombers could fall within the offence of "encouraging or inducing" a terrorist act. This is particularly so in the absence of a specific intent requirement and with no provisions for a media defense. It could therefore mean that material that may be freely transmitted in other European countries or anywhere else in the world may be banned on UK-based broadcasting services. This was effectively the case with the Sinn Fein ban introduced in 1988 forbidding the broadcasting of statements made by members of Sinn Fein. Not only did the media render it something of a farce by using actors to speak the words instead, it also reflected extremely badly on the UK internationally. John Simpson, a journalist with the BBC, complained in 1991 that the Iraqi government was using the example of the ban to justify its own censorship.

Whilst such an impact on the media may not be intended, it is essential that this is clarified and assurances are given both by the government and in the drafting of the offences that media reporting on terrorism will not fall foul of any of the new measures.

Chilling effect on free expression generally

Even in the absence of any direct media restriction, the other obvious danger is that such laws have a chilling effect on free expression generally, creating self-censorship and inhibiting political discourse, including criticism of the government. Universities, schools, mosques and other places of worship are all likely to be affected by the measures. This runs directly contrary to the fact that public debates based on free and unhindered dissemination of ideas and opinions are an important way of promoting understanding and tolerance in the overall aim of preventing terrorism. And while there is little or no evidence that criminalizing such speech will deter terrorism, there is very strong evidence that it will deter free expression.

Counter productive

In all these measures, unless it is convincingly shown that they are necessary and fair, there is a danger that the very communities whose support is needed in the fight against terrorism will be alienated. This is particularly the case for the Muslim community in the UK where previous counter-terrorism measures, including indefinite detention of foreign terrorism suspects, are regarded as having had a manifestly disproportionate impact. For example, apart from organizations related to Ireland, the majority of the groups proscribed under the 2000 Act are of Islamic origin[122] At the same time the new stop and search powers introduced by the same Act have resulted in reports of disproportionate stop and search of young Muslims. This includes a recent report from the Metropolitan Police Authority which says that current practice has created deeper racial tensions and severed valuable sources of community information and criminal intelligence.[123]

Clauses 19 and 20: Extension of Detention Period

The bill proposes that pre-trial detention without charge in terrorist cases may be extended up to three months with judicial supervision. Human Rights Watch is concerned that such an extended period of detention without even sufficient evidence to warrant a criminal charge may amount to a criminal punishment without trial, in violation of the right to a fair trial and the presumption of innocence. It is unclear whether the arrested person will be informed promptly of the reasons for his arrest, as the ECHR requires.

The current maximum period permitted in terrorism cases in the UK is 14 days. Originally the period was for seven days but this was extended to14 days with effect from January 2004.[124] This period was set after 30 years of UK anti-terrorism legislation, after a series of cases in the ECtHR, and after extensive parliamentary debate. Since the 14-day period came into effect, the statistics show that between 20 January

[120] Muslum Gunduz v Turkey (No.1) (2003).

[121] EKIN Association v France (2001); Okcuoglu v. Turkey (1999).

[122] See, The Terrorism Act 2000 (Proscribed Organisations) (Amendment) Orders 2001 (SI 2001/1261) and 2002 (SIU 2002,2724).

[123] Report of the Metropolitan Police Authority, "Scrutiny on MPS Stop and Search Practice", May 2004.

[124] Criminal Justice Act 2003.

2004 and 4 September 2005, 357 people have been arrested under the relevant detention provision, of whom only 36 have been held in excess of seven days and only 11 of these being held for the full 14 days.[125] Despite such statistics showing that the present 14-day period is only rarely resorted to by the police, the current proposal is that detention can be extended to 90 days which is a six fold increase on the current period and is 30 times longer than that allowed for any other crime, including murder and drug trafficking, for example. As Human Rights Watch pointed out when the measures were first announced, this period is equivalent to the average time served for during a six-month prison sentence. As a point of comparison, one of the recently-announced measures in Australia that has been most criticized is the proposal to extend their detention period from seven to 14 days so as to bring it in line with the UK.

The police and the Crown Prosecution Service (CPS) have sought to justify the extension by arguing that the current limits are insufficient to investigate possible offences. It is claimed that the extension would avoid charges being amended as a result of ongoing investigations. In fact, it is common practice for charges to be reviewed based upon an assessment of the evidence and then amended.

It is also claimed that this extra time is needed to review complex material. However the examples given of the quantity of material that has had to be investigated in certain terrorist cases including the 80,000 CCTV videos reviewed after the July attacks, could not on a simple calculation have been completed even within a three-months period. In addition to this the police cite problems of encryption, complex international networks, and possible hazardous materials. Whilst it is not doubted that these investigations take considerable time and expertise, this must be the same for major white collar fraud, drug importation offences and other organized crime especially as there is usually a similar international dimension to these crimes. No explanation has been given why an extended period of detention is necessary in order to facilitate the prosecution of terrorism offences when it is not deemed necessary for other complex investigations.

Counter productive

The third advisory paper published with the Bill explains that the government is committed "to better understanding the process of radicalization and recruitment and tackling the focal points at which young men and women are tempted into violence." Since the majority of those held for extended periods will be Muslims, extended preventive detention has the potential to further antagonize a community who already feel that they are disproportionately affected by counter-terrorism measures. This concern will be exacerbated if the majority of those arrested are subsequently released without charged.

A report from the Institute of Race relations indicates that hundreds of Muslims have been arrested under terrorist powers since the introduction of the 2000 Act before being released without charge. The Home Office's official statistics give further cause for concern. They show that of the 756 people arrested under the 2000 Act between 11 September 2001 and 30 June 2005, only 122 were charged with a terrorist-specific offence under the 2000 Act, 141 with other criminal offences. A total of 22 people were convicted. The measure therefore poses the very real danger of mirroring the disastrous policy of preventive detention ("internment") in Northern Ireland in the 1970s, which is now widely regarded as having served as a strong motivation for the recruitment of new members of the Irish Republican Army.

7 October 2005

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15. Submission from Immigration Law Practitioners' Association to the JCHR's inquiry into counter-terrorism policy and human rights

A. Our Expertise

1. ILPA is a professional association with some 1,200 members, who are barristers, solicitors and advocates practising in all aspects of immigration, asylum and nationality law. Academics, non-government organisations and others working in this field are also members. ILPA exists to promote and improve the giving of advice on immigration and asylum, through teaching, provision of high quality resources and information. ILPA is represented on numerous government and appellate authority stakeholder and advisory groups.

2. ILPA counts among its members those who have undertaken the highly specialised work of representation before the Special Immigration Appeals Commission (SIAC), including former Special Advocates. Members have experience of dealing with cases involving the exclusion clauses of the Refugee Convention and with human rights cases involved the limitations that may be placed upon the exercise of rights in the interests of national security. ILPA members have also represented in the leading cases involving challenges to detention under terrorism legislation and in other leading immigration, asylum and nationality cases involving national security considerations.

[125] Statistics on arrests under the Terrorism Act 2000, Home Office [unpublished].

3. We have been involved in consultation and parliamentary work on all developments in the fields of immigration, asylum and nationality as they relate to counter-terrorism. In this evidence we confine our response to our areas of specialist expertise: "unacceptable behaviours" and the Home Secretary's exercise of powers of exclusion or deportation; "diplomatic assurances" and the proposals for amendment to the Immigration, Asylum and Nationality Bill 2005.

B. "Unacceptable Behaviours" and the Home Secretary's Exercise of Powers of Exclusion or Deportation

4. ILPA responded to the Home Office consultation on this matter on 18 August 2005. A full copy of our response can be found at www.ilpa.org.uk (Section on submissions). The following paragraphs summarise our comments.

5. ILPA expressed concern at the imprecise and subjective nature of the proposed list of unacceptable behaviours. "Terrorism", "freedom fighting", "insurgency" and a host of other words may be used to describe the same actions or events and the government at one period may "consider" views or actions differently from another. This has been stated frequently but it is still important, when the need to debate and spread information about threats to this society and about the best means to counter them is so vital. ILPA would be concerned if these powers were to be used to stifle debate mainly because the views expressed were unacceptable to a government.

6. ILPA's estimation is that many, if not most, of the attempts to deport foreign nationals accused of terrorist activities to date have been based on allegations of activities which amount to indirect threats to the UK's national security, public order or to the rule of law, and that the existing powers are wide enough to secure the deportation of whom the proposed powers purport to address.

7. Since the *Rehman*[126] case in the House of Lords, national security has remained an undefined, subjective concept, where a government's assessment of any threat rules the day. Because of the excessive secrecy attached to national security, it is usually impossible for members of the public or their lawyers to know whether the government are talking about direct or indirect threats to Britain's national security.

8. Although the Judges in *Rehman* avoided a clear definition of national security they did make it clear that indirect threats to British national security, brought about by the promotion of terrorism abroad, were included in the definition. They made it clear that the promotion of terrorism against any state, although not a direct threat to Britain, is capable of being a threat to the UK's national security, since increasingly the security of one country is dependent upon the security of others, so that any activity likely to create a risk of adverse repercussions, including conduct which could have an adverse effect on the UK's relationship with a friendly state, could threaten the UK's national security. Thus planning and organisation in the UK of terrorist acts abroad could be a basis for deportation.[127]

9. The open evidence in the Belmarsh detainees' cases[128] was based in part upon evidence of activities which could only be described, at their highest, as posing an indirect threat to Britain's national security, such as obtaining supplies, including boots and blankets, for Chechen rebels fighting against the Russians.

10. Where deportation is concerned, what is always required is the balancing of the public interest against the private interest. Under existing law, deportation is only warranted if that balance is struck properly and lawfully against the individual concerned. Where it has not been properly struck, or where there is a violation of a Convention right, deportation is not permissible. Where exclusion is concerned, a balance will be required if a Convention right is engaged (e.g. free speech), where the motive for the exclusion is to defeat the exercise of that Convention right.

11. The new measures are not being directed against those wanted in other countries for crimes committed or to serve prison sentences imposed by a court. If those against whom they were used could be charged or tried in the UK or abroad, it would be abusive to use deportation rather than extradition.[129] As the headline in a Sunday broadsheet article[130] put it, "throwing people out will not stop terrorism but just send it elsewhere." If the UK is facing a new international threat from an ideology that feeds a network of loosely associated terrorist cells, as the evidence before SIAC alleged, deportation or exclusion are an incomplete response.

[126] *Rehman v SSHD* [2001] UKHL 47 [2001] 3 WLR 877 [2002] INLR 92 [2002] Imm AR 98,affirming*Secretary of State for the Home Department v Rehman (Shafiq ur)* [2000] INLR 531.

[127] See *Rehman* (HL), per Lord Slynn at para 18, Lord Steyn (para 28), Lord Hoffmann (para 49). See also *R v Secretary of State for the Home Department, ex p Singh (Raghbir)* [1996] Imm AR 507, CA, at 510.

[128] A (FC) and others (FC) (Appellants) v. Secretary of State for the Home Department (Respondent), X (FC) and another (FC) (Appellants) v. Secretary of State for the Home Department (Respondent) [2004] UKHL 56

[129] See *R v Horseferry road Magistrates' Court ex parte Bennett* [1994] 1 AC 42; *R v Mullen [1999] 2 Cr App R 143, CA.*

[130] John Rentoul, Independent on Sunday 14 August 2005.

C. Deportation of Non-UK Nationals Suspected of Terrorism on the Basis of Diplomatic Assurances

12. This matter is discussed in detail in ILPA's submission of 25 September 2005 to the JCHR as part of the JCHR's enquiry into the UK's compliance with its obligations under the UN Convention Against Torture. We refer you to that submission, which also contains full references, and summarise only a few key points here.

13. It is long established in international and UK jurisprudence that the absolute prohibition on torture enshrined in Article 3 ECHR encompasses an absolute prohibition on refoulement.

14. This is not caselaw that has grown up free from any consideration of crime, or terrorism. The first case in which the European Court of Human Rights spelled out the principle, *Soering v UK*[131] was an extradition case. The other leading case, *Chahal*[132], again a case against the UK involved a person accused of terrorism.

15. Diplomatic assurances have been used in extradition cases (*Soering* was one such example) where, for example, the extraditing country has outlawed the use of the death penalty and will not extradite a person if to do so would put them at risk of that penalty. In such cases the assurance is given in respect of the sentencing powers that will be made available to a court, sitting in public, in a legal system that provides for the penalty to be withheld from the jury. Where such conditions do not hold and a fair trial is not guaranteed, diplomatic assurances may not be acceptable in such a case and attempts at extradition may fail.

16. Torture by contrast, takes place in secret, behind close doors, and the prohibition against torture is a peremptory norm of customary international law binding on all states (*jus cogens*).[133] As detailed in ILPA's submission to the JCHR on UK compliance with the UN Convention against torture, all the empirical evidence shows that diplomatic assurances are ineffective protection against the risk of torture on return, this is in accordance with what would be anticipated, and that post-return monitoring is incapable of rendering diplomatic assurances an effective safeguard against torture.

17. The existing jurisprudence has evolved in a context in which terrorism has been part of the facts of the cases. In 1996, in the *Chahal* case, the European Court of Human Rights ruled that the UK government could not rely on assurances against torture to return to India a Sikh activist wanted by the Indian authorities on terrorism charges. In 1999, the government tried unsuccessfully to return four alleged Islamic militants to Egypt by seeking assurances against torture, despite reservations expressed by Home Office and Foreign Office lawyers about the effectiveness of such measures as a safeguard against ill-treatment.[134]

18. Successive UN Special Rapporteurs on Torture, the UN Committee against Torture, the UN Independent Expert on the Protection of Human Rights and Fundamental Freedoms while Countering Terrorism, the Council of Europe Commissioner on Human Rights, and the European Committee for the Prevention of Torture have all expressed concern about the use of diplomatic assurances[135]. In the words of the UN Special Rapporteur on Torture, commenting on the UK government's plan to rely on diplomatic assurances not to torture from Jordan and other government "reflects a tendency in Europe to circumvent the international obligation not to deport anybody if there is a serious risk that he or she might be subjected to torture."[136]

19. As detailed in ILPA's submission to the JCHR on the UK's compliance with its obligations under the UN Convention Against Torture, government interest in returning people on the basis of diplomatic assurances that they would not face torture predates 7 July 2005, and was formally announced to parliament on 26 January 2005, although the first Memorandum of Understanding was agreed after 7 July 2005, with Jordan, on 10 August 2005.

20. The non-refoulement obligation is integral to the prohibition against torture. It is a norm of customary international law, and arguably enjoys the same *jus cogens* status as the overall prohibition. ILPA considers that returns based on agreements such as that concluded with Jordan are incompatible with the UK's *non-refoulement* obligation under the UN Convention Against Torture and under the European Convention on Human Rights, and that by their use, the UK is weakening the global ban on torture.

[131] 1989] ECHR 14038/88

[132] Chahal v UK, 1996, European Court of Human Rights

[133] See ILPA's submission to the JCHR regarding UK compliance with the United Nations Convention Against Torture of 25 September 2005.

[134] The case came to light when one of the men, Hanif Youseef, brought a successful civil action against the UK government for wrongful imprisonment pending deportation, *Youseef v Home Office*, High Court of Justice, Queen's Bench Division, 2004 EWHC [1884] (QB)

[135] Statement of the Special Rapporteur on torture, Manfred Nowak, to the 61st Session of the UN Commission on Human Rights, Geneva, 4 April 2005; Report of the Independent Expert on the Protection of Human Rights and Fundamental Freedoms while countering Terrorism, E/CN.4/2005/103, 7 February 2005; Report of the Special Rapporteur on Torture Theo Van Boven to the UN General Assembly, 23 August 2004, para.30; UN Committee Against Torture (UNCAT) Decision: Communication NO.233/2003, *Agiza v Sweden*, CAT/C/34/D/233/2003, 20 May 2005; Report by Mr Alvaro Gil-Robles, Commissioner for Human Rights, on his visit to the UK, 4th to 12th November 2004, CommDH(2005)6, 8 June 2005; European Committee for the Prevention of Torture (CPT), 5th General Report on CPT's activities, 22 September 2005.

[136] "Diplomatic Assurances" Not An Adequate Safeguard For Deportees, UN Special Rapporteur Against Torture Warns, United Nations Press Release, 23 August 2005. Similar concerns have been expressed by Professor Robert Goldman, former UN Independent Expert on Human Rights and Counter-Terrorism and the European Committee for the Prevention of Torture.

D. Proposed Amendments on the Immigration, Asylum and Nationality Bill 2005

21. ILPA has had sight of the letters of Charles Clarke, Home Secretary, of 15 September 2005 and 12 October 2005 (to the Rt. Hon David Davis MP and to Mark Oaten MP) and our comments on the proposed amendments are based upon reading them. At this stage, with incomplete information, our priority has been to set before the committee what we think the changes would mean in practice rather than to express a views upon them.

Arrest or detention pending deportation

22. The proposal is stated in the letters to be to extend existing powers, to obtain a warrant to enter premises to effect an arrest where a person has been served with notice of an intention to deport him/her to cases where the notice has not yet been served and entry is for the purposes of service as well as the subsequent arrest. The Immigration Officer or constable would be able to obtain a warrant to serve the notice and affect the subsequent arrest. It is unclear from the wording of the proposed amendment *(Arrest and detention pending deportation)* whether or not the new powers would apply only to cases where a warrant is obtained or whether they are sufficiently broad to allow Immigration Officers or constables to arrest a person without a warrant for the purpose of serving the notice under the Immigration Act 1971 (c.77) Schedule 2, paragraph 17(1).

23. Part VII of the Immigration and Asylum Act 1999, modelled to a large extent on the Police and Criminal Evidence Act 1984, amended the Immigration Act 1971 to give immigration offices powers of arrest and search previously the sole province of the police. Subsequent legislation has extended these powers. Section 145 of the Immigration Act 1999 provides for immigration officers to have regard to codes of practice in exercising these powers. These codes (the difficult to find Immigration (PACE Codes of Practice) Direction 2000, and the Immigration (PACE Codes of Practice No 2 and Amendment Direction of 19 November 2000, as amended apply some parts of the PACE Codes to immigration officers. However, some safeguards that apply to police officers do not apply to immigration officers, for example the requirement to give one's name when conducting certain searches. Immigration Officers are also not publicly accountable to an independent complaints authority. The only possible means of redress against them, apart from a civil action for assault or false imprisonment, is to the Immigration and Nationality Department (IND)'s own complaint procedures. These were designed to enable individuals to complain about the way in which their applications for leave had been handled and are not equipped to adjudicate on matters such as these. Nor are the IND Complaint procedures in any meaningful way independent. Complaints are dealt with by officers within the department and only monitored by individuals from outside the department, who are appointed by, and who report to, the Secretary of State for the Home Department. This lack of public accountability is of particular concern when the proposed new powers will be linked with a range of new anti-terrorist measures that appear set to be targeting certain communities.

24. This proposal is exemplary of a more general concern we have with the proposed terrorism amendments: it elides the concept of a person's presence in the UK not being conducive to the public good, with the notion that the person is a terrorist. The concept of a person whose presence in the UK is not conducive to the public good, and the attendant powers to deport, go much wider than terrorism cases. A person might, for example, have a criminal record that is entirely unrelated to terrorism or anything similar: some of the leading cases have concerned people with previous convictions for selling drugs.

Deprivation of citizenship

25. The proposal is that the Secretary of State will have powers to deprive a person of British Citizenship if satisfied that this deprivation is conducive to the public good. Under the current law a person can only be deprived of British citizenship under Section 40 (2) of the British Nationality Act 1981 if the Secretary of State is satisfied that he or she has done something which was seriously prejudicial to the vital interests of the United Kingdom or a British Overseas territory. That test is clearly capable to being successfully applied to those involved in terrorism.

26. The phrase "conducive to the public good" is much less precise. Whilst it is correct that deportations on the basis that an individual's presence was not conducive to the public good have been made previously on national security grounds, the proposed repeal of the current wording of Section 40(2) suggests an intention to use the power in situations where a person has not necessarily done something which is seriously prejudicial to the vital interests of the United Kingdom. It could be interpreted to include acts done which interfered with the interests of UK allies, if, indirectly, this was not in the public interest. It would also be used to deprive those convicted of relatively minor offences of British citizenship. The use of the term also tends to suggest that anyone whose presence is not conducive to the public good is an actual or a potential terrorist.

27. Section 40(2) of the British Nationality Act 1981 was last amended only three years ago in 2002. The Committee may wish to refer to its reports on the nationality sections of the Nationality, Immigration and Asylum Act 2002.

28. The 2002 wording "replaced provisions which can be broadly summarised as disloyalty to the sovereign, unlawful communication with the enemy, or sentences of imprisonment in any country of more than 12 months within 5 years of registration or naturalisation. The 2002 wording was taken from the European Convention on Nationality (Strasbourg 6 September 1997).

29. The other main change in 2002 was that for the first time the Secretary of State had power to deprive those born British of their nationality, provided that to do so would not leave them stateless (i.e. it could only be used for dual nationals). The Committee will recall concerns that, given that the powers applied only to dual nationals,

they were discriminatory in effect, although Ministers stated that the intention was to remove an unjustified distinction between those registered or naturalised as British and those who acquired British nationality by birth (*Hansard* HL Report 10 October 2002 Vol. 639, No. 194, Col 502).

30. As with the existing provisions, it is our understanding that those to be deprived of their citizenship will have a right of appeal.

31. The 2002 Act contain important safeguards (see Nationality Immigration and Asylum Act 2002 s.4(4)) against retrospectivity. Thus for acts done before the coming into force of the Act, a person could not be deprived of his/her nationality unless s/he could have been so deprived under the previous law. The proposed amendment contains no such protection against retrospectivity. Given the seriousness of the loss of rights associated with deprivation of citizenship, we should wish to see protection against retrospective application applied to any new powers.

Deprivation of the right of abode

32. The proposal here is stated to be to prevent the exercise of a right of abode deriving in part from a person's citizenship of another Commonwealth country where the Secretary of State thinks that it would conducive to the public good for the person to be excluded or removed from the UK.

33. Again we note the concern that not being conducive to the public good is being conflated with being a terrorist.

34. Again we question how removing a person from the UK, rather than ensuring that they face charge or trial here for any crimes, improves security, either here in the United Kingdom or internationally.

35. We are concerned to note that the test in this section is merely that the Secretary of State "thinks" that the person's exclusion or removal would be conducive to the public good, whereas for deprivation of citizenship, in the previous amendment, the test was being "satisfied that deprivation is conducive to the public good". We see no reason for the lower test. Deprivation of the right of abode has the same serious consequences as deprivation of citizenship for a dual national. The loss of the right of abode is the loss of one of the fundamental rights associated with a nationality. We recall that Britain's colonial history has resulted in their being many, rather than one, forms of British nationality and in nationality status being severed from what one might have expected to be the rights of any national: to enter, reside in and leave the country of nationality, i.e. the rights to be free from immigration control. These rights are treated as a separate package: the right of abode set out in s.2 of the Immigration Act 1971, which provides that British Citizens, as well as certain Commonwealth citizens, have the right of abode. The right of appeal against deprivation of citizenship was introduced by the 2002 Act and we should anticipate that all the arguments proffered for this change would apply equally to cases seeking to deprive people of the right of abode.

36. We also question the equation of the right of abode with "exclusion or removal". Is it is not anticipated that a person would have any opportunity to challenge their exclusion or removal from the United Kingdom? In contrast to provisions for deprivation of citizenship, no provision is made for a right of appeal against deprivation of the right of abode. But the government should be asked to clarify what rights they anticipate that a person deprived of the right of abode would have to challenge their exclusion (if not in the UK) or removal if here, and what opportunities they would have to present human rights arguments both against deprivation of the right of abode and against exclusion or removal.

37. Those affected by the proposal will be Commonwealth citizens who, immediately before the commencement of the British Nationality Act 1981 were Commonwealth citizens with the right of abode in the UK. That citizenship can be removed if it is considered conducive to the public good for them to be excluded or deported from the United Kingdom.

38. The 2002 Act contain important safeguards (now in s.40A(4) of the British Nationality Act 1981 against retrospectivity. As noted above, no such protection is offered in the new proposals to deprive people of citizenship. The same is true for deprivation of the right of abode. Given the seriousness of the loss of rights in associated with loss of the right of abode, we should expect to see protection against retrospective application applied to the new powers.

Extend the statutory requirement that an applicant must be of "good character in granting British Citizenship to all cases, save those where British Citizenship is granted because of the UK's ratification of the UN Convention on the Reduction of Statelessness.

39. We have yet to see the draft amendment reflecting this proposal. At the moment the "good character" requirement applies only to those seeking naturalisation as a British Citizen and not to those seeking to register as British. Registration and naturalisation are the only two ways in which a person can become British.

40. The important matter to note is that certain people have a right to register as a British citizen, which the proposal will take away, making all applications to become British a matter of discretion. One example is children who are born in the UK when one of their parents becomes settled or when the child remains in the UK for the first 10 years of their life and is not outside the UK for more than 90 days in any of these years. It is difficult to imagine what the good character test could mean in the case of a baby whose parent becomes settled, and not entirely clear what it would mean in the case of a 10 year old.

41. Registration has also historically been used as a mechanism to patch over difficulties created by the operation of entitlement to British Citizenship and the effect of the various forms of British nationality, including in the Nationality, Immigration and Asylum Act 2002. This has included using time limited registration periods or using rights to registration for finite groups. Again, the effect of the new measures will be to take away rights to register as British from those whose form of British Nationality gave them little other than this right.

Information: Embarking passengers

42. Embarkation controls were first reduced in 1996 under the then Conservative government and subsequently by the Labour government.[137]

43. The proposed amendment includes a power to detain a person for up to 12 hours to complete the information. See our comments on the powers given to immigration officers under *Arrest or detention pending deportation* above. These are powers to detain people leaving the United Kingdom and to establish the person's identity, compliance with conditions of leave and whether return to the UK is prohibited or restricted. We assume this is partly to ensure that the person's passport would be endorsed accordingly before they were allowed to leave. We also observe that it could provide the Government with an opportunity to gather information about the movement of certain "suspect communities" and information that individuals may be required to give as the result of provisions contained in the Terrorism Act 2000. The 1976 Prevention of Terrorism (Temporary Provisions) Act contained a similar provision for the police and immigration officers at ports to the power to detain and examine individuals arriving in or leaving Great Britain for up to twelve hours and other provisions of the Act required individuals to co-operate with those trying to prevent terrorism. It was used extensively to collect information from people travelling to or from the Northern Ireland. Home Office statistics show that in 1985 for example 55,328 people were detained and questioned under these powers and in 1986 for example, 59,481 were detained and questioned.

Refugee Convention: Construction

44. The proposed amendment would provide a statutory construction of the reference to "acts contrary to the purposes and principles of the United Nations" in Article 1(F) of the Refugee Convention which sets out the grounds on which people can be excluded from recognition as a refugee.

45. Statutory construction of the Refugee Convention was a feature of s.72 of the Nationality, Immigration and Asylum Act 2002 where the Home Office construction was the subject of criticism by the United Nation as High Commissioner for Refugees who described it as suggesting and approach "which is at odds with the Convention's objectives and purposes...runs counter to long-standing understandings developed through State practice over many years regarding the interpretation and application of Article.."[138]

46. Resolution 1377 (2001) adopted by the Security Council at its 4413th meeting, on 12 November 2001, stated that "acts of international terrorism, are contrary to the purposes and principles of the Charter of the United Nation as, and that the financing planning and preparation of, as well as any other form of support for acts of international terrorism are similarly contrary to the purposes and principles of the charter of the United Nations". All is not as clear-cut as it looks however, given that the UN has never adopted a definition of terrorism nor of international terrorism whereas the proposed clause relies on the meaning set out in section 1 of the Terrorism Act 2000 (c.11). This definition has been widely criticised by human rights organisations including Liberty and Amnesty International. It is an extremely broad definition of terrorism and encompasses actions taken for not only political, but also religious and ideological, reasons. It further includes reference to acts which involve serious damage to property but do not endanger lives or cause any injury to any individual. The Committee may wish to refer to its reports on that legislation.

47. Moreover, the draft clause is wide. "[E]ncouraging terrorism (whether or not the acts amount to an actual or inchoate offence)" is enough to bring a person within the statutory construction. Thus it would appear that a person could be excluded from recognition as refugee for actions that are not a crime under UK law. This is contrary to UNHCR's *Handbook*, which states of Article 1F(c) that "Article 1F(c)...is intended to cover in a general way such acts against the purposes and principles of the United Nations that might not be fully covered by the two preceding exclusion clauses. Taken with the latter, it has to assumed, although this is not specifically stated, that the acts covered...must also be of a criminal nature"[139]

48. It is notable that the Home Secretary's letter of 15 September 2005 made reference to "our scope to refuse asylum to those whose conduct is covered by the list of unacceptable behaviours" giving some indication of the anticipated scope of the clause. It is unclear whether a change of policy or drafting considerations have resulted in no express reference being made to the list of unacceptable behaviours or to the provisions that will govern them in the clause. If the government intention remains that described in the letter of 15 September 2005 then it would

[137] See eg. *Hansard* HC Report 20 December 2004 Col 1965. See also Embarkation Controls, *Hansard* HL Report, House of Lords Written Answer HL957 (the Lord Marlesford, response from the Lord Rooker on behalf of the government) 5 November 2001. News reports at the time drew attention to a perceived link between a reduction in embarkation controls and opportunties for terrorism, see for example "£3 millon cuts "made life easier for terrorists"" Philip Johnston, The Daily Telegraph 29 09 2001. The Conservative's 2005 election manifesto calls for the reintroduction of "full embarkation controls".

[138] UNHCR briefing on the then Clause 64 of the Nationality, Immigration and Asylum Bill

[139] UNHCR Handbook on Procedures and Criteria for Determining Refugee Status, Paragraph 162.

appear that an attempt is being made considerably to broaden the scope of exclusion under Article 1F(c) and or concerns about the list of unacceptable behaviours, as set out above, all apply. Such an interpretation would go beyond that endorsed by the UNHCR *Handbook*.

49. Subsection (2) of the draft clause is not merely about terrorism, but about every case in which reliance on the exclusion clauses arises. Subsection (2) refers to Article 1F as a whole, not even just to Article 1(F)(c) which deals with acts contrary to the principles and purposes of the United Nations. Article 1(F) also covers, for example, the commission of serious non-political crimes outside the country of refuge prior to admission as a refugee (1(F)(b)).

50. This extra breadth of subsection (2) makes it difficult to determine whether or not it is envisaged that cases involving reliance on the new statutory definition might come up before the AIT or whether they will only arise before SIAC, which would in itself provide a clue as to whether they were going to be used widely or narrowly in terms of the range of people to whom they would be applied.

51. It is not enough to contend that those caught by this clause would still enjoy the protection of the European Convention on Human Rights were they found to be at risk on return. As has been noted many times, recognition as a refugee carries with it enhanced rights, including rights to family reunion and therefore it is vital that, in the words of UNHCR's *Handbook* "Considering the serious consequences of exclusion for the person concerned . . . the interpretation of these exclusion clauses must be very restrictive"[140]

52. Subsection (2) provides that consideration of exclusion should be considered prior to consideration of the substantive matters in the case, but does not go so far as to state unequivocally that the question must be decided prior to consideration of the substantive case. This is the (unsatisfactory) effect of current Asylum and Immigration Tribunal (AIT) caselaw in any event... Where it is concluded that Article 1F provides, provision is made for dismissal of the claim for recognition as a refugee. The latter is no more than a restatement of Article 1F itself.

Appeals: deportation

53. The effect of this section is that an appeal against a deportation order in a national security case would be "non-supensive"—the appellant would only be able to challenge the national security case against them from abroad. Provision is made for a limited appeal pre removal to consider whether it would be a breach of the person's human rights to remove them from the UK. There is provision in draft subsection (2)(iii) for the Secretary of State to issue a certificate barring even that limited right of appeal, but provision is made for a challenge of the certificate to SIAC.

54. It is easy to envisage circumstances in which it would be necessary to consider elements of the national security case against a person before determining the risks on return. Where the human rights invoked against removal involve consideration of the extent to which the limitation of rights can be justified on national security grounds (e.g. Article 8) ECHR, it is impossible to envisage SIAC being able to proceed without consideration of the national security grounds. The clause as drafted appears to offer scant protection for the rights of appellants and to be unworkable in practice.

THE OVERALL SOCIAL AND POLITICAL CONTEXT: HUMAN RIGHTS AND NATIONAL SECURITY

55. Proper exercise of border and migration control is one element in ensuring national security, alongside use of the criminal law, measures to interrupt the financing of operations designed to ensure that security, and good community and race relations which help to ensure that a society is cohesive in working to detect and counter threats to civilians. Migration control is one element but not the only one, nor even one of the most important, especially in situations where terrorism, as described above, is identified to be international with threats likely to come from persons based in different parts of the world. As we have set out, the proposed new "terrorism" amendments to the Immigration, Asylum and Nationality Bill are not immune from the error of conflating all "undesirable" migrants with terrorists. If the government has policy reasons that go wider than national security for amending immigration and nationality legislation it should set these out that they can be debated and scrutinised, otherwise allegations of opportunism and using people's fear of terrorism to undermine individuals rights against the state, a vital part of any positive concept of security, will continue to be made. Human rights apply to all within the jurisdiction, and international law also imposes obligations upon States to act to protect the security of all, not just their own nationals. To see deportation, exclusion and detention of foreign nationals as the key elements of the struggle against terrorism would be to fail to respect both human rights and a sensible approach to ensuring security. On a practical level, creating "suspect communities" is ultimately counter-productive. The use of border controls and exclusion in the 1970s and 1980s led to a situation where the thousands of innocent Irish people where detained, examined and felt excluded from the wider community. It did not necessarily mean that they became terrorists themselves, but it certainly alienated them from law enforcement agencies and discouraged them from volunteering vital information.

[140] *Ibid.* Paragraph 149.

56. Since 7 July 2005 we have seen increased objection by the government to judicial scrutiny of its actions, and proposals for measures that would decrease government accountability, to the population whether before the courts or in the face of public criticism. These are not new trends, they can be identified before the 7 July, but developments since that date, of which some are considered above, provide evidence of the need for vigilance in protecting the rights of the individual against the State. ILPA is particularly concerned by recent statements that amount to attacks upon the independence of the judiciary, which bode ill for a culture of respect for the rule of law and human rights.

15 October 2005

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16. Submission from JUSTICE to the JCHR's inquiry into counter-terrorism policy and human rights

SUMMARY

1. Founded in 1957, JUSTICE is a UK-based human rights and law reform organisation. Its mission is to advance justice, human rights and the rule of law. It is also the British section of the International Commission of Jurists.

2. Following the terrorist attacks in London on 7 July, we recognise the importance of reviewing existing counter-terrorism measures to ensure that public safety and fundamental rights are properly protected. We therefore welcome the Joint Committee's inquiry into the human rights implications of counter-terrorism policy.

3. We have already provided the Committee with our preliminary analysis of the draft Terrorism Bill. The final version of the Bill was published on 12 October and we hope to provide the Committee with our briefing on this version shortly. Above and beyond our concerns with the Bill's provisions, JUSTICE has serious concerns over:

— the government's intention to deport foreign nationals suspected of terrorism on the basis of diplomatic assurances;

— the list of "unacceptable behaviours" (sic) published on 24 August according to which the Home Secretary proposes to exercise his powers of exclusion or deportation against foreign nationals;

— proposed government amendments to the Immigration, Asylum and Nationality Bill for the creation of a streamlined appeal process against deportation orders in national security cases;

— the use of deportation as a counter-terrorism measure generally;

— statements by government ministers concerning the role of the judiciary in interpreting and applying counter-terrorism legislation;

— the continuing failure of the government to bring forth measures to allow intercept evidence to be adduced in criminal proceedings; and

— proposals to establish a judicial role in the investigation of terrorist crimes.

DIPLOMATIC ASSURANCES

4. We set out our concerns over the use of diplomatic assurances in our submission to the Committee's inquiry into the UK government's compliance with the UN Convention Against Torture.[141] To avoid repetition, we would summarise our concerns as follows:

— The obligation against returning a person to a country where they face a real risk of torture, inhuman or degrading treatment ("non-refoulement") is an absolute one. It is provided by Article 3 of the UN Convention Against Torture, Article 3 of the European Convention on Human Rights, Article 7 of the International Covenant on Civil and Political Rights and—most recently—Article 21(2) of the Council of Europe Convention on the Prevention of Terrorism.[142]

— The obligation of non-refoulement admits of no exceptions on the grounds of national security.[143] It also requires the competent authorities to "take into account all relevant considerations, including, where applicable, the existence in the State concerned of a consistent pattern of gross, flagrant or mass violations of human rights".[144] In other words, a state's assurance against ill-treatment cannot be regarded as categorical or dispositive, particularly where there is considerable evidence to show that the state's authorities frequently torture detainees.[145]

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141 See joint submission of Liberty and JUSTICE, September 2005, paras 5–33.
142 CETS no. 196, concluded 16 May 2005.
143 See eg *Chahal v United Kingdom* (1996) 23 EHRR 413.
144 Article 3(2) UNCAT.
145 See eg *Agiza v Sweden* CAT/C/34/D/233/2003, 20 May 2005, para 13.4.

— The use of such assurances has been strongly criticised by the UN Committee Against Torture,[146] the UN Independent Expert on the Protection of Human Rights and Fundamental Freedoms while Countering Terrorism[147] and successive UN Special Rapportuers Against Torture.[148] It has also been questioned by the Council of Europe Commissioner for Human Rights[149] and the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment.[150]

— In our view, the memorandum of understanding between the UK and Jordan—at the time of writing, the only assurances so far—offers no effective protection for the rights of any person who would be returned under its terms. For those returned, the memorandum provides no enforceable rights under international law or the domestic law of either the UK or Jordan. Other than provision for monitoring of those returned by an independent body, there is nothing to prevent breach or denunciation of the terms of the memorandum by either party.

— Jordan, Algeria and Egypt are all party to the UN Convention Against Torture,[151] yet successive annual country reports prepared by the US State Department, Amnesty International and Human Rights Watch all indicate the repeated use of torture by the authorities of each country.[152] In circumstances where such countries are unable to comply with their obligations under an international convention—not to mention the one of the peremptory norms of international law—there is no reason to believe that any would therefore comply with the terms of a bilateral agreement concluded with another country. We therefore doubt that a British court would accept diplomatic assurances from such countries as sufficient guarantee against ill-treatment.

Grounds for Deportation or Exclusion

5. In our response to the Home Office consultation on 18 August, we noted that the existing immigration powers of the Home Secretary to exclude or deport non-nationals on the grounds that to do so would be "conducive to the public good" are extremely broad.[153] In principle, therefore, a clarification of what constituted non-conducive behaviour ought to have been welcome. However, for the reasons set out below, we regard the finalised list of 'unacceptable behaviours' (sic) released by the Home Office on 24 August to be flawed and unnecessary.

6. The list gives such activities as "fomenting, justifying or glorifying terrorist violence in furtherance of particular beliefs", "seeking to provoke others to terrorist acts", "fomenting other serious criminal activity", and "fostering hatred which might to lead to inter-community violence in the UK". It includes doing these things by way of "writing, producing, publishing or distributing material", "public speaking, including preaching", "running a website", and "using a position of responsibility, such as a teacher and community or youth leader".

7. On the one hand, since "foment" and "provoke" are both synonymous with "incite" and "advocate" synonymous with "support", "counsel" and "persuade",[154] most of what is listed refers to conduct that is already covered by existing criminal offences, eg incitement to terrorism,[155] soliciting to murder,[156] or incitement to racial hatred.[157] To this extent, the list is redundant. For it is already well-understood that any foreign national committing (or in the case of those seeking entry, liable to commit) a serious criminal offence is liable to deportation. threaten "public order or the rule of law in the UK".

8. On the other hand, where the list refers to conduct going beyond criminal activity (eg "glorifying" terrorist violence), we are concerned that using such conduct as grounds for deportation or exclusion would amount to a serious interference with the free expression rights of both foreign and UK nationals.

[146] Ibid.

[147] UN Commission on Human Rights, Report of the Independent Expert on the Protection of Human Rights and Fundamental Freedoms while Countering Terrorism, para 56.

[148] See eg Professor Theo Van Boven, Report of the UN Special Rapporteur on Torture to the UN General Assembly, 23 August 2004, para 37, "the principle of non-refoulement must be strictly observed and diplomatic assurances should not be resorted to" ; Professor Manfred Nowak, BBC Radio 4, 4 March 2005.

[149] Statement of Council of Europe Commissioner for Human Rights Alvaro Gil-Robles, July 2004.

[150] 15th General Report, CPT/Inf (2005) 17.

[151] Jordan acceded to the Convention on 13 November 1991, Egypt acceded on 25 June 1986, and Algeria ratified the Convention on 12 September 1989.

[152] See eg US State Department Country Reports on Human Rights Practices, 28 February 2005; and the annual country reports prepared by Amnesty International and Human Rights Watch.

[153] See *Secretary of State for the Home Department v Rehman* [2001] UKHL 47 per Lord Slynn at para 8: 'There is no definition or limitation of what can be 'conducive to the public good' and the matter is plainly in the first instance and primarily one for the discretion of the Secretary of State'.

[154] The Oxford English Dictionary defines "foment" as to "instigate or stir up", and "provoke" as to "incite to do or feel something".

[155] Section 59 of the Terrorism Act 2000 (incitement to terrorism overseas) and section 1A of the Criminal Law Act 1977 (conspiracy to commit offences outside the UK).

[156] Section 4 of the Offences against the Person Act 1861: "Whosoever shall solicit, encourage, persuade or endeavour to persuade or . . . propose to any person to murder any other person . . .".

[157] Section 18 of the Public Order Act 1986.

9. The first and most obvious difficulty is with the definition of "terrorism" itself. Although no reasonable person would support the use of political violence in liberal democratic societies governed by the rule of law, there is little agreement on the legality or morality of the use of force by non-state actors in other countries, eg attacks by freedom fighters against military targets in a totalitarian regime. The second difficulty is with the subjective quality and scope of "glorification": a highly nebulous category, one covering the expression of an extremely wide range of views whose connection to acts of terrorism may be fanciful or speculative. Third, the list of "unacceptable" activities makes no distinction concerning the intention of the person expressing the view, ie whether or not they intend to incite an act of terrorism, or whether in fact the views expressed are likely to incite an act of terrorism. Nor does the list seek to distinguish, for instance, between views expressed in the course of academic discussion, in a newspaper article or broadcast, or as part of a novel or play.

10. Although states have a right under international law to control the entry and residence of non-nationals, it is well-established that the decision of the Home Secretary to refuse entry or expel a non-national solely to prevent his expressing opinions within the UK or by way of sanction for the expression of such opinions engages Article 10 ECHR (the right to free expression).[158] Therefore, given the breadth of the definition of "terrorism" in section 1 of the Terrorism Act 2000 and the scope of the grounds (covering expression whether in the UK or abroad), we consider that—were such grounds to be applied consistently by the Home Secretary without regard for the intention of the speaker or the different contexts in which such statements may be made—the use of such grounds to justify exclusion or deportation would almost certainly amount to a serious interference with the free expression rights of both foreign and UK nationals.

11. We recognise that Article 10(2) allows for some measure of lawful restriction in the interests of national security. We further note that the rights of non-nationals to free expression are circumscribed by Article 16 ECHR, which permits the imposition of restrictions on "the political activity of aliens", although we would also draw attention to the view of the Court of Appeal in *Farrakhan* that Article 16 "appears something of an anachronism half a century after the agreement of the Convention".[159] Even so, in *Piermont v France,* the European Court of Human Rights made clear that immigration restrictions made for the purpose of limiting free expression on national security grounds may nonetheless breach Article 10 because they are disproportionate interference with the right to free expression.[160] In particular, we note that states cannot seek to exclude the expression of views merely because they are controversial or offensive. As the Strasbourg Court noted in the *Piermont* case:[161]

> The Court reiterates that freedom of expression constitutes one of the essential foundations of a democratic society, one of the basic conditions for its progress. Subject to paragraph 2 of Article 10 (art. 10–2), it is applicable not only to "information" or "ideas" that are favourably received or regarded as inoffensive or as a matter of indifference, but also to those that offend, shock or disturb. Such are the demands of that pluralism, tolerance and broadmindedness without which there is no "democratic society".

12. We would also draw the Committee's attention to the 1996 *Johannesburg Principles on National Security, Freedom of Expression and Access to Information*, principle 6 of which provides materially as follows:[162]

> expression may be punished as a threat to national security only if a government can demonstrate that:
>
> (a) the expression is *intended to incite* imminent violence;
>
> (b) it is *likely* to incite such violence; and
>
> (c) there is a *direct and immediate connection* between the expression and the likelihood or occurrence of such violence.

13. It is important to make clear that interests engaged by the exclusion or deportation of a person expressing a particular viewpoint are not limited merely to those who agree with that viewpoint. It is also in the interests of those who may strongly disagree with the views being disseminated. This is because the value of free expression protected by Article 10 derives not only from the interests of those who wish to express their views but also from the interests of the general UK public in being free to receive them. Again, this is not limited to the public's interest in receiving views that individual members of the public are likely to agree with or approve of. Rather, it is the broader public interest in receiving the benefits of what John Stuart Mill referred to as 'the collision of adverse opinions'.[163] A healthy pluralist democracy requires the free exchange of ideas and opinions in order to flourish and these are not limited to those ideas that a

[158] *R (Louis Farrakhan) v Secretary of State for the Home Department* [2002] EWCA Civ 606 at paras 55-56: "Where the authorities of a State refuse entry or expel an alien from its territory solely for the purpose of preventing the alien from exercising a Convention right within the territory, or by way of sanction for the exercise of a Convention right, the Convention will be directly engaged . . . . Thus, where the authorities of a State refuse entry to an alien solely to prevent his expressing opinions within its territory, Article 10 will be engaged".

[159] *Farrakhan*, ibid, at para 70.

[160] (1990) 20 EHRR 301.

[161] Ibid at para 76.

[162] U.N. Doc. E/CN.4/1996/39 (1996). Emphasis added.

[163] On Liberty, Chapter 2, p 64.

majority thinks "conducive" or "acceptable". The public good of the UK is not sustained, therefore, by deporting or excluding those who express views that are unpopular, false or even wicked. As Chief Justice Hughes observed in the 1937 US Supreme Court case of *De Jonge v Oregon*:[164]

> The greater the importance of safeguarding the community from incitements to the overthrow of our institutions by force and violence, the more imperative is the need to *preserve inviolate the constitutional rights of free speech, free press and free assembly in order to maintain the opportunity for free political discussion, to the end that government may be responsive to the will of the people* and that changes, if desired, may be obtained by peaceful means. Therein lies the security of the Republic, the very foundation of constitutional government.

Streamlined Deportation Process on National Security Grounds

14. We note the letter of the Home Secretary of 12 October 2005 attaching draft clauses to be tabled as amendments to the Immigration Asylum and Nationality Bill currently before the House of Commons, including a proposed amendment to add section 97A to the Nationality Immigration and Asylum Act 2002. The draft clause would disapply section 79 of the 2002 Act, which prevents a person from being removed from the UK while their appeal is in progress.

15. Currently, non-suspensive appeals only operate in the asylum and immigration context in relation to applicants from so-called "safe countries"—those to which the Home Office considers it generally safe to return failed asylum seekers (eg EU accession countries). In *R (Razgar) v Secretary of State for the Home Department*, Mr Justice Richards noted that, for an applicant, a non-suspensive asylum appeal amounted to "plainly a very serious disadvantage as compared with an in-country appeal".[165] Similarly, the Council on Tribunals (the independent statutory body appointed to oversee the operation of administrative tribunals) has given its view that procedures for non-suspensive asylum appeals were "capable of leading to unfairness and injustice".[166] It noted that:

> The requirement to conduct appeals from abroad will make it more difficult for adjudicators to assess the evidence of appellants. It will also make it more difficult for appellants to have face-to-face discussions with their advisers and to present their cases satisfactorily. Costs will inevitably be greater. And there could be serious problems with regard to the status and safety of tribunal users in the countries from which they are appealing.

16. The evident obstacles to sustaining an appeal from outside the UK have been reflected in the very low success rate for such out-of-country appeal, at least according to initial figures. According to the Department for Constitutional Affairs:[167]

> As of 17 April 2003, provisional [Immigration Appellate Authority] figures show that 56 out-of-country appeals had been lodged with the [Authority]. 42 of those have so far been dismissed and one withdrawn. None has been successful.

On the issue of non-suspensive asylum appeals, the House of Commons Constitutional Affairs Committee expressed concern at "the extremely low success rate of appellants' appeals under that system' and recommended that the Government 'investigate the fairness of the non-suspensive appeal system'.[168]

17. Even were the proposed amendment to succeed, it remains unlikely that any deportation order could be enforced in circumstances where it was established that the person faced a real risk of ill-treatment contrary to article 3 ECHR or a "flagrant breach" of their other Convention rights.[169] Indeed, in light of the article 3 concerns surrounding all of the recent deportation cases on national security grounds, the amendment seems a futile gesture. As the Newton Committee noted in 2004, "there have been no successful deportations on national security grounds since 1997".[170] Despite this, the government's proposal to establish a non-suspensive deportation process in national security cases signals a disturbing disregard for the fundamental right of effective access to the courts.

Deportation as a Counter-terrorism Measure

18. We take as our starting point the view expressed by the Newton Committee in 2004:[171]

> *Seeking to deport terrorist suspects does not seem to us to be a satisfactory response, given the risk of exporting terrorism.* If people in the UK are contributing to the terrorist effort here or abroad, they should be dealt with here. While deporting such people might free up British police,

[164] 299 US 353. Emphasis added.

[165] [2002] EWHC Admin 2554 at para 1.

[166] Council on Tribunals, *Annual Report 2001–02,* pp 30–31.

[167] Memorandum of Department of Constitutional Affairs to Commons Constitutional Affairs Committee, attached to 2nd Report of the Committee (2003/4 session), Ev 141.

[168] Para 81, House of Commons Constitutional Affairs Committee, *Asylum and Immigration Appeals,* 2 March 2004 (HC 211-I; 2nd report, 2003/2004 session).

[169] See *Ullah v Special Adjudicator* [2004] UKHL 26.

[170] Privy Counsellor Review Committee, *Anti-Terrorism Crime and Security Act 2001 Review: Report* (HC100, 18 December 2003), at p 54, fn 99.

[171] Privy Counsellors Review Committee, *Anti-Terrorism Crime and Security Act 2001 Review: Report* (HC100: 18 December 2004) at para 195.

> intelligence, security and prison service resources, it would not necessarily reduce the threat to British interests abroad, or make the world a safer place more generally. Indeed, there is a risk that the suspects might even return without the authorities being aware of it.

19. Terrorism is a global problem. There is no better illustration of this than the UK's own involvement in the invasion of Afghanistan in October 2001, in order to "eradicate Osama bin Laden's network of terror and to take action against the Taliban regime that is sponsoring it".[172] This was justified by the fact that the UK had a "direct interest in acting in our own self defence to protect British lives".[173]

20. It therefore seems open to question whether removing or exporting persons who are suspected of involvement in terrorism to other countries where they will be beyond the reach of UK law enforcement authorities is either a rational or an effective measure. Specifically, the effectiveness of deportation as a counter-terrorism measure seems to rely on the assumption that those removed will be subject to detention upon return, thereby disrupting further threat to the UK. However, it is clear from the 2 most recent cases of attempted removal on national security grounds—Ajouaou and 'F'—that the assumption of automatic detention is false. Both were detained under Part 4 of the Anti-Terrorism Crime and Security Act 2001 on the basis that they were suspected international terrorists who posed a threat to the national security of the United Kingdom. As the Special Immigration Appeals Commission ("SIAC") noted in respect of 'F':[174]

> On 12th March 2002, ['F'] decided that he could face detention no longer. He went to France the next day. He was escorted by two police officers and was interviewed on arrival by French security officials . . .. The upshot of the interview was, he says, that he was told he was free to go and would not have any problem in France. He is still in France.

In Ajouaou's case, he returned to Morocco voluntarily in December 2001 and has been there ever since.[175] In his case, SIAC referred to the fact that he made several trips to Morocco in the months preceding his detention in the UK and noted that this "must cast serious and probably fatal doubt on any claim by Ajouaou that it would be in breach of an international Convention to return him to Morocco".[176]

21. Even were it shown that an individual was more likely than not to be detained on their return, it may still be unreasonable to assume that the alleged threat would thereby be contained. An assessment of a 75% likelihood that a person would be detained, for instance, would still be a 1 in 4 chance that the suspect would free to continue their alleged activities abroad: whether to plot attacks against the UK or against UK nationals abroad.

22. It seems to us that if the Home Secretary has reasonable grounds for believing that an individual may be involved in terrorist activity in the UK, the proper course would be to refer that person's case to the CPS to consider prosecution for terrorist offences—or at the very least closely monitor their activities with a view to gathering sufficient evidence to prosecute—rather than to remove them to a country where they may be free to continue their activities.

The Role of the Judiciary in Counter-terrorism Cases

23. Following the attacks of 7 July, we have been concerned at statements made by government ministers concerning the role of the judiciary in counter-terrorism cases. For example, the Prime Minister on 27 July indicated his view that it was the task of judges to ensure that "the laws that I think the country would regard as the minimum necessary are . . . upheld".[177]

24. It is of course open to members of the legislature and the executive to express their views on what is the correct interpretation of the laws that they pass. But the task of interpreting law remains the responsibility of the judiciary. In order to carry out this task, moreover, it is well-understood that the judicial branch must maintain strict independence from the other two branches. It is therefore plainly improper for members of other branches of government to make statements seeking to instruct members of the judiciary as to how they should carry out their constitutional functions. Instead, we would invite the Committee to endorse the view expressed by Lord Bingham in the case of *A and others v Secretary of State for the Home Department*:[178]

> It is of course true that the judges in this country are not elected and are not answerable to Parliament. It is also of course true . . . that Parliament, the executive and the courts have different functions. But the function of independent judges charged to interpret and apply the law is universally recognised as a cardinal feature of the modern democratic state, a cornerstone of the rule of law itself. The Attorney General is fully entitled to insist on the proper limits of judicial authority, but he is wrong to stigmatise judicial decision-making as in some way undemocratic.

[172] Prime Minister's statement on military action in Afghanistan, 7 October 2001.
[173] Ibid.
[174] Appeal No: SC/11/2002 (SIAC, 29 October 2003), para 6.
[175] Appeal No: SC/10/2002 (SIAC, 29 October 2003), para 5.
[176] Ibid, para 24.
[177] See eg "9/11 wake-up call ignored, Blair says in swipe at obstructive judges", by Philip Webster, *The Times*, 27 July 2005.
[178] [2004] UKHL 56 at para 42.

25. As Lord Bingham makes clear, it is "particularly inappropriate" to suggest that courts are not entitled to review the necessity and proportionality of legislation where it has been expressly directed to do so under the scheme of the Human Rights Act. On the contrary, "the 1998 Act gives the courts a very specific, wholly democratic, mandate".[179] Therefore—having been charged by Parliament with the task of reviewing the compatibility of government actions and legislation with fundamental rights—it would be an abdication of their constitutional role for the courts to refrain from doing so at the behest of government ministers.

The Use of Intercept Evidence

26. In our 1998 report on surveillance powers, JUSTICE argued that the ban on intercept evidence should be lifted:[180]

> There is a growing consensus that [the] restriction is now unsatisfactory and that material lawfully obtained through an interception should be *prima facie* admissible evidence, subject to the usual judicial discretion under section 78 [of the Police and Criminal Evidence Act 1984] on fairness grounds.

27. In our view, lifting the ban on the use of intercept evidence in criminal proceedings (currently contained in section 17(1) of the Regulation of Investigatory Powers Act 2000 ('RIPA')) would allow for an increase in the number of prosecutions that could be brought for terrorist offences and other serious crimes. As the author of the 1996 review of counter-terrorism legislation,[181] the former Law Lord Lord Lloyd of Berwick, noted during parliamentary debate on RIPA:[182]

> We have here a valuable source of evidence to convict criminals. It is especially valuable for convicting terrorist offenders because in cases involving terrorist crime it is very difficult to get any other evidence which can be adduced in court, for reasons with which we are all familiar. We know who the terrorists are, but we exclude the only evidence which has any chance of getting them convicted; and we are the only country in the world to do so.

Lifting the ban on admitting intercept evidence would also bring the UK's position into line with that of virtually all the other legal systems in the world, including Australia, Canada, France, Germany, India, Israel, Italy, New Zealand, the Russian Federation, South Africa and the United States.[183] If the use of intercept evidence is admissible on a regular basis in these other jurisdictions, it seems difficult to conceive of a compelling reason for the government to maintain the current self-imposed ban while at the same time seeking to justify a departure from ordinary principles of criminal law in other areas. In particular, we note that the inadmissibility of intercept evidence is being used by the government in order to justify the extension of the maximum period of pre-charge detention to 90 days.

Establishing a Judicial Role in the Investigation of Terrorist Offences

28. We are aware that there is support in some quarters for increased judicial involvement in the investigation of terrorist offences. In this context we note the recommendations of the Newton Committee in 2004 and the more recent support given by Lord Carlile of Berriew QC to increased judicial involvement in the pre-charge detention process in the debate over the Terrorism Bill.[184]

29. The Newton Committee recommended, among other things, the possible use of security-cleared judges to assess evidence on a more inquisitorial basis.[185] This, it was suggested at the time, might be a way to increase the likelihood of criminal prosecutions for terrorist offences in view of the significant evidential hurdles that the Committee had identified. While we agreed with the Newton Committee's call for a more structured system of disclosure of evidence,[186] it was at the time wholly unclear to us how the Committee foresaw the use of security-cleared judges screening evidence[187] might improve on the admissibility of material from the current system. It was particularly unclear what weight the 'fair answerable case' assembled by one judge would have in full criminal proceedings before another, particularly if the preliminary hearing were conducted on an inquisitorial rather than adversarial basis. The findings of a judge (particularly one who has seen evidence not disclosed at trial) would likely to carry great weight with a subsequent judge and jury, and would effectively preempt much of what ought properly to be determined

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179 Ibid.

180 JUSTICE, *Under Surveillance: Covert Policing and Human Rights Standards*, p76.

181 Lord Lloyd of Berwick, *Inquiry into Legislation against Terrorism*, 30 October 1996 (Cm 3420). The report identified at least 20 cases in which the use of intercept evidence would have allowed a prosecution to be brought—see vol 1, p 35.

182 See Hansard, HL Debates, 19 June 2000, Col. 109-110. Lord Lloyd is currently sponsoring a private members Bill to repeal section 17(1) RIPA—see clause 1, Interception of Communications (Admissibility of Evidence) Bill.

183 See Lord Lloyd, *ibid,* col. 106: 'evidence of telephone communications of that kind is admissible in court in every country in the world as I am aware. The countries I visited during my inquiry into terrorism—France, Germany, the United States and Canada—regard such evidence as indispensable. They were astonished to hear that we do not use it in this country'.

184 Proposals By Her Majesty's Government For Changes To The Laws Against Terrorism, 12 October 2005.

185 Newton Report, paras 224, 228.

186 Newton Report, paras 236-239.

187 Ibid, para 231: 'An investigative approach would address the disclosure problem by putting a security-cleared judge in control of assembling a fair, answerable case'.

in-trial. The unfairness of determining guilt or innocence, be it by a judge or jury, on evidence that is not disclosed to an accused and upon which he or she cannot make comment or challenge should be manifest and is likely to breach the right in Article 6(3)(d) ECHR to 'examine or have examined witnesses against him'.

30. We are equally sceptical of the recent suggestions made by Lord Carlile, the Independent Reviewer of Terrorism legislation, in respect of increased judicial involvement in the pre-charge detention process. We agree with his analysis that district judges would not be suited to the task of considering applications for longer periods of detention than the current 2-week maximum:[188]

> A more searching system is required to reflect the seriousness of the State holding someone in high-security custody without charge for as long as three months.

However, the specific proposals that Lord Carlile then puts forth to provide a "reassuringly strong system of protection for the detained person" seem to us to fall far short of that goal. First, he proposes "the introduction of one of a small group of security-cleared, designated senior circuit judges as examining judge".[189] We note, however, that those civil law jurisdictions such as France that employ examining magistrates and inquisitorial methods provide far more specific and intensive training for the task of supervising (and, indeed, directing) criminal investigations than does the common law system. Lord Carlile makes reference to his proposals comparing favourably to those available in the United States (the only common law jurisdiction he cites as a comparison)[190] and yet we are unaware of any comparable provision for pre-charge detention in US state or federal law.

31. Secondly, Lord Carlile proposes the introduction of a "security-cleared special advocate . . . to make representations on the interests of the detained persons and to advise the judge".[191] However, Lord Carlile nowhere explains how such a system (hitherto used only in civil proceedings and in public interest immunity applications in criminal proceedings) would be compatible with the guarantees of Articles 5(4), which include the right to full disclosure of adverse material. The idea that a suspect could be detained for what Lord Carlile acknowledges to be lengthy periods of time without knowing the full case against him or her seems to us to be antithetical to basic notions of fairness. As Lord Steyn noted in his dissenting judgment in *Roberts v Parole Board*:[192]

> It is not to the point to say that the special advocate procedure is "better than nothing". Taken as a whole, the procedure completely lacks the essential characteristics of a fair hearing. It is important not to pussyfoot about such a fundamental matter: the special advocate procedure undermines the very essence of elementary justice. It involves a phantom hearing only.

32. Thirdly and more generally, little thought appears to have been given for the longer-term consequences of seeking to introduce inquisitorial methods of justice into the common law system of adversarial justice. It is sufficient to note that much of what is originally presented as wholly exceptional, once introduced, becomes part of the general fabric of the law: the process variously known as "legislative creep" or "function creep". For the arguments from complexity that are made in the context of terrorism offences are equally applicable to serious organised crime and serious fraud. From there, it would not be too difficult for a government to subsequently argue that—since the process is already in place for serious criminal offences—consistency demands that the same procedures should be applied to ordinary criminal prosecutions as well. It is perhaps sufficient to notice how the stop and search powers of section 44 of the Terrorism Act 2000, originally introduced to fight terrorism, appear to have become part of the general array of police powers.[193]

33. We continue to support the Newton Committee's call for a more structured system of disclosure of evidence. There is also perhaps a greater role for judges to play in facilitating increased use of sensitive intelligence material in criminal proceedings. However, we strongly oppose any extension of pre-charge detention beyond the current maximum of 2 weeks and we harbour serious doubts whether any suitable procedures of "judicial control" could be devised under our existing adversarial system of justice that would be sufficient to safeguard fundamental rights. To compare the role of a judge from a common law system with that of an examining magistrate in a civil law jurisdiction fails to compare like with like. We therefore caution strongly against importing features from other systems of law without at least understanding the different distribution of checks and balances in those systems, not to mention the careful equilibrium of our own.

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[188] See n44 above, para 64.
[189] Ibid, para 67.
[190] Ibid, para 68.
[191] Ibid, para 67.
[192] [2005] UKHL 45 at para 88.
[193] See eg BBC Online, "Hero's return for Labour heckler", 29 September 2005.

17. Submission from the Law Society on the Draft Terrorism Bill

Introduction

On 20 July the Home Secretary Charles Clarke set out the details of proposed anti-terrorism legislation, brought forward in the light of the 7 July bomb attacks in London.

He announced that three new offences would be created, those of acts preparatory to terrorism; indirect incitement to terrorism; and the giving and receiving of terrorist training. Indirect incitement would target those who "glorify and condone terrorist acts" with the intention of inciting terrorism.

In relation to powers to exclude extremists who sought to enter the UK, the Home Secretary noted that he already had certain powers, but stated that these needed to be applied more widely and systematically. He noted the need to "tread very carefully indeed in areas that relate to free speech". He said the Government was seeking to sign memoranda of understanding with countries to ensure that deportation was consistent with the European Convention of Human Rights, and revealed that such a memorandum had been signed with Jordan.

On 15 September, the Home Secretary published a new Terrorism Bill with a letter to David Davis MP and Mark Oaten MP explaining the Government's thinking behind the proposed new offences.

Summary

The Society entirely agrees that it is vital that we have effective measures to combat terrorism and we fully recognise that it is the Government's responsibility to protect its citizens. However, we continue to believe that protection against terrorism can be achieved without serious intrusion on human rights standards.

We welcome the fact that the Government has listened to concerns about the drafting of the Bill and has removed clause 2. Whilst we are not opposed to the offence of encouragement to terrorism in principle, we remain very concerned about the impact of the provision, particularly as the drafting of the new clause is unclear and difficult to understand.

We are not opposed in principle to new offences relating to the dissemination of terrorist publications (clause 3) or acts preparatory to terrorism (clause 4). However, the proposed offences in the Bill cause us serious concern due to the broad nature of the drafting, particularly the lack of intention in clause 3. We are concerned that the drafting of these clauses is so uncertain that it may potentially breach Article 10 ECHR and if the court finds this to be the case, it will either need to strike down the provisions or interpret them extremely narrowly.

We oppose the extension of detention powers from 14 days to 3 months as being unnecessarily draconian. There are far more appropriate and proportionate ways of dealing with problems relating to pressure of time. A period of 3 months detention prior to charge is likely to be incompatible with Article 5(3) ECHR.

Clause 1—Encouragement of Terrorism

We understand the Government's motivation to ensure that there are offences to cover this type of behaviour and welcome the fact that the Home Secretary has explicitly recognised that freedom of speech should not be inappropriately curtailed in relation to this offence[194]. We also welcome the fact that the Government has listened to concerns about the drafting of the Bill and has removed clause 2. However, the drafting of the new clause 1 is unclear and difficult to understand, which gives serious cause for concern.

We note that the Home Office's press release states that the amendments make it clear that for an offence of glorifying terrorism to be committed, the offender must have also "intended to incite further acts of terror"[195]. However, the requirement in clause 1 remains that the accused knew or believed or had "reasonable grounds for believing" that other members of the public were likely to understand it as a direct or indirect encouragement to commit terrorist acts (which itself is widely defined, using the Terrorism Act 2000 definition). This does not equate to intent, but instead appears to be utilising a negligence test and in so doing, is creating a negligent incitement offence. We would welcome clarification from the Home Office as to how the drafting of the new clause has introduced an intention element into the offence.

The law must be accessible, such that those affected by it can find out what the law prohibits, and must be formulated with sufficient clarity that those affected can understand it and regulate their conduct to avoid breaking the law[196]. In view of the potential for confusion surrounding the drafting in clause 1, we are concerned that it may not comply with these principles.

We remain concerned that the clause may inhibit freedom of speech. Statements which might be considered unwise, but are not intended to encourage terrorism should not be criminal. The clause as drafted runs the risk of criminalising conduct that ought not to be criminalised because of lack of intent. We are

194 Letter to David Davis and Mark Oaten, 15 September 2005.

195 Home Office Press Release, 6 October 2005, 146/2005.

196 *Sunday Times* v UK (1979–80) 2 ECHR 245.

concerned that the drafting of the clause is so uncertain that it may potentially breach Article 10 ECHR which protects freedom of expression. Although a court would accept that restrictions on free expression pursue a legitimate aim of safeguarding national security, public safety and the prevention of crime, it appears to be likely that this clause will be found to fail to strike a fair balance between national security considerations and the fundamental right of free expression. If the court finds this to be the case, it will either need to strike down the provision or interpret it extremely narrowly.

Clause 2—Glorification of Terrorism

This clause has now been removed (see above).

Clause 3—Dissemination of Terrorist Publications

This offence covers a publication containing material that constitutes a direct or indirect encouragement or inducement to commission acts of terrorism, or information of assistance to acts of terrorism. It will constitute a direct or indirect encouragement or inducement if it is likely to be understood as such by some or all of the persons who it is or is likely to be available to. This includes any information that is capable of being useful in the commission or preparation of such acts, and so could conceivably include maps or train timetables.

Whilst we understand the motivation behind the creation of such an offence, we are concerned at its breadth. It contains no element of intent that the dissemination should encourage terrorism, only that it will constitute an encouragement or inducement if it is likely to be understood to do so by its recipients. Neither does it contain the defence of reasonable excuse or lack of terrorist purpose, as there is in the existing and similar offences under sections 57 and 58 of the Terrorist Act 2000. Due to the broad nature of the drafting, this clause raises similar concerns in relation to Article 10 ECHR as does clause 1.

We also have practical concerns that the offence may be difficult to prosecute as it would require proof beyond reasonable doubt that a potential and perhaps hypothetical terrorist is likely to interpret the publication in a particular way.

Clause 4—Preparation of Terrorist Acts

This clause makes it an offence, with the intention of committing acts of terrorism or assisting others, to engage in any conduct in preparation for giving effect to this intention. Whilst we are not opposed in principle to this offence, we are not clear that there is a gap in the law necessitating its creation[197].

The Newton Committee said that that they had not been told that it has been impossible to prosecute a terrorist because of a lack of available offences and found that the difficulty in prosecuting terrorism offences related to evidential rather than legal problems[198]. The Joint Committee on Human Rights has considered whether new terrorism offences are necessary. It concluded that the evidential problem, highlighted by the Newton Committee, "is unlikely to be helped by the creation of still more offences"[199].

The Newton Committee also noted a reluctance to adduce sensitive intelligence- based material in open court due to concern about compromising their source or methods[200]. The Society has repeatedly called for intercept evidence to be admissible as we believe that this would help with the prosecution of alleged terrorists. Evidential tools, similar to public interest immunity certificates, could be used to deal with what evidence is actually revealed to a jury and protect sources. The majority of common law jurisdictions, including Canada, Australia, S Africa, New Zealand and the United States admit intercept evidence[201]. In the light of the use of such evidence by other common law jurisdictions, the use of foreign intercept evidence in UK courts[202] and greater EU co-operation, the introduction of intercept evidence is the logical next step. Indeed, the Society agrees with the Joint Committee on Human Rights that the case for relaxing the absolute ban on the use of intercept evidence is overwhelming[203].

The offence is drafted very broadly as it covers "any conduct in preparation for giving effect to terrorism". As with the drafting of clauses 1 and 3, we are also concerned that the broad nature of the drafting may be incompatible with Article 10 of the ECHR.

[197] Current offences includes support for terrorism—s 12 Terrorism Act 2000, attempted offences—Criminal Attempts Act 1981, conspiracy—s 1 Criminal Law Act 1977.

[198] Paragraph 207, Privy Councillors review Committee. Anti-Terrorism Crime and Security Act 2001 Review Report (HC100: 18 December 2004).

[199] Para 67, Joint Committee on Human Rights, 18th Report, 4 August 2004, HL158/HC713.

[200] Paragraph 207, Privy Councillors review Committee. Anti-Terrorism Crime and Security Act 2001 Review Report (HC100: 18 December 2004).

[201] Page 9 JUSTICE Response to Counter Terrorism Powers: Reconciling Security and Liberty in an open society.

[202] RvP [2002] 2WLR463.

[203] Paragraph 56, Joint Committee on Human Rights, 18th Report, 4 August 2004, HL158/HC713.

Clause 17—Grounds for Proscription

This clause allows the Secretary of State to proscribe as "involved in terrorism" any group whose activities "include the glorification, exaltation or celebration" of acts of terrorism or "are carried out in a manner which ensures that the organisation is associated" with such statements. We are concerned that the vague nature and lack of clarity of these grounds may infringe the right to freedom of association under Article 11 ECHR.

Clause 19—Extension of Period of Detention by Judicial Authority

We do not think that the case is made out for such an extension. 14 days is a serious length of time without charge. Powers to detain are already longer in terrorism cases. The 14 day limit applicable to terrorist offences was enacted by the Criminal Justice Act 2003 which amended schedule 8 of the Terrorism Act 2000. It came into effect on 20 April 2004 and involves an application to a senior District Judge. There is an initial period of 48 hours, then an application under paragraph 29 (7 days) or paragraph 36 of schedule 8 must be made. In relation to other offences, under PACE the limit for pre-charge detention is 24 hours, extendable to 36 hours by an officer of superintendent rank or above, detention in respect of an arrestable offence[204]. A magistrate can then extend the period to 72 hours, followed by a further extension to 96 hours at most. This proposal will therefore allow suspects to be detained more than 20 times longer than the maximum period that a suspect can be detained for any serious non-terrorist offence, for example murder, rape or serious fraud.

It appears to a large extent that the call for an extension of detention powers relates to the question of resources. Speed is of the essence in these cases where there may be evidence that could lead to prosecution for such serious offences, and the preferable option is surely therefore to ensure that investigations can be carried out as quickly as possible, in case they yield further useful information. We therefore believe that the more appropriate and proportionate way to deal with these concerns would be to ensure that the police and security services are properly resourced, rather than to extend the period of detention before charge.

Furthermore, under PACE[205], the police are required to have some reasonable grounds to arrest, and so there must be evidence to ground that suspicion. We have seen no clear explanation as to why it is not sufficient to charge a suspect with a lesser offence to ensure that they do not have to be immediately released from custody whilst other matters are still being investigated. Charges can always be upgraded at a later stage and suspects questioned in relation to those further charges. Even if suspects are granted bail, courts have the power to impose strict conditions.

Three months detention prior to charge is a length of time tantamount to internment. The government has stated that any extension would be used in extremely rare circumstances and would only apply to a tiny number of people[206]. In view of the serious nature of an extension and the few cases in which it should be necessary, should any extension beyond 14 days be made possible, it should be granted and reviewed at very short intervals by a High Court, rather than a District, Judge.

The legality of detention prior to charge is governed by Article 5(3) ECHR, which provides that those arrested or detained must be brought before a judge within a reasonable time and tried or bailed. We think it very unlikely that extension of the detention period prior to charge to three months will be compatible with Article 5(3) ECHR.

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18. Further submission from the Law Society on additional amendments to the Immigation, Asylum and Nationality Bill

Appeals: Deportation

This clause provides for out of country appeals against the decision to make deportation orders and any related asylum claim of an applicant whose case has been certified on the grounds of national security. Any appeal on human rights grounds could be heard in country unless the Secretary of State certifies that removal of the person from the UK would not breach the UK's obligations under the ECHR. If the human rights claim is certified there will be an in country right of appeal to SIAC against the certification. The Government's aim in introducing the amendment is to speed up deportations of applicants who pose a threat to national security.

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204 This distinction is to be abolished when the Serious Organised Crime and Police Act arrest powers come into effect in January 2006, and the power to arrest will exist for any offence.

205 S 24 Police and Criminal Evidence Act 1984, as amended by s 110 of the Serious Organised Crime and Police Act 2005.

206 Charles Clarke, Today programme, 27 September 2005.

The Law Society welcomes the Government's decision to allow judicial scrutiny before deportation of arguments about the treatment the person concerned may be exposed to if removed. However, the Society understands that the person concerned will be able to challenge the security case against them only from abroad. This separation of the grounds on which the person concerned can appeal is potentially problematic. It is conceivable, for instance, that evidence relating to the security case against the person may impact on whether they will be subject to inhumane treatment or torture on return to the country or origin. The inability to fully explore the implications of and to challenge such evidence as part of the human rights appeal may inhibit effective scrutiny of whether return will. constitute a breach of Article 3.

It is not apparent on the face of the amendment how the suggested certification of the human rights element of a claim will be decided. The Law Society suspects that this will involve consideration of diplomatic assurances given by countries of origin. Very careful thought needs to be given by both Ministers and the courts to the weight to be attached to any relevant diplomatic assurances and the Society would welcome clarification of how these will feature in the certification process.

INFORMATION: EMBARKING PASSENGERS

This clause provides new powers to Immigration Officers (IOs) to question a person leaving the UK as to their identity; whether or not they entered the UK lawfully; they have complied with conditions of leave to enter or remain; and whether their return to the UK is prohibited or restricted in some way. The clause also provides for the power to detain the person for 12 hours if further examination is required. The Society is not clear as to the Government's aim in extending the powers of IOs in this way. The logical conclusion must be that the person's passport will be endorsed according to the IO's findings. We would welcome clarification on this point.

It is arguable that this clause is not compliant with Article 5 of the ECHR. Despite falling within the exception in the second limb of Article 5(1)(b), ie lawful detention in order to secure fulfilment of any obligation provided by the law, the power could be used in an arbitrary manner through abuse or disproportionate application. This is particularly the case as IOs are not subject to adequate supervision or scrutiny when exercising their powers. We would welcome an assurance that proper supervision and monitoring will be put in place.

As this measure has been introduced as part of a package of measures dealing with terrorist activity, the danger is that IOs may use the examination to identify people suspected of involvements in terrorist activities. If this is the case, the Society believes that any power of detention should be exercised by specialist police on notification by an IO following proper procedures.

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19. Further submission from the Law Society to the JCHR'S inquiry into counter-terrorism policy and human rights

The Society entirely agrees that it is vital that we have effective measures to combat terrorism and we fully recognise that it is the Government's responsibility to protect its citizens. However, we continue to believe that protection against terrorism can be achieved without serious intrusion on human rights standards.

(i) *the new list of "unacceptable behaviours" drawn up after consultation indicating some of the circumstances in which the Home Secretary may exercise his powers of exclusion or deportation;*

We will comment on this in our submissions regarding the Immigration and Asylum Bill.

(ii) *the Government's intention to deport non-UK nationals suspected of terrorism on the basis of diplomatic assurances and the potential conflict with Article 3ECHR;*

The Society has serious concerns about proposals to deport non-UK nationals suspected of terrorism on the basis of diplomatic assurances.

There are existing powers allowing the Secretary of State to exclude or deport people where their exclusion or deportation would be conducive to the public good. It has been suggested that these powers can only be used against those who pose a direct threat. However, the relevant immigration rules do not specify that the threat must be direct in order for the powers to apply. Indeed, the existing powers have been successfully used in the past to exclude those who may cause others to commit public order offences through their use of words or behaviour[207].

[207] In the case of R (on the application of Farrakhan) v Secretary of State for the Home Department [2002] 4 All ER 289 the Home Secretary excluded Mr Farrakhan from entering the UK on that basis. The ban was upheld by the Court of Appeal despite Article 10 of the ECHR being engaged.

The Society believes that it is preferable to charge and prosecute those who are suspected of being terrorists or involved with terrorism. As the Newton Committee commented, "terrorists are criminals, and therefore ordinary criminal justice and security provisions should, so far as possible, continue to be the preferred way of countering terrorism"[208].

Criminal prosecution of suspected terrorists remains the most effective and human rights compliant counter-terrorist measure.

The Society has grave concerns regarding the Government's use of diplomatic assurances to deport people to countries where they may be subject to torture or inhuman and degrading treatment. The right in Article 3 of the ECHR not to be subjected to torture or inhuman or degrading treatment or punishment is an absolute right and so does not allow the state to balance the right against national security interests. We believe that individual suspects should not be deported to countries where they are at risk of torture as a result of who they are, or what they have done.

The countries which may receive deportees are in the main party to one or both of the UN treaties which absolutely prohibit torture and ill-treatment. Unlike the death penalty, the use of which is limited but not proscribed by international law, torture or ill-treatment must not be used at any time or under any circumstances.

Blanket diplomatic assurances are not reliable. Reports from human rights organisations including Amnesty International, show that countries regularly breach international treaties they have signed up to, even if post-return monitoring arrangements are put into place[209]. Reports from the United States Department of State[210] and Human Rights Watch[211] show that human rights violations and serious torture are still prevalent in these countries. Individual assurances might go some way to easing this problem but there remain difficulties in monitoring whether or not countries adhere to individual assurances and all the evidence we have would lead us to believe that they cannot be relied upon to do so. The courts should thus decline automatically to accept that an inter-Governmental agreement can be relied on when it is clear that the country concerned continues to engage in torture.

(iii) *the various measures announced by the Prime Minister at his press conference on 5 August*

Some of the measures announced by the Prime Minister on 5 August have been dealt with in the Terrorism Bill, on which we have commented separately, and some will be included by way of Government amendments to the Immigration and Asylum Bill. We will forward our comments on the amendments to the Immigration and Asylum Bill as soon as possible after they have been published.

We note the publication on 6 October 2005 of a consultation paper on Places of Worship, but have not yet had time to consider it.

We currently have the following comments:

Prime Minister: Fifth, cases such as Rashid Ramda, wanted for the Paris Metro bombings 10 years ago, and who is still in the UK whilst France seeks extradition are completely unacceptable. We will begin consultation on setting a maximum time limit for all future extradition cases involving terrorism.

Extradition proceedings are now subject to the Extradition Act 2003 (EA 2003) which introduces a fast-track procedure in respect of Category 1 countries, which includes France, without the need for intervention by the Home Secretary.

Rashid Ramda is an Algerian man suspected of terrorism offences involving the bombing of the Paris Metro some 10 years ago. France has applied for his extradition. As this is a pre-EA 2003 case, the proceedings are taking place under much slower pre-EA 2003 law, as the new procedures and much quicker "fast track" time limits that apply under the 2003 Act, particularly for Part 1 EU countries where the European Arrest Warrant is in force, are not applicable. Criticism of the delays inherent in the old system led to the introduction of the EA 2003.

Under the EA 2003 if a judge decides that a person's extradition would not be compatible with their Convention rights the person must be discharged. There is a right of appeal against this decision to the High Court, and thereafter to the House of Lords.

Therefore, although a decision to order extradition made under the EA 2003 is subject to a right of appeal on human rights grounds, the extradition proceedings of someone in Ramda's position would now be much quicker. If no appeal is lodged the person must be extradited within 10 days if it involves a category 1 country. The effectiveness of the new process was recently demonstrated in the speedy extradition of the 21 July bombing suspect from Italy to the UK.

We would oppose any change to allow for the extradition of a person charged with a terrorist offence who successfully claims that their human rights would be violated, particularly their right not to be subject to torture or inhuman and degrading treatment in breach of Article 3 ECHR.

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[208] Para 1, Report of the Privy Council Review Committee on Anti-Terrorism, Crime and Security Act 2001.

[209] See *Still at Risk: Diplomatic Assurances No Safeguard against Torture* Human Rights Watch, 2005.

[210] Eg 2004 Country Report: Jordan, US Department of State, 28 February 2005.

[211] Eg *Mass Arrests and Torture in the Sinai,* Human Rights Watch, February 2005.

Prime Minister: Sixth, we are already examining a new court procedure which would allow a pretrial process. We will also examine whether the necessary procedure can be brought about to give us a way of meeting the police and security service request that detention, pre-charge of terrorist suspects, be significantly extended.

New court procedure—see paragraph (iv) below

Extension of detention

We do not think that the case is made out for such an extension. 14 days is a serious length of time without charge. Powers to detain are already longer in terrorism cases. The 14 day limit applicable to terrorist offences was enacted by the Criminal Justice Act 2003 which amended schedule 8 of the Terrorism Act 2000. It came into effect on 20 April 2004 and involves an application to a senior District Judge. There is an initial period of 48 hours, then an application under paragraph 29 (7 days) or paragraph 36 of schedule 8 must be made. In relation to other offences, under PACE the limit for pre-charge detention is 24 hours, extendable to 36 hours by an officer of superintendent rank or above, detention in respect of an arrestable offence[212]. A magistrate can then extend the period to 72 hours, followed by a further extension to 96 hours at most. This proposal will therefore allow suspects to be detained more than 20 times longer than the maximum period that a suspect can be detained for any serious non-terrorist offence, for example murder, rape or serious fraud.

It appears to a large extent that the call for an extension of detention powers relates to the question of resources. Speed is of the essence in these cases where there may be evidence that could lead to prosecution for such serious offences, and the preferable option is surely therefore to ensure that investigations can be carried out as quickly as possible, in case they yield further useful information. We therefore believe that the more appropriate and proportionate way to deal with these concerns would be to ensure that the police and security services are properly resourced, rather than to extend the period of detention before charge.

Furthermore, under PACE[213], the police are required to have some reasonable grounds to arrest, and so there must be evidence to ground that suspicion. We have seen no clear explanation as to why it is not sufficient to charge a suspect with a lesser offence to ensure that they do not have to be immediately released from custody whilst other matters are still being investigated. Charges can always be upgraded at a later stage and suspects questioned in relation to those further charges. Even if suspects are granted bail, courts have the power to impose strict conditions.

Three months detention prior to charge is a length of time tantamount to internment. The government has stated that any extension would be used in extremely rare circumstances and would only apply to a tiny number of people[214]. In view of the serious nature of an extension and the few cases in which it should be necessary, should any extension beyond 14 days be made possible, it should be granted and reviewed at very short intervals by a High Court, rather than a District, Judge.

Prime Minister: Seventh, for those who are British nationals and cannot be deported, we will extend the use of control orders any breach of which can mean imprisonment.

Whist we welcomed the Government's change to the Prevention of Terrorism Bill, now Act, to place the making of a derogation order depriving an individual of their liberty within the jurisdiction of a High Court judge, rather than the Home Secretary, we do not believe this goes far enough.

We are disappointed that no concession was made with respect to non-derogation orders. We acknowledge that in certain cases the imposition of restrictions on liberty will not necessarily amount to a deprivation of liberty engaging Article 5 of the European Convention on Human Rights. However, to argue that this obviates the need for initial judicial control misses the point that severe restrictions, in some cases constituting penal penalties such as tagging or a curfew, will have a significant effect on the controlled person's liberty.

In other cases, the restrictions listed in the Act may, in combination, be so restrictive as to amount to a deprivation of liberty. To argue that such an order may be overturned on appeal, if indeed it does in reality amount to a deprivation of liberty, does not provide the affected person with an effective remedy against the initial decision that will have breached their right to liberty.

We maintain that the rule of law requires that the initial decision regarding the imposition of all control orders must be made by a judge, not an elected politician.

We are not persuaded by the Government's argument that allowing the Home Secretary to make the initial decision will allow greater speed of decision making. If they concede the power to make derogation orders to judges, which presumably will be required where the subject is considered to present a greater risk, practical arrangements will be in place so that cases can be listed before a judge very quickly.

[212] This distinction is to be abolished when the Serious Organised Crime and Police Act arrest powers come into effect in January 2006, and the power to arrest will exist for any offence.

[213] S 24 Police and Criminal Evidence Act 1984, as amended by s 110 of the Serious Organised Crime and Police Act 2005.

[214] Charles Clarke, Today programme, 27 September 2005.

(iv) *the possibility of allowing sensitive evidence, including intercept evidence, to be adduced in criminal trials*

The Newton Committee has noted a reluctance to adduce sensitive intelligence- based material in open court due to concern about compromising their source or methods[215]. The Society has repeatedly called for intercept evidence to be admissible as we believe that this would help with the prosecution of alleged terrorists. Evidential tools, similar to public interest immunity certificates, could be used to deal with what evidence is actually revealed to a jury and protect sources.

The majority of common law jurisdictions, including Canada, Australia, S Africa, New Zealand and the United States admit intercept evidence[216]. In the light of the use of such evidence by other common law jurisdictions, the use of foreign intercept evidence in UK courts[217] and greater EU co-operation, the introduction of intercept evidence is the logical next step. Indeed, the Society agrees with the Joint Committee that the case for relaxing the absolute ban on the use of intercept evidence is overwhelming[218].

(v) *the possibility of establishing a judicial role in the investigation of terrorist crimes*

In the Law Society's response to the Government's consultation "Reconciling security and liberty', we said:

> "We reiterate our preference for CPS Special Caseworkers, rather than the judiciary, having a greater role in the assembling of a case. The judiciary have a key role in the management of criminal cases but to extend this into the assembling of criminal cases may adversely impact on their independence.
>
> We endorse the Joint Committee's recommendation[219] for a greater role for security cleared prosecutors to help translate sensitive intelligence into evidence. The Criminal Justice Act 2003 introduces a greater role for prosecutors generally, in the early stages of criminal proceedings and the White Paper on organised crime considered using specialist prosecutors in assembling cases. The Society believes that any concern about impartiality could be met by extending the pool of Special caseworkers to include defence specialists."

If what is being suggested is a continental-style system, where the investigating magistrate basically directs the police to gather the evidence, both for and against the accused, that would constitute a major change from the adversarial system, in which the investigation and prosecution of serious offences is performed by the police and CPS, who then present the evidence to a magistrate who commits the case to the Crown Court for trial by jury.

It is not clear what the advantage of such change is thought to be, as the prosecution/state would still have to disclose all the evidence upon which their case relies to the accused person, who has a fundamental right to know the case against them. This principle applies equally in an inquisitorial system. We acknowledge that in serious terrorist cases there may be a case for restrictions on the rights of the defence, such as the use of anonymous testimony, provided that the restriction is strictly proportionate to its purpose, does not undermine the very essence of a fair trial and the conviction is not based solely or decisively on evidence from such a source.

(vi) *the overall social and political context in which human rights standards are understood and applied by the courts, the Government and others, and in which the requirements of security are reconciled with those standards.*

No comment.

October 2005

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20. Submission from Liberty to the JCHR's inquiry into counter-terrorism policy and human rights

About Liberty

Liberty (The National Council for Civil Liberties) is one of the UK's leading civil liberties and human rights organisations. Liberty works to promote human rights and protect civil liberties through a combination of test case litigation, lobbying, campaigning and research.

[215] Paragraph 207, Privy Councillors Review Committee. Anti-Terrorism Crime and Security Act 2001 Review Report (HC100: 18 December 2004).
[216] Page 9 JUSTICE Response to Counter Terrorism Powers: Reconciling Security and Liberty in an open society.
[217] RvP [2002] 2WLR463.
[218] Paragraph 56, Joint Committee on Human Rights, 18th Report, 4 August 2004, HL158/HC713.
[219] Joint Committee on Human Rights, Eighteenth Report, 4 August 2004, HL 158/HC713.

Introduction

1. Liberty believes that appropriate steps must be taken to protect us all from terrorism. Security and freedom (as manifest in the right to life and freedoms of speech and against arbitrary detention) are best reconciled and advanced within the international human rights framework left to the world by the generation which survived the Holocaust and the Blitz. This framework pays considerable respect to questions of public safety, but rightly demands detailed and rigorous thinking from Governments and legislators who find themselves interfering with competing rights and freedoms.

2. Legislation and policy should never be devised as a blunt tool for expressing political revulsion at terrifying acts. Statutes must be drafted with greater care than speeches. It is not sufficient that the passing of a new law would send tough signals to Britain's enemies, nor that it somehow makes some of us feel safer. Each proposed interference with democratic rights and freedoms must be carefully weighed against its purported benefits.

A. List of "Unacceptable Behaviours" Indicating Some of the Circumstances in which the Home Secretary May Exercise His Powers of Exclusion or Deportation.

3. From the list of examples of unacceptable behaviour published on 24 August 2005, Liberty has concerns over the inclusion of "foment(ing), justify(ing) or glorify(ing) terrorist violence" as a grounds for exclusion or deportation. We believe that there must be further discussion over excluding or deporting those who justify or glorify terrorism.

4. Firstly, what exactly is meant by "terrorism"? Section 1 of the Terrorism Act 2000 defines terrorism as (among other things) an action that involves serious violence against a person, serious damage to property or which endangers a person's life, and which is intended to influence the government or intimidate the public for the purpose of advancing a political, religious or ideological cause. This is an extremely broad definition, especially since it applies not only to the UK Government and public, but worldwide. There is no indication that this definition will be the one used by the Home Secretary when making the decision to exercise the powers of exclusion or deportation.

5. Secondly, what kind of behaviour constitutes "justification" or "glorification"? It is arguable that comments made in the past by Cherie Booth and the former Liberal Democrat MP Jenny Tunge[220] were justifying terrorism. As these comments show, "justification" of terrorism is a very low bar to meet. Participants in legitimate political debate about the circumstances in which it is acceptable to take up arms against non-democratic regimes across the world would run the risk of being deported.

6. The broad nature of this list of "unacceptable behaviours" will have the effect of stifling the freedom of expression protected by Article 10 of the Human Rights Act 1998. This right has been described as "one of the essential foundations of (a democratic) society, one of the basic conditions for its progress and the development of every man . . . applicable not only for "information or ideas" that are favourably received . . . but also to those that offend, shock or disturb the state or any sector of the population. Such are the demands of that pluralism, tolerance and broadmindedness without which there is no democratic society".[221] People resident in this country should not feel that they cannot legitimately express an unpopular or controversial opinion without running the risk of being deported. It is also sensitive in the context of the community relations that are vital to ongoing intelligence efforts. For example, before the war in Iraq would it have been seen as justifying terrorism for an Iraqi asylum seeker to voice his opinion that Saddam Hussain was an evil dictator who should be overthrown by violence if necessary?

7. People who are not British citizens do not have a "right" to come to Britain and of course removals can be justified. It is worth pointing out that some of the behaviour described, such as "provoking others to terrorist or criminal acts" or "foment other serious criminal activity" is already criminal. If we say people are criminals then it is our responsibility to put them on trial rather than send them to another country.

8. Whilst we welcome the positive exercise of setting out guidance and examples of when and how this broad discretion will be used, we have some concerns about the lack of clarity and explanation offered in relation to grounds that might catch a wide range of people, from those who pose a threat to the UK, to those who are simply voicing dissension about oppressive regimes across the world. Freedom of speech is a vital part of the culture of tolerance that is so celebrated in this country. We urge some clearer indication that political debate should not be restrained for fear of being caught by this broad and rather vague example of unacceptable behaviour.

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[220] "As long as young people feel they have got no hope but to blow themselves up you are never going to make progress" Cherie Blair, June 2002.
On Palestinian suicide bombers: "If I had to live in that situation—and I say that advisedly—I might just consider becoming one myself" Jenny Tunge, January 2004.

[221] Handyside v. U.K (1976) 1 E.H.R.R 737.

B. The Government's Intention to Deport non-UK Nationals Suspected of Terrorism on the Basis of Diplomatic Assurances and the Potential Conflict with Article 3 ECHR

9. Since the London bombings both the Prime minister and Home Secretary have said that "the rules of the game have changed". The first move in this "game" (an analogy of questionable taste) has been to allow easier deportation of foreign nationals it believed to represent a threat. This is being achieved by broadening the scope of existing powers allowing removal of foreign national whose presence is "not conducive to the public good", and by seeking assurances with countries not to torture or mistreat returnees.

10. People who are not British citizens do not have a "right" to come to Britain, and Liberty does not contest the fact that the removal of certain people is justified. However, the state has an obligation to ensure that we do not return people to countries where they will be treated inhumanly, tortured or killed. Article 3 of the European Convention on Human Rights (ECHR) is a prohibition on torture, which prevents the UK from returning anyone to a country if the government accept that it is likely that they will be so treated. Liberty is deeply concerned about the Prime Minister's statement at his press conference that in order to deport people even if there is a substantial risk of torture in the destination country, "we can amend the Human Rights Act and that covers the British Courts' interpretation of the law".

11. The government is considering legislation forcing judges to take greater account of national security when considering human rights issues. To an extent this is misleading as it implies that national security concerns are not already at the heart of human rights considerations. Most of the rights and protections covered must take into account appropriate national security considerations and the courts are obliged to appreciate this.

12. A solution has been sought which seeks to reach assurances with other countries that there will be no mistreatment. Assurances are infinitely preferable to opting out of human rights obligations. However, they should still be treated with caution. No country is likely to admit to maltreatment or torture. The Government recently received assurances from Libya and is seeking others. However, the US State Department has acknowledged persistent allegations of routine torture in Libya in its latest country report on human rights practices, included reported methods such as "clubbing; applying electric shock; applying corkscrews to the back; pouring lemon juice in open wounds; breaking fingers and allowing the joints to heal without medical care; suffocating with plastic bags; deprivation of food and water; hanging by the wrists; suspension from a pole inserted between the knees and elbows; cigarettes burns; threats of being attacked by dogs; and beating on the soles of the feet".

13. Sir Nigel Rodley, the Special Rapporteur on Torture, has stated that to send terrorism suspects to counties where they would be likely to face torture would not only be "a violation of an absolute and peremptory rule of international law, it would be also responding to a crime against humanity with a further crime under international law. Moreover, it would be signalling to the terrorists that the values espoused by the international community are hollow and no more valid than the travesties of principle defended by the terrorists".[222] The 2005 Foreign Office Report on Human Rights states that "it is vital that we expose torturers and bring them to account". It is difficult to see how this view is in any way compatible with deporting anyone to a country which widely uses torture on the basis of diplomatic assurances.

14. If we are to rely on assurances from other nations at the very least there must be corroboration and robust involvement from international human rights monitors. What separates us from the terrorists is that we do not torture people or send them to be tortured.

C. The Various measures announced by the Prime Minister at his Press Conference on 5 August 2005

15. At his press conference on 5 August 2005, the Prime Minister outlined 12 measures to "set a comprehensive framework for action in dealing with the terrorist threat in Britain". Liberty's concerns with some of these measures are outlined below.

Anyone who has participated in terrorism or has anything to do with it anywhere in the world will be automatically refused asylum

16. To refuse asylum to such a vaguely defined group of people would be a breach of the Refugee Convention. The Convention specifically excludes people when "there are serious reasons for considering" that they have committed such grave acts as war crimes, crimes against humanity or a "serious non-political crime outside the country of refuge prior to his admission to that country as a refugee". Liberty believes that these measures are disproportionate. Had this policy been in place in the past, if Nelson Mandela had requested asylum, it would have been automatically refused due to his association with the ANC. As he explained in his trial for sabotage in 1961, the ANC was involved in "attacks on the economic life lines of the country . . . linked with sabotage on Government buildings". Under the Terrorism Act definition, this is terrorism.

[222] Statement by the Special Rapporteur to the Third Committee of the General Assembly, delivered on 8 November 2000, Annex II, E/CN.4/2002/76, at p14.

Extending powers to strip people of citizenship

17. Powers already exist to strip a person of British citizenship, if the Secretary of State is satisfied that he has done anything "seriously prejudicial to the vital interests of the United Kingdom"[223] or a British overseas territory. What the Prime Minister proposed on 5 August is to remove citizenship from a person "if the Secretary of State is satisfied that deprivation is conducive to the public good".[224] Liberty is concerned at the width of this proposal. It is not, as the context in which it was introduced suggests, limited to those suspected of involvement in terrorism. People could be stripped of their citizenship and removed from their homes and families without any sort of criminal charges being brought. If British citizens are suspected of crimes, then they should be charged and prosecuted in Britain, and if found guilty, punished in Britain. To attempt to remove the problem by arbitrarily declaring people "non-citizens" is not an effective solution.

18. Stripping a person of their citizenship is a very visible declaration of suspicion. While this in fact may be what is intended, Liberty is concerned that the measure will be counterproductive, impacting both on community relations and on the ability of the intelligence services to gather reliable information.

Extended pre-charge detention

19. The Prime Minister's plans to significantly extend the pre-charge detention of terrorist suspects are contained in clause 23 of the current Terrorism Bill. Liberty has profound concerns about any extension of the detention period.

20. *Habeas Corpus* is an ancient tradition of the civil law. Clause 39 of the Magna Carta states "No freeman shall be taken or imprisoned or disseised or exiled or in any way destroyed, nor will we go upon him nor will we send upon him except upon the lawful judgement of his peers or the law of the land." This right against unjustified detention was later enshrined in statute in the Habeas Corpus Act 1679. More recently Article 5 of the Human Rights Act 1998 provides protection of liberty and security of person.

21. Naturally, liberty is not an absolute right and the state must be permitted to detain individuals for a reasonable period, without laying charges, to allow investigation. Currently terrorism suspects can be detained for a maximum 14 days. The proposal to extend this to three months is a direct response to a request by the Association of Chief Police Officers (ACPO) in a press release issued shortly after the London bombings. ACPO claimed that due to difficulties with collecting evidence, three months detention would be a more appropriate for terrorism suspects. The legality of pre-charge detention is governed by Article 5(3) of the HRA. This provides that anyone arrested or detained must be brought before a judge within a reasonable time and tried or bailed.[225] We think it is extremely unlikely that any attempt to allow three month detention could be compatible with Article 5, regardless of whether the detainee is regularly brought before a judge to authorise detention as required in the Bill. Rather than argue about how many days extension may or may not be permitted by the Convention, we choose to focus on the community impact of any extension and investigate alternative solutions.

22. The first proposal is one that we and others have made on repeated occasions. The bar on intercept evidence in criminal trials must be removed. We do not intend to go over arguments in favour of removing the bar again other than to point out that it must be the case that the inadmissibility of intercept must be a major factor in being unable to bring charges. We presume that much of the evidence gathered must be by way of intercept and would certainly be sufficient to meet the relevant charging standard. Continuing inadmissibility means that charges cannot be brought as easily.

23. Next, review the way in which people that have already been charged can be re-interviewed and recharged as further evidence is uncovered. This will allow for a charge to be replaced at a later stage of proceedings with a more appropriate offence. Given the range of offences available under the TA, under offences such as "preparation of terrorist acts" once the Terrorism Act 2005 is enacted, and under other criminal law[226] it is difficult to see how no charge could be brought. There is likely to be investigation and evidence gathering prior to arrest, followed by 14 days further investigation. In this time it must be possible to bridge the small gap between the evidence needed to arrest and the evidence needed to charge. Once an initial charge has been brought the police and Crown Prosecution Service, they can apply to the Court to remand in custody as they feel appropriate.

24. Arguments from the police advocating the extension of the detention period make references to difficulties arising from the need to locate and break encryption keys. A civil court can currently make an order requiring such a key to be handed over. Anyone failing to comply with such an order will be in contempt of court and can be detained in custody for a fixed period. This means they do not have to be under arrest with the custody clock running.

25. Section 47 of PACE already allows for people to be bailed to reappear back at a police station while the police continue investigations. This is a commonly used technique to allow time for forensic examination (for example, the testing of a substance to see if it is a narcotic). We presume that section 47 powers would

[223] Section 40, British Nationality Act 1981.

[224] Proposed Government amendment to the Immigration, Asylum and Nationality Bill 2005.

[225] The person arrested can of course be charged and application made for remand in custody.

[226] Presumably terrorist activities would include other offences of dishonesty such as fraud and deception.

not usually be used in terrorism cases due to a concern that the suspect would abscond. This problem could be addressed by attaching conditions to section 47 bail. Conditions could include curfew, reporting, or the surrender of a passport. Defendants in criminal cases will frequently have restrictions placed on their bail. Similarly, section 1 of the Prevention of Terrorism Act 2005 (PTA) suggests a range of restrictions. Part of our objection and opposition to the provisions of Section 1 PTA was that they were applied as a punishment in themselves, were not made in anticipation of any criminal proceedings, and were potentially indefinite. If conditions were time limited and made part of criminal process by being imposed in conjunction with Section 47 PACE we do not imagine the same concerns arising.

26. The overwhelming majority of people arrested under terrorism laws are released without charge. It is highly likely in the current context, that most of those arrested would be Muslim. At a time when the Prime Minister and others are emphasising the need for all sections of the community to work together any measure which caused Muslims to feel unfairly treated would be counterproductive. We appreciate many people will be in favour of extending time limits. It is unlikely that anyone who supports these measures would be directly affected by them. However, the impact upon those who have family, friends and neighbours arrested and then released weeks, or even months, later with no charge and no explanation will be huge.

Extensive use of control orders

27. The Prime Minister declared on 5 August that "for those who are British nationals and cannot be deported, we will extend the use of control orders, any breach of which can mean imprisonment". Control orders amount to long-term punishment without trial (in violation of the right to a fair trial under Article 6 of the ECHR) and provide neither justice nor security.

28. Many control orders, whether restricting movement, association and communication or tagging, curfew or house arrest, will be punitive. European caselaw makes clear that if a measure punishes and has serious consequences, then it is part of the criminal process. Those subjected to control orders will suffer the badge of criminality without the benefit of a trial. They will be denied the presumption of innocence, the "golden thread" that runs back through centuries of criminal process to the Magna Carta. As with restrictions on liberty, to satisfy requirements of fair trial and presumed innocence, control orders must anticipate criminal proceedings.

29. Under Clause 2 (1) (a) of the Prevention of Terrorism Act 2005, the Secretary of State merely needs "reasonable grounds for suspecting that the individual has been involved in terrorism related activity". This is an extremely low threshold. We cannot imagine a situation where material that is put before the Home Secretary by the police or security services does not raise suspicion. Otherwise, it is unlikely to be placed before him. The ease with which this test will be satisfied is compounded by the fact that there is no mechanism for testing the strength of the material on which his suspicion will be based.

30. Once the Secretary of State has reasonable suspicion, he may make a control order if he considers it necessary to protect the public from the risk of terrorism (Clause 1 (1) (b)). This might appear to more stringent test. However, once satisfied that there is reasonable suspicion that a person is or has been involved in "terrorism related activity", it is not difficult to establish that the control order is necessary to protect the public from the risk of terrorism. There does not have to be any factual basis for this assessment of risk. Even if the suspicion is based on totally inaccurate and misleading information all that is required is that the suspicion of the Secretary of State be reasonable according to what is placed in front of him. If satisfied that there is reasonable suspicion it follows that there must be at least some risk, however slight that risk may be. The standard required to make a control order is exceedingly low.

31. Given the range of control orders they are extremely easy to breach. For example, if the person under an order meets someone who he is barred from contacting (Under Clause 1 (4) (d)) he will be in breach. As it is likely that these people will be from the same community, possibly from a small geographic location, it is difficult to see how any contact could be avoided. This means there is prospect of a criminal conviction and lengthy custodial sentence arising from a chance meeting. It is important to remember that the person subject to the order never has to be accused of any criminal offence. Breaching an order will involve an act which in normal circumstances would not be in any way improper, such as being out at a certain time or meeting a particular person. It will, therefore be easy to be criminalised and incarcerated without having ever committed a "crime".

Extending powers to proscribe organisations

32. The Government has the power to proscribe organisations concerned with terrorism under Part II of the Terrorism Act 2000. The suggestion now appears to be to ban extreme political parties and groups who are not involved with violence or its incitement. This is contrary to rights of free association, entirely anti-democratic and counter-productive to the priority of engaging young Britons in democratic discourse. This would violate Article 11 (freedom of association) of the ECHR.

33. Once organisations linked to terrorism has been proscribed, any type of contact becomes a serious criminal offence. Doing anything to further the aims of the organisation, such as speaking at a meeting or wearing a T-shirt expressing support for the proscribed organisation, will be an offence. It is one thing to

prescribe organisations that are actually involved in terrorist activity. Once political organisations with no links to terrorism are banned, then fundamental democratic traditions of free speech and free expression are threatened. We may find the views of some extremist organisations to be distasteful. However, a ban will achieve nothing apart from further disenfranchisement. The current Terrorism Bill extends the grounds for proscription our briefing on the bill goes into further detail.

Closing Down Places of Worship

34. One of the most terrifying of the Prime Ministers proposals was to close down places of worship which the government considers to be centres of extremism. Religious freedom is a fundamental right which the state must respect. Any individual who is inciting other to commit offences can be prosecuted. Closing down places of worship is a broad-brush approach that can only be counterproductive. Those who hold extreme views will not change them but will instead become more resentful. Those involved will simply find other venues and forums to meet. Extremism needs to be confronted not driven underground.

Securing our Borders

35. Liberty has no problem with secure visa systems or with excluding those rationally believed to be dangerous from the United Kingdom. However we are disappointed in the repeated suggestion that combating terrorism is a matter of immigration control. Terrorists are not exclusively foreign nationals who may be legitimately denied entry to or deported from Britain. Serious questions must be asked about how terrorist organisations are able to successfully recruit among Britons and non-Britons alike. Creating "Fortress Britain" will not solve these problems.

D. The Possibility of Allowing Sensitive Evidence, Including Intercept Evidence, to Be Adduced in Criminal Trials

36. Liberty has never supported an absolute bar on the admissibility of intercept evidence in criminal trials. The imperative behind the historic bar was the protection of Security Services' sources and methods rather than concern for the fairness of the trial process.

37. Legally the bar is an anomaly. The UK and Ireland are the only countries in the world to have a ban. The Regulation of Investigatory Powers Act 2000 (RIPA) forbids the use of domestic intercepts in UK court proceedings. However, foreign intercepts can be used if obtained in accordance with foreign laws. Bugged (as opposed to intercepted) communications of the products of surveillance or eavesdropping can be admissible even if they were not authorised and interfere with privacy rights. There are no fundamental civil liberties or human rights objections to the use of intercept material, properly authorized by judicial warrant, in criminal proceedings.

38. Rules of criminal evidence will apply to ensure that evidence is not admitted in such a way as to unfairly prejudice the case. Section 78 of the Police and Criminal Evidence Act (PACE) gives the court the discretion to exclude evidence if "having regard to all the circumstances, including the circumstances in which the evidence was obtained, the admission . . . would have such an adverse effect on the fairness of proceedings that the court ought not to admit". There is a further common law power to exclude though this is rarely used. If there are concerns over protection of the State's sources then clearly established rule of Public Interest Immunity allow disclosure to be withheld from the defence and the public. This is particularly applicable when there are state interests that require protection of when informers and undercover sources have been used.

39. There may be further practical issues to overcome, but there is no principled reason why the bar cannot be lifted. The Government has stated that it is not a magic bullet solution. This may or may not be true. Lifting the bar would, however, remove the primary obstacle to bringing trials in criminal cases.

E. The Possibility of Establishing a Judicial Role in the Investigation of Terrorist Crimes

40. In Lord Carlile's Report on the Terrorism Bill 2005, he recommended the adoption of measures suggested by the Newton Committee in 2003, principally "to make a security cleared judge responsible for assembling a fair, answerable case, based on a full range of both sensitive and non sensitive material". This system of "examining magistrates" is currently in use in France. Liberty believes that to adapt this continental approach to the English system would be a flawed idea. It is not possible or desirable to simply transpose part of another State's legal system onto our own, especially when the framework underlying that part is so fundamentally different to our current legal system.

41. The French inquisitorial method has some problematic features, and we should at all costs avoid replicating any of these into English criminal law. The duties of the examining magistrate in France formerly involved both examination of the case, and the authorisation of detention. In 2000, the power to authorise detention was removed, and another judicial role was created for this purpose. The necessity to separate these roles is indicative of conflict in the original duties imposed on the examining magistrate. Any attempt

to import this system into English law would be likely to require a similar division of responsibilities, perhaps requiring an examining judge with a separate judge to authorise detention, and a further judge to conduct the trial. This is an unnecessary and inefficient duplication.

42. The Home Office has in the past suggested the use of an investigating judge in order to combat its reluctance to disclose certain sensitive material. However, if the French model is followed, the lawyer for the person charged is kept informed of the information held by the investigators. Consequently, special procedures would still be required in order to deal with the disclosure of sensitive information.

43. Liberty believes that there exist uncomfortable parallels between the role of examining magistrates proposed by the Newton Committee and the "Diplock" courts used in Northern Ireland. The essential feature of the Diplock courts was a single judge sitting without a jury. The judge in this role is the sole and final arbiter of the law and of the facts of the case, which creates the possibility of the judge adopting a more pro-active or interventionist approach to the trial. Studies of Diplock courts have found evidence suggesting that judges did adopt such an interventionist approach.[227] Placing a judge in the position of deciding on both fact and law means that they must hear evidence before deciding whether it is admissible. If evidence is found to be inadmissible, the judge is still in the artificial position of having to forget what he has heard.

44. In the Diplock courts, criminal rules of evidence were relaxed in order to admit evidence using a lower standard than that in normal criminal courts. This relaxation led to a number of people being convicted on the basis of uncorroborated testimony of informants. By its very nature, intelligence evidence is unlikely to be corroborated. Liberty is concerned that any move towards a closed, Diplock style system—such as the French system of examining magistrates—will create the same problems and the same injustice.

October 2005

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21. Submission from the Mayor of London on the Terrorism Bill

1. Following the deplorable and tragic attacks in July the Mayor fully supports the Government's review of existing counter-terrorism legislation. It is vital for the safety, security and economic health of London and the UK that counter-terrorism measures are robust and effective. As the directly elected head of London's regional government, the Mayor is in a unique position to represent the concerns and interests of Londoners.

2. The London bombings brutally served to demonstrate that there must be a range of appropriate and rigorous measures that can be used to prevent attacks on the innocent and to bring the perpetrators to justice.

3. The Mayor is deeply concerned that a number of the provisions in the Terrorism Bill may criminalise those who oppose terror and whose cooperation is vital to the police. While the Mayor recognises the pressing need to tackle terrorism decisively and effectively, lasting success is unlikely to be achieved if we rush into legislation that lacks consensus and if we fail to take with us those communities whose support and trust are vital.

4. At a time when Londoners are standing united against those who threaten our city's security and multiculturalism, it is essential that we properly consider the potential impact on community relations of criminalising some non-violent behaviours and groups. Such steps will isolate and disenfranchise those who may disagree with the Government's perspective on struggles past and present, but who oppose violence.

5. The emphasis must be on developing effective engagement with all communities, and developing policies and laws that not only protect, but also unite. It would be both regrettable and dangerous if new anti-terror laws inadvertently add to the hostility faced by minority groups from some sections of society through presenting visible minorities, or particular faith groups, as part of the problem, rather than part of the solution.

6. The onus must be on the Government to present a clear and compelling case for why the current law on incitement is inadequate and broader measures are required—specifically, who and what is the new law designed to address that existing legislation does not? This case has not yet been made.

7. At a time when the democratic principles that underpin our society are under threat, the Government should strive to safeguard our right to express opinions that are controversial or even offensive. One person's freedom fighter is another's terrorist. It is the freedom to debate—and to disagree—that helps to make our society strong.

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[227] Doran S and Jackson J, *Judge Without Jury: Diplock Trials in the Adversary System* (Oxford, Clarendon Press 1992).

The Terrorism Bill

8. Clauses 1 and 21 of the Terrorism Bill, which relate to the encouragement and glorification of terrorism by individuals and organisations, give cause for greatest concern. While Clause 1 is undoubtedly an improvement on draft Clauses 1 and 2, it would still make it quite possible for an individual to be prosecuted for making a statement that unintentionally encourages an act of terrorism.

9. Under the definition of terrorism that will be used for the purposes of this Bill, it could be argued that the African National Congress was engaged in "terrorism", as it was involved in a military conflict with the Apartheid regime. Both the ANC and its supporters could therefore have been caught by Clauses 1 and 21.

10. Indeed, any non-state actors involved in a military conflict where democratic means to resolve issues do not exist, irrespective of the circumstances, could arguably be deemed to support terrorism and fall foul of these clauses. Laws that would criminalise those who supported action against the regime of Adolf Hitler, will undermine the legitimacy of our anti-terror efforts.

11. The trust and cooperation of all our communities is indispensable to isolate and defeat supporters of terrorism. If legislation is framed too loosely, people who totally condemn terrorist attacks may fear that legitimate views on, for example, the conflict in the Middle East, make them and others vulnerable to prosecution. In those circumstances, they are more likely to be wary of contact with the police and less likely to volunteer information that could prove crucial to counter-terrorism investigations.

12. For similar reasons, the Mayor sees no purpose to banning organisations that do not advocate or support terrorism. Driving such organisations underground, where they are impossible to engage with, would be counter-productive and make intelligence-gathering more difficult.

13. The Mayor recognises the importance of proscribing organisations that directly incite violence. However, clause 21 will significantly broaden the criteria for proscription to include the "glorification" (defined as "any form of praise or celebration") of acts of terrorism. The use of such a vague term risks outlawing wholly non-violent groups which happen to have a different view to the Government on certain political issues or historical events.

14. The Mayor recognises the considerable challenges faced by the Police in gathering enough evidence to bring charges against terrorist suspects. However, the Mayor fears that proposals contained in Clause 23, to extend the period of pre-charge detention of suspects from 14 days to three months, could prove to be highly counter-productive and that a better balance between the demands of operational policing and the rights of the individual must be found.

15. Clause 23 is likely to impact on British Muslims disproportionately. The Mayor is concerned to avoid a situation in which possibly innocent Londoners will be held for up to three months—equivalent to a six month custodial sentence—without charge. This would impact not only on the individuals involved, but also on their families and their communities, and significantly dent public confidence in policing.

16. The Mayor firmly believes that only united communities will defeat terrorism and protect human rights. The Mayor, Liberty, faith communities, MPs, peers, trade unionists and lawyers have together launched a campaign to ensure that any measures adopted by Parliament and the Government against terrorism do not criminalise people who condemn attacks like the ones on 7 July and who urge communities to work with the police to find those responsible.

22. Submission from Medical Foundation for the Care of Victims of Torture to the JCHR's inquiry into counter-terrorism policy and human rights

The Medical Foundation for the Care of Victims of Torture (the "Medical Foundation") is a human rights organisation that works exclusively with survivors of torture and organised violence, both adults and children. It has received more than 40,000 referrals since it began in 1985. The Foundation offers its patients medical and psychological treatment and documentation of the signs and symptoms of torture—providing some 700 to 1,000 forensic medical reports each year—as well as a range of therapeutic services.

The Medical Foundation is concerned about the UK Government's proposal to rely on diplomatic assurances from receiving states that returned individuals will not be subjected to treatment contrary to the standards of Article 3 ECHR. In its judgment in the case of Chahal v United Kingdom, the European Court of Human Rights (the "Court") concluded that assurances obtained in that case from the Indian Government did not provide the Appellant an adequate guarantee of safety. While, in that case, the Court did not doubt the good faith of the Indian Government in providing assurances, and despite the efforts of the National Human Rights Commission of India and the Indian courts to bring about reform, the violation of human rights by members of the country's security forces remained a "recalcitrant and enduring problem".

A similar conclusion was reached by the United Nations Committee Against Torture in the case of *Agiza v Sweden,* the applicant in that case being removed to Egypt, where he was abused in detention. Again, the returning state had obtained diplomatic assurances prior to the applicant's removal that he would not be

subjected to torture or other forms of abuse. The Committee, noting the "consistent and widespread use of torture against detainees" and the particular susceptibility of those held for political or security reasons (such as the applicant) to such abuse, concluded that the Swedish Government was in breach of its obligations under article 3 of the UN Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment in returning the applicant to Egypt, and that this liability was not displaced by the diplomatic assurances obtained.

The Medical Foundation is concerned about the ability of those states providing assurances to the UK Government to protect individuals and to guarantee the conduct of security personnel at a grassroots level. We therefore fear that such assurances cannot provide the requisite security to a returning individual.

The Medical Foundation is also concerned about the negative mental health consequences of returning a torture survivor to a country solely on the basis of such assurances. In obtaining express assurances that an individual will not be mistreated by the agents of the receiving state, the UK Government is effectively acknowledging the risk of abuse. In such circumstances it is disingenuous to return an individual, particularly where return is likely to be highly anxiety-provoking to individuals who have suffered torture or other severe abuse in the past.

13 October 2005

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23. Joint submission from "Protect our rights" comprising Birnberg Peirce & Co, CAMPACC, Christian Khan solicitors, East London Communities against State Terror, Hizb-ut-Tahrir, Islamic Forum of Europe, Islamic Human Rights Commission, Liberty, National Civil Rights Movement, Muslim Association of Britain, Muslim Council of Britain, Newham Monitoring Project, Statewatch, Stop Political Terror, The 1990 Trust, The Monitoring Project to the JCHR's inquiry into counter-terrorism policy and human rights

Summary

The UK's counter-terrorism legislation is among the most developed in the world. There is no evidence that the wide-ranging powers, already in place, are in anyway inadequate to investigate and prosecute those involved in any way in the incidents that have recently occurred. Daily reporting of the progress of police investigations suggest that conventional police investigations are piecing together an extensive breadth and range of evidence. There are no suggestions by the police that they have been thwarted in any relevant investigation by any lack of legal powers.

The greatest threat to our security comes not from an inability to counter terrorism but the government's refusal to conduct an honest debate on the causes of the attacks against London in July 2005. In place of that debate, Tony Blair has turned the spotlight on Britain's Muslim communities. British tolerance has fertilised terrorism, he suggests. Multiculturalism and human rights are to be the scapegoats.

In the context of an ill advised and counter productive "war on terror", these proposals pave the way for an equally misguided "war on Islamic extremism". There can be no doubt that the measures they envisage—restrictions on free speech, freedom of association and freedom of conscience—coupled with the simplistic and inflammatory portrayal of Islam as a "dangerous" religion, will further alienate and marginalise the very communities in which the government professes to be combating radicalisation.

The Prime Minister has suggested that Parliament will be recalled to consider new legislation, possibly at short notice in September. There is a grave danger that past mistakes will be repeated in hastily drafted legislation that fundamentally restricts the liberties that define us as a free and democratic society.

Briefing

This briefing examines together the Home Secretary's proposals for three new offences (18 July),[228] the Association of Chief Police Officers' demand for more powers (21 July),[229] the Prime Minister's 12 point statement (5 August)[230] and the Home Office consultation document on deportation and exclusion (5 August).[231] This kind of government by press release is not conducive to much-needed debate and does not amount to meaningful consultation. To avoid the growing suspicion about a possible September "stitch-up" the government should make its full intentions clear immediately so all in civil society can have their say.

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[228] Home Secretary announces new terrorism laws (20 July 2005): http://www.statewatch.org/news/2005/jul/12uk-terr-laws-HmSec.htm

[229] ACPO proposals (21 July 2005): http://www.statewatch.org/news/2005/jul/acpo-terr-proposals.pdf

[230] Prime minister's statement (5 July 2005): http://www.statewatch.org/news/2005/aug/02pm-terror-statement.htm

[231] Home Office consultation document (5 July 2005): http://www.statewatch.org/news/2005/aug/uk-deportation.pdf

1. *"Acts preparatory to terrorism", "terrorist training" and "indirect incitement"*

On 18 July 2005 the Home Secretary announced his intention to introduce three new terrorism offences when parliament reconvenes. Parliament was dissolved two days later with the three main parties having reached a "consensus" on new laws to prosecute "acts preparatory to terrorism", "terrorist training" and "indirect incitement to terrorism".

The reason for creating new offences of "acts preparatory to terrorism" is still quite unclear. Under the Terrorism Act 2000, the "possession of an article in circumstances which give rise to a reasonable suspicion that [it] is for a purpose connected with the commission, preparation or instigation of an act of terrorism" already carries a 10 year jail sentence (s 57). It is an equally serious offence under the Terrorism Act to "collect information" or "possess documents" that could be used for terrorism (s 58). The Home Secretary has stated that "the new offence will lead to the capture of those planning serious of acts of terrorism", implying surveillance powers rather than additions to an already broad offence. It is also possible that visiting a "jihadist" website could also be in some way criminalised, notwithstanding the fact that visiting a website is obviously completely different to planning "a serious of act of terrorism". ACPO has also called for a new offence of "inappropriate internet usage", a concept more readily associated with regimes like China and Iran.

A "new offence" of "terrorist training" can similarly add little to the existing Terrorism Act under which those who give or receive training in the making or use of weapons or explosives, or recruit persons for this purpose, are also liable to 10 years in prison (s54).

Things are clearer as far as "indirect incitement to terrorism" is concerned since the Home Secretary has announced that this will allow the UK to implement the Council of Europe convention on the prevention of terrorism agreed in April 2005. Article 5 of that Convention defines "public provocation" as:

> the distribution, or otherwise making available, of a message to the public, with the intent to incite the commission of a terrorist offence, where such conduct, whether or not directly advocating terrorist offences, causes a danger that one or more such offences may be committed.[232]

This vague concept, based on the Spanish law of "*apologia de terrorismo"*, based on the principle of criminalising people for what they say rather than what they do, is at the heart of a number of the current proposals.

2. *"Condoning, glorifying or justifying terrorism"*

On 5 August the prime minister suggested that the new offence of "indirect incitement" will now cover "condoning", "glorifying" or "justifying" terrorism (point 2 of the statement), broadening its potential scope significantly. The obvious concern is that people who express support for armed resistance to the occupation of Palestine or Iraq, for example—resistance that many people around the world feel is legitimate—could be caught-up in the new laws. There is an extremely thin line between empathising with the Palestinian cause, for example, and justifying and condoning the actions of suicide bombers, a point highlighted by Cherie Blair during a speech in Jordan in 2004 for which she was publicly accused by Israel of "condoning" such bombings. It is not a line that can be drawn with any legal certainty.

Condoning, glorifying or justifying terrorism will apparently be grounds for excluding and deporting people (point 1), closing down mosques (point 11) and the "more extensive" use of control orders (point 7). It is important to note that the only persons that have been subject to control orders since the legislation was enacted in March 2005 are the 11 foreign nationals that were interned in Belmarsh and elsewhere, rather belying the suggestion that Britain is teeming with known terrorists or other men so dangerous that these sanctions are necessary.

The talk of "closing extremist mosques" suggests the government cannot differentiate between individual responsibility and blanket criminalisation. In a recent trial in which a number of defendants had an association with the Finsbury Park mosque, the prosecution itself emphasised that thousands of law-abiding persons worshipped at that mosque weekly. They did not and could not criminalise the mosque in its entirety.

3. *The clampdown on "extremism" and "unacceptable behaviours"*

Tony Blair's 12 point plan is aimed at those he describes as "extremists". The fundamental problem is that "extremist" is not defined or recognised in UK law. So what is meant by "extremist"? In a speech to the Labour Party national conference in July Blair outlined what "barbaric ideas":

> "They demand the elimination of Israel; the withdrawal of all Westerners from Muslim countries, irrespective of the wishes of people and government; the establishment of effectively Taleban states and Sharia law in the Arab world en route to one caliphate of all Muslim nations."

[232] Council of Europe Convention on terrorism (2005): http://conventions.coe.int/Treaty/Commun/QueVoulezVous.asp?NT = 196&CM = 8&DF = 19/07/2005&CL = ENG

This is dangerously simplistic and serves only to equate terms such as "Shariah" and "caliphate" with "terrorism" in the minds of an ignorant public. Shariah, an Arabic term meaning "the path", has different guises according to different Islamic schools of thought. The establishment of Shariah in Muslim countries, the aspiration to one Caliphate of Muslim States is as legitimate as any other political ideology as long as it evolves from the will of the people.

To the prime minister's interpretation of "extremism" can be added the Home Office's list of "unacceptable behaviours" (which applies to "any non-UK citizen whether in the UK or abroad"): "writing, producing, publishing or distributing material", "public speaking including preaching", "running a website" or "using a position of responsibility such as a teacher, community or youth leader" to express views which the Government considers:

- Forment terrorism or seek to provoke others to terrorist acts.
- Justify or glorify terrorism.
- Forment other serious criminal activity or seek to provoke others to criminal acts.
- Foster hatred which may lead to intercommunity violence in the UK.
- Advocate violence in furtherance of political beliefs.

The Foreign Office is working on a database of foreign "extremists" and the Home Office a "list" of "specific extremist websites, bookshops, centres, networks and particular organisations of concern" in the UK". It is entirely predictable that the resulting "clampdown" will be perceived as censorship of those who might criticise British foreign policy or call for political unity among Muslims. This is disingenuous to say the least, carrying the dual risk of "radicalisation" and driving the "extremists" further underground, to use the government terminology.

4. *Deportation and exclusion*

The Home Secretary has long enjoyed wide-ranging powers to exclude and deport people from Britain that he deems "not conducive to the public good" and, under a law drawn-up ingeniously to cover a single individual, can also strip British nationals of citizenship if they have a second nationality (the "abu Qatada law", which notably failed to lead to the deportation of Mr. abu Qatada). The "problem" (as the government sees it) is Article 3 of the ECHR (as incorporated into the UK Human Rights Act) which prevents the government removing people to third countries in which they face a risk of torture or inhuman or degrading treatment (a proviso which has been upheld by the UK courts time-and-time again). The government's solution is a series of "memoranda of understanding" (MoUs) with third countries that persons being returned there will not be mistreated. The first such "understanding" was reached with Jordan last week, though it is not at all clear from the text that the MoU even expressly prohibits the death penalty. "Not worth the paper it's printed on" said Amnesty International.

On 11 August the first 10 "extremists" were seized pending deportation. These were the very same individuals who had been interned and then subject to control orders. A number have severe mental health problems as a result of their indefinite detention; one was seized from a psychiatric unit. Their families and lawyers were initially not told where they were taken to and the Home Office denied repeated requests for this information. Most of the men face expulsion to Algeria. The decision to rely on diplomatic assurances from a regime that the government knows on strong evidence make use of torture undermines the universal international rejection of such "assurances".

5. *Asylum and extradition*

The government has deliberately conflated the issues of asylum and extradition with its intention to deport people from the UK. "Anyone who has participated in terrorism or has anything to do with it anywhere will be automatically be refused asylum" said the prime minister (in point 3 of his statement), equating terrorism with asylum and scapegoating refugees in the comfortable knowledge that the security services have been vetting those from targeted countries for years.

As for extradition: "cases such as Rashid Ramda wanted for the Paris metro bombing 10 years ago and who is still in the UK" are "completely unacceptable" said Blair (point 4), we "will set a maximum time limit for all future cases involving terrorism". What this deliberately ignores is the fact that the Home office has taken five years to make a decision on the Ramda case, and that the Extradition Act 2003 has already introduced fast-track procedures. The European Arrest Warrant (EAW) legislation contains a maximum time limit of 60 days and in 2004 the Home Office reported to the European Commission that its average EAW proceedings lasted a mere 17. Two EU countries, Poland and Germany, have now ruled the hastily adopted EAW legislation unconstitutional and a third, Belgium, has referred the matter to the European Court of Justice. There are likely to be similar challenges in other EU countries because constitutional protections were simply discarded in the desire to speed-up proceedings.

6. *"Special" court procedures and "special" judges*

ACPO's call to hold terror suspects for up to three months without charge must be seen in the context of the government's intention to revisit administrative detention (without charge) which was struck down by the House of Lords, leading to the "control orders" legislation. It proposes "new court procedures" (point 6) and more money for "special judges" (point 8). These proposals are shorthand for detention without trial, a government appointed prosecuting judge, secret evidence, secret hearings, court appointed defence lawyers, and so on—procedures that all concerned have long recognised violate the right to a fair trial and the prohibition against arbitrary detention under Article 5 of the ECHR, from which the UK has already infamously derogated.

A seven-day interview period was already long time. This has only very recently been doubled to 14 days. There is no evidence that this is not enough time to make decisions on whether to charge suspects or not. A longer period of detention without charge would be likely to encourage the police to make arrests not based on concrete intelligence but as "fishing expeditions" This aggressive policing would constitute harassment and alienate the Muslim community, who will feel increasingly criminalised. Note that a three month period of detention without charge is the equivalent of a six month prison sentence.

The idea of secret courts with judges considering secret evidence undermines the fundamental principles that (a) criminal proceedings must be held in public because justice must be seen to be done and (b) that the accused person must know the evidence against them. Arguably the more serious the charge which the accused person faces the more important this is. What is suggested as future legislation is a "wish list" that police, intelligence services and governments would love to possess if there were no restraint upon their powers. There is one possible exception, the admissibility in court proceedings in the UK of phone tap evidence. What is extraordinary is that this is evidence whose use has been continuously long opposed only by the intelligence services.

We should not forget that the justification for secret courts in SIAC to consider the cases of people interned indefinitely without trial was in large part because phone tap evidence was not used in court here. What are now being demanded are secret courts and using phone tap evidence in normal court proceedings. Secrecy for "intelligence" evidence is a recipe for yet more misleading claims that, therefore, go untested. There have been too many recent examples of deliberate manipulation of "intelligence" for political purposes to think of bringing in "secret" courts.

7. *Extended powers of proscription*

The government has also announced its intention to proscribe "Hizb-ut-Tahrir" and any successor organisation to "Al Muhajiroun" (point 9), extending the powers of proscription under the Terrorism Act 2000 if necessary to cover "extremist" as well as "terrorist" organisations. Hizb-ut-Tahrir is a political organisation that has been committed to non-violence for 50 years. Shami Chakrabarti of Liberty, is correct to say that it is "unwise to emulate the banning tendencies of Middle Eastern regimes that radicalised generations of dissenters by similar policies".

It must also be pointed out that "proscription" is an extremely serious sanction: members of a proscribed organisation can be jailed for 10 years and many forms of active and passive support are criminalised. Wearing clothing or displaying a symbol suggesting support for a banned organisation, for example, carries a five year jail sentence. There can be no justification for prosecuting Hizb Ut Tahir and not the British National Party, whose members have been accused of inciting and perpetrating violent racist acts. In a democracy, neither should be proscribed. Those of us who disagree with them should confront them politically. If their members break the law they should be dealt with by the criminal justice system.

Since the 7 July bombings there has been a UK-wide increase in faith related and racially motivated attacks and widespread violence against individuals, their homes and families, businesses and places of worship. The British National Party has been distributing leaflets with images from the London bombings and the question "isn't it about time you started listening to the BNP"? They have been spurred on—"indirectly incited" perhaps—by a right-wing media intent on an "extremist" witch-hunt. The government is not doing enough to confront this form of extremism. On the contrary, some of its proposals pander directly to it.

8. *"Securing our borders"*

The proposals to "secure Britain's borders" have so far been limited to the creation of a database on international extremists to be refused entry (discussed above) but are likely to encompass a much wider agenda. The idea of a "border police" has been floated, though it must be said that joint operations of immigration and police officers increasingly resemble such a force.

The government has been careful not be drawn into debate around the unpopular ID cards bill and both Blair and Clarke have been unequivocal in admitting that "all the surveillance in the world" could not have prevented the London bombings. Yet in the same breath, Mr Clarke was in Brussels on the 13 July for a specially convened meeting of the EU Justice and Home Affairs Council proposing to his 24 counterparts

that they all introduce a biometric ID card in response to the bombings.[233] Predictably, the attacks were also used as a justification for the long-standing and long-opposed proposal to introduce the mandatory retention of all telecommunications data in the EU. Neither of these measures are necessary to combat terrorism or legitimate in a democratic society.

9. *Good citizens and stop-and-search*

Presenting the London bombings as an attack on "our way of life", the government argues that the problem is that "our freedom" and generosity has for too long has allowed people to come to this country without fully accepting "our values".

UK law already requires people being granted British citizenship to take an English test, attend a "citizenship ceremony" and swear allegiance to Britain and the monarchy (something many existing British citizens would refuse). What is now proposed by the government is an "Integration Commission" to focus on "those parts of the community presently inadequately integrated" (point 10 of the Blair statement). The irrevocable flaw in this argument is of course, as one commentator succinctly put it, that "being born in a barn doesn't make you a horse".

To prepare the ground for the integration commission the prime minister duly dispatched Home Office minister Hazel Blears on a bus tour of northern cities to reach out to young Asian youth. Blears was a surprising choice because she had outraged the Asian population before and after the bombings by telling them that, contrary to the Race Relations Act, they should expect to be disproportionately stop-and-searched.

"Why are you disaffected?", asked a patronising Blears in Leeds, Bradford and elsewhere. There were two overwhelming and entirely predictable responses: disproportionate stop-and-search and UK foreign policy, particularly Iraq. Ignoring these concerns can only add to any feelings of alienation and marginalisation.

A recent report from the Metropolitan Police Authority[234] stated that the current stop and search practice has created deeper racial tensions and severed valuable sources of community information and criminal intelligence. Rather than extend the period of detention of innocent people, the police should concentrate on improving their intelligence whose failures have lead to huge resentment on the part of the Muslim community.

Analysis of Governments Proposals

New grounds for deportation and exclusion

- Fostering hatred, advocating violence to further a person's beliefs or justifying or validating such violence.
- Memorandum of Understanding with Jordan and possibly 10 other countries.
- Legislating specifically for a non-suspensive appeal process in respect of deportations.
- A list drawn up of specific extremist websites, bookshops, centres, networks and particular organisations of concern. Active engagement with any of these will be a trigger for the home secretary to consider the deportation of any foreign national.

New anti-terrorism legislation

- An offence of condoning or glorifying terrorism. To be applied to justifying or glorifying terrorism anywhere, not just in the UK.

Automatic refusal of asylum for anyone who has participated in terrorism or has anything to do with it anywhere.

Extending powers to strip citizenships for those acting in a way contrary to the interests of the country and applying them to naturalised citizens engaged in extremism.

Maximum time limit for all future extradition cases involving terrorism.

New court procedure to allow a pre-trial process. Detention pre-charge of terrorists be significantly extended.

Extend use of control orders to British citizens and those unable to be deported. Any breach will mean imprisonment.

Expand court capacity and appoint new special judges for control orders and related issues.

Proscribe Hizb ut Tahrir and Al-Muhajiroun. Expand the grounds for proscription in new legislation.

New citizenship tests and community integration proposals.

[233] Statewatch news online: http://www.statewatch.org/news/2005/jul/07eu-id-bio-plan.htm.
[234] Report of the MPA Scrutiny on MPS Stop and search Practice, May 2004.

New powers to close extremist mosques. List of Imams who are non-UK citizens who will be banned from Britain.

New measures for border controls—biometric visas.

International database of non desirables to be denied entry to UK. Any appeals to take place out of UK.

Joint Statement

United to Protect Our Rights

Since the bombings in London in July 2005 the police have succeeded in conducting widespread investigations using the vast range of powers already available to them.

Throughout those same five weeks, however, we have observed with fear and horror announcements by the government of the steps it intends to take to change legal certainties that it was previously believed would stand firm in all circumstances. We are particularly concerned that the government is giving a green light to racism and Islamaphobia and signalling a general attack on freedom of expression in the Muslim community

We the following register our grave concerns, and our total and stalwart opposition to the following steps proposed by the government:

1. The removal of trial by jury for offences linked to terrorism.
2. The hearing of evidence in secret by judges and special advocates alone in terrorist trials with the accused person not told of the evidence against them and no public accountability.
3. The deportation of individuals at risk to regimes known to practise torture in reliance on "diplomatic assurances".
4. The extension of pre-charge detention beyond the already lengthy 14 day period and the encouragement it will give to arrest people about whom there is no reasonable suspicion or intelligence.
5. The banning of organisations which are not involved in terrorism or violence and do not advocate it such as Hizb-ut-Tahrir.
6. The criminalisation of imams, bookshops, mosques and organisations for the expression of legitimate religious and political ideas (even if such ideas are thought to be offensive or wrong) such as the adoption of sharia law.
7. The creation of new offences of indirect incitement to terrorism—even though incitement to murder is already a crime—and of acts preparatory to terrorism—even though existing law already makes it an offence to be knowingly involved in terrorism.
8. The amendment or repeal of the Human Rights Act.

We have not forgotten the experiences of the conflict in Northern Ireland and the lessons of the last 30 years when the removal of fundamental rights and the creation of an entire suspect community achieved nothing other than the continuation of violence, fear, bitterness and the creation of an unbridgeable divide. We call on the government to protect all of the people by advocating a proper and judicious use of the existing law and by realising that over-reaction will be deeply counterproductive.

24. Submission from REDRESS to the JCHR's inquiry into counter-terrorism policy and human rights

Introduction

1. These submissions are put forward in response to the call for evidence issued by the Joint Committee on Human Rights in respect of its new inquiry into the subject of "counter-terrorism policy and human rights".

2. The Redress Trust (REDRESS) is an international non-governmental organisation with a mandate to ensure respect for the principle that survivors of torture and other cruel, inhuman or degrading treatment and punishment, and their family members, have access to adequate and effective remedies and reparation for their suffering.

3. REDRESS produced a report on the relationship between counter-terrorism measures and the prohibition of torture in July 2004,[235] and is involved in a number of cases in the United Kingdom and elsewhere where this relationship is explored 2004,[236]

[235] The report is available at[nbsp]: http://www.redress.org/publications/TerrorismReport.pdf.

[236] More information on REDRESS' most recent case submissions can be found on its website at[nbsp]: http://www.redress.org/case—submissions.html.

SUMMARY OF THESE SUBMISSIONS

4. These submissions will focus on the Government's intention to deport non-UK nationals suspected of terrorism on the basis of diplomatic assurances and the potential conflict with Article 3 of the European Convention on Human Rights, only.

THE GOVERNMENT'S INTENTION TO DEPORT NON-UK NATIONALS SUSPECTED OF TERRORISM ON THE BASIS OF DIPLOMATIC ASSURANCES AND THE POTENTIAL CONFLICT WITH ARTICLE 3 ECHR

The absolute prohibition on refoulement: *fighting terrorism is no excuse*

5. International law recognises an absolute prohibition against forcibly sending, transferring or returning a person to a country where he or she may be submitted to torture and other cruel, inhuman or degrading treatment or punishment (*non-refoulement*).[237]

6. Article 3 (2) of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment specifies that a state's human rights record is relevant in determining whether a person may be subjected to torture in that state. It provides that: "For the purpose of determining whether there are such grounds, the competent authorities shall take into account all relevant considerations including, where applicable, the existence in the State concerned of a consisted pattern of gross, flagrant or mass violations of human rights."

7. The jurisprudence that has developed within the European human rights system confirms the protection of persons against expulsion to a country where he or she is at risk of torture and inhuman or degrading treatment or punishment.[238] The European Court of Human Rights has held that a State party to the Convention may itself be responsible for violating the prohibition of torture if it sends a person to a State when there are substantial grounds to believe that they may suffer torture.[239]

8. Indications from Government reveal that it is trying to shift the goalposts, and under its legitimate duty to combat terrorism it is seeking to argue that the prohibition against torture is not in fact absolute, but relative, and is to be balanced against other considerations. The Home Secretary Mr Clarke has said:

> "Our strengthening of human rights needs to acknowledge a truth which we should all accept, that the right to be protected from torture must be considered side by side with the right to be protected from the death and destruction caused by indiscriminate terrorism, sometimes caused or fomented by nationals from countries outside the EU."[240]

Speaking in the context of the jurisprudence of the European Court of Human Rights he went on to talk of the balance not being right between the protection of individual rights and the protection of democratic values such as safety and security under the law.[241] The absolute prohibition against torture and other cruel, inhuman or degrading treatment or punishment, and its corollary prohibition against *refoulement* are the bedrock of international and European human rights law, admitting of no balancing at all.

9. Significantly, the speech received a swift riposte from the President of the Parliamentary Assembly of the Council of Europe, Rene van der Linden, who said (correctly in our view) that the ECHR "is the heart and foundation of the Council of Europe's human rights protection system" and "I find it very alarming that a politician may be making statements that could have the effect of undermining the judicial independence of that Court, by stating in advance that an undesired judgement might have negative political consequences."[242]

[237] This prohibition is found in the European Convention on Human Rights (ECHR), and has been affirmed in numerous other international and regional instruments, including: article 3 of the UN Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment; article 13 (4) of the Inter-American Convention to Prevent and Punish Torture; article 22 (8) (general clause on *non-refoulement*) of the American Convention on Human Rights; article 8 of the Declaration on the Protection of All Persons from Enforced Disappearance; article 3 (1) of the Declaration on Territorial Asylum; and article II (3) of the Organization of African Unity's Convention Governing the Specific Aspects of Refugee Problems in Africa.

[238] European Court of Human Rights, Soering v United Kingdom, Judgment of 7 July 1989, Series A, Vol 161 (this is the case which established the general principle that the nonrefoulment obligation attaches to article 3); Nsona v. The Netherlands, Judgment of 28 November 1996, 1996-V, no 23; *Chahal v The United Kingdom*, Judgment of 15 November 1996, 1996-V, no 22; Ahmed v Austria, Judgment of 7 December 1996, 1996-VI, no 26; Scott v Spain Judgment of 18 December 1996, 1996-VI, no 27; Boujlifa v. France, Judgment of 21October 1997, 1997-VI, no 54; D V The United Kingdom 02 May 1997, 1997-III, no 37; Paez v Sweden Judgment of 30 October 1997, 1997-VII, no 56.

[239] Loizidou v Turkey Series A No 310 and Soering post; idem. *See also* Lawless v Ireland (No 3) (1961) and Ireland v UK (1978) 2 EHRR 25.

[240] Speech to European Parliament 7 September 2005, available from http://www.statewatch.org/news/2005/sep/03clarke.htm.

[241] Ibid.

[242] 9 September 2005, http:// www.coe.int/press.

Diplomatic Assurances

10. The Government has indicated a renewed enthusiasm to go down the road of diplomatic assurances or "memoranda of understanding" despite the absolute prohibition of *refoulement* contained in article 3 ECHR. The United Nations Special Rapporteur on Torture, in response to the Prime Minister's 5 August 2005 statement, called on Governments to scrupulously observe the principles of *non-refoulement* and not expel any person to frontiers or territories where they run a serious risk of torture and ill treatment. In addition, the Special Rapporteur requested "Governments to refrain from seeking diplomatic assurances and the conclusion of memoranda of understanding in order to circumvent their international obligation not to deport anybody if there is a serious risk of torture or ill treatment."[243]

11. The Special Rapporteur notes further that the fact that assurances are sought shows in itself that the sending country perceives a serious risk of the deportee being subject to torture or ill-treatment upon arrival in the receiving country. Diplomatic assurances are not an appropriate tool to eradicate this risk. Most of the states with which the memoranda might presumably be concluded are parties to the United Nations Convention against Torture (Afghanistan, Algeria, Egypt, Jordan, Libyan Arab Jamahiriya, Morocco, Saudi Arabia, Syrian Arabic Republic, Tunisia and Yemen) and/or to the International Covenant on Civil and Political Rights (Afghanistan, Algeria, Egypt, Iran, Iraq, Jordan, Libyan Arab Jamahiriya, Sudan, Syrian Arab Republic, Tunisia and Yemen) and are therefore already obliged not to resort to torture or ill-treatment under any circumstances. Such memoranda of understanding therefore do not provide any additional protection to the deportees.

12. The Government's policy shift goes against the well-established principles set out in *Chahal v United Kingdom,*[244] where the European Court of Human Rights refused to rely on diplomatic assurances as a safeguard against torture and ill-treatment. Despite India's assurances that Chahal would not be mistreated on return, the Court found that his forced return to India (he was a Sikh activist suspected of involvement in terrorism) would violate the UK's obligations under article 3 of the ECHR. The Court referred to the UN Special Rapporteur on Torture who had described the practice of torture on those in Indian police custody as "endemic" as well as evidence from the Indian National Human Rights Commission's (NHRC) of widespread, often fatal mistreatment of prisoners. Although the Court did not call into question the good faith of the Indian Government in providing the diplomatic assurances, it found that despite the efforts of the Government, the NHRC and the courts "the violation of human rights by certain members of the security forces in Punjab and elsewhere is a recalcitrant and enduring problem."[245] In this context the Court was not persuaded that the assurances would provide Chahal with an adequate guarantee of safety, and the decision established the standard that diplomatic assurances are not adequate for returns to countries where torture is "endemic", or a "recalcitrant or enduring problem", as well as reaffirming the *non-refoulement* obligation in human rights law.[246]

13. UK courts also rejected a request from Russia to extradite two men suspected of having committed crimes in Chechnya.[247] Despite diplomatic assurances from Russia that the men would not be tortured, the court determined that *Mr. Zakaev* faced substantial risk of torture upon his return and relied on evidence given that a witness statement implicating Zakaev was extracted by torture.

14. Evidence of the Government's attempt to circumvent the *Chahal* principles dates to several years before "9/11". An examination of the case of *Hani El Sayed Sabaei Youssef and The Home Office*[248] reveals what Human Rights Watch has called "numerous disturbing details regarding the British Government's attempts throughout 1999 to deport [four Egyptian] ...men, all asylum seekers determined to have a well-founded fear of persecution should they be returned to Egypt."[249] The case itself was a claim for damages for unlawful detention. In the course of the trial numerous letters of advice were revealed from the Home Office and the Foreign and Commonwealth Office (FCO) to the Prime Minister explaining the significance of the ECtHR decision in *Chahal* in the context of Egypt's negative human rights record, questioning from the start whether it would be reasonable to conclude "that assurances from the Egyptians [that the men would be safe from ill-treatment] could be sufficiently authoritative and credible to diminish the Article 3 risk sufficiently to make removal to Egypt a realistic option."[250] Faced with the Prime Minister's determination to deport the men, however, the FCO and Home Office continued to endeavour to obtain assurances from the Egyptian Government to ensure the men would not be tortured, that they would have a fair trial and proper procedural rights. During negotiations the Egyptians effectively refused, but despite this the Prime Minister personally intervened several times, for example, in one letter his Private Secretary wrote to the Home Office as follows:

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[243] Press Release, 23 August 2005, available from http://www.unhchr.ch/huricane/huricane.nsf/view01/9A54333D23E8CB81C1257065007323C/opendocument.

[244] ECtHR Judgment of 15 November 1996, 1996-V, no 22.

[245] Ibid.

[246] Human Rights Watch, *Still At Risk*[nbsp]: *Diplomatic Assurances No Safeguard Against Torture,* April 2005 Vol. 17, No. 4 (D), at page 15, http://hrw.org/reports/2005/eca0405/

[247] Bow St. Magistrate Court decision of Workman, 13 November 2003.

[248] Case No[nbsp]: HQ03X03052, 2004 EWHC 1884 (QB).

[249] Human Rights Watch, *Still At Risk*[nbsp]: *Diplomatic Assurances No Safeguard Against Torture,* April 2005 Vol. 17, No. 4 (D), at page 70, http://hrw.org/reports/2005/eca0405/

[250] Hani El Sayed Sabaei Youssef and The Home Office, supra, fn 14, page 3, para 8.

"The Prime Minister thinks we are in danger of being excessive in our demands of the Egyptians in return for agreeing to the deportation of the four [men]. He questions why we need all the assurances proposed by the FCO and Home Office Legal Advisers. There is no obvious reason why British officials need to have access to Egyptian nationals held in prison in Egypt, or why the four should have access to a UK-based lawyer. Can we not narrow down the list of assurances we require?"[251]

15. A later letter from the Prime Minister's Private Secretary recorded:

"The Prime Minister's view is that we should now revert to the Egyptians to seek just one assurance, namely, that the four individuals, if deported to Egypt, would not be subjected to torture. Given that torture is banned under Egyptian law, it should not be difficult for the Egyptians to give such an undertaking."[252]

16. This latter letter also indicated in stark terms that the detainees' post-return welfare was not the main concern:

"[The Prime Minister] believes that we should use whatever assurances the Egyptians are willing to offer, to build a case to initiate the deportation procedure and to take our chances in the courts. If the courts rule that the assurances we have are inadequate, then at least it would be the courts, not the government, who would be responsible for releasing the four from detention."[253]

17. A later case in which the Government tried to deport two men to India on the basis of diplomatic assurances is *Singh and Singh v Home Secretary*[254] where the court decided that assurances which the UK Government had obtained from the Indian Government did not, in the light of the evidence, provide a sufficient degree of reassurance about the safety of the deportees on their return. In his judgment in 2000 Mr Justice Potts concluded that "in future cases we earnestly urge the [Home Secretary] to consider whether the type of material he relied upon in these appeals is sufficient to do justice to the case."[255]

The Content of Agreements

18. The Home Secretary has indicated that: "No agreement could be made unless it included proper procedures for monitoring the situation."[256] Subsequently, the first published memorandum of understanding is that of 10 August 2005 with Jordan "regulating the provision of undertakings in respect of specified persons prior to deportation." The memorandum asserts that each state understands that their authorities "will comply with their human rights obligations under international law regarding a person returned under this arrangement", and lists eight conditions which will apply to a returnee:

1. If arrested, detained or imprisoned following his return, a returned person will be afforded adequate accommodation, nourishment, and medical treatment, and will be treated in a humane and proper manner, in accordance with internationally accepted standards.
2. A returned person who is arrested or detained will be brought promptly before a judge or other officer authorised by law to exercise judicial power in order that the lawfulness of his detention may be decided.
3. A returned person who is arrested or detained will be informed promptly by the authorities of the receiving state of the reasons for his arrest or detention, and of any charge against him.
4. If the returned person is arrested, detained or imprisoned within three years of the date of his return, he will be entitled to contact, and then have prompt and regular visits from the representative of an independent body nominated jointly by the UK and Jordanian authorities. Such visits will be permitted at least once a fortnight, and whether or not the returned person has been convicted, and will include the opportunity for private interviews with the returned person. The nominated body will give a report of its visits to the authorities of the sending state.
5. Except where the returned person is arrested, detained or imprisoned, the receiving state will not impede, limit, restrict or otherwise prevent access by a returned person to the consular posts of the sending state during normal working hours. However, the receiving state is not obliged to facilitate such access by providing transport free of charge or at discounted rates.
6. A returned person will be allowed to follow his religious observance following his return, including while under arrest, or while detained or imprisoned.

[251] Ibid, page 5, para 18.
[252] Ibid, page 11, para 38.
[253] Ibid.
[254] SC/4/99 SC/10/99, SIAC, 31 July 2000. The case is cited in the Privy Counsellor Review Committee Report (the "Newton Report") *Anti-Terrorism, Crime and Security Act 2001 Review,* 18 December 2003 at page 67 para. 256, and footnote 136.
[255] Ibid
[256] Ibid, answer to Question 17.

7. A returned person who is charged with an offence following his return will receive a fair and public hearing without undue delay by a competent, independent and impartial tribunal established by law. Judgment will be pronounced publicly, but the press and public may be excluded from all or part of the trial in the interests of morals, public order or national security in a democratic society, where the interests of juveniles or the protection of the private life of the parties so require, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice.

8. A returned person who is charged with an offence following his return will be allowed adequate time and facilities to prepare his defence, and will be permitted to examine or have examined the witnesses against him and to call and have examined witnesses on his behalf. He will be allowed to defend himself in person or through legal assistance of his own choosing, or, if he has not sufficient means to pay for legal assistance, to be given it free when the interests of justice so require.

19. The envisioned monitoring mechanism is set out in paras. 4-5. The only safeguard that goes beyond what states are obliged in any event to observe, is contact with, and then "prompt and regular visits" by, a representative of an independent body nominated by both states, which body will be able to see the returnee in private. This mechanism, and this mechanism alone, will stand between the returnee and a potential torturer. A non-exhaustive list of serious questions arise as follows:

— How is the independent body to be agreed upon, and what would happen, for example, if no agreement could be reached;

— Is the independent body to be agreed before anyone is returned, or afterwards;

— What, in any event, would constitute an independent body, even if both states agreed on it. There already are well-established independent bodies such as the European Committee for the Prevention Against Torture—what is the likelihood of their co-operating (or any other genuinely independent body) in the context of "lending legitimacy" to a process fraught with difficulties;

— What expertise in torture issues, if any, will the representative be required to have;

— What happens if the receiving state fails to co-operate with the representative, and does not (again, this is non-exhaustive) afford proper visits, private or otherwise, and/or does not afford independent medical examination of the returnee if the representative wants such to take place;

— What is the mandate of the representative, other than to report to the states;

— If the representative is told or suspects that torture has taken place, what can he/she do about it, and what is he/she expected to do about it, and how;

— If an allegation of torture is raised with the receiving state by the representative and the receiving state ignores it, how is the interest of the returnee to be protected.

20. The memorandum also allows each Government to withdraw from it on six months notice, the arrangement continuing to apply to anyone who had been returned in accordance with it. The fundamental problem remains: how to enforce the arrangement, and there is nothing at all in the memorandum which effectively deals with this. The arrangement depends entirely on the good faith of the receiving state, and if there is a breach there is nothing that can be done about it.

21. The memorandum does nothing to deal with the fundamental problems of diplomatic assurances:

— Resorting to diplomacy to ensure compliance with the absolute prohibition against torture is not an obviously proper method In order for torture and other ill-treatment to be prevented, effective legislative, judicial, and administrative safeguards must be in place on a state-wide basis. Visits aimed at ensuring compliance with diplomatic assurances might be helpful depending on the circumstances of each case, but are no guarantee against prohibited treatment, in particular because there are no available remedies to enforce the assurances.

— Even the best, unhindered monitoring mechanisms using trained monitors can nonetheless be ineffective in preventing acts of torture. This is because torture is almost always practiced secretly; states that torture are very familiar with how to cover their tracks. They generally use "trained" torturers who leave little trace of their work and operate with medical assistance to disguise the results.

— When diplomatic assurances fail to protect returnees from torture and other ill-treatment, there is no mechanism that would enable a person subject to the assurances to hold the sending or receiving governments accountable. Diplomatic assurances have no legal effect and the person they aim to protect has no effective recourse if the assurances are breached. Furthermore, the sending government has no incentive to find that torture and other ill-treatment has occurred following the return of an individual—doing so would amount to an admission that it has violated its own *non-refoulement* obligation. As a result, both the sending and receiving governments share an interest in creating the impression that the assurances are meaningful rather than establishing factually that they actually are.

CONCLUSION

22. In sum, REDRESS submits that any attempts by the executive to weaken the absolute nature of article 3, as interpreted in the jurisprudence of the ECtHR, through diplomatic assurances, memoranda of understanding or any similar arrangements are to be deprecated, and should be strenuously resisted.

14 October 2005

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25. Submission from Dr C N M Pounder, Editor, Data Protection and Privacy Practice on the Draft Terrorism Bill

INTRODUCTION

I have been asked to give an update to the Joint Committee on Human Rights (JCHR) on a series of FOI requests which related to the ID Card Bill which fell before the General Election. These requests concerned access to information relating to:

(a) the legal advice which substantiated Government claims that the ID Card database complied with Article 8 of the Human Rights Act (something which has exercised the JCHR in its reports on the ID Card Bill), and

(b) briefing information, given to Ministers by civil servants, in relation to opposition amendments tabled to that Bill.

For completeness, I have attached my 40 page reasoned argument sent to the Home Office in favour of disclosure[257] (and this is in the hands of officials of the JCHR). These requests were originally made in January and are still going through the system of internal review. I hope that the JCHR will see my two recommendations as a means of improving Parliament's role in the scrutiny of legislation in general (these recommendations are set out at the end of this document).

However, the main purpose of this note is to state that these recommendations are relevant to the forthcoming work of the JCHR when it embarks on its scrutiny of the Government anti-terrorism legislation. So in leading the Committee to my recommendations, it would be helpful to set the scene in the context of the current security debate.

If the Government is correct and the "war on terrorism" is to extend into the next two or three decades, there needs to be a stable framework which creates the necessary balance between the information needs of those involved in countering terrorism, and the protection of the public who need to be reassured that the proper safeguards are in place. In the current debate about terrorism, consideration of the structure of the current system of safeguards has been largely absent—it is assumed to be satisfactory.

My own view is that the current system for the supervision of national security issues is unfit for the purpose. Parliament needs to strengthen the safeguards in new legislation as the judiciary cannot be expected to perform this task. The role of the various Commissioners supervising the national security agencies needs to be reviewed—their powers of scrutiny need to be strengthened and the Commissioners' resourcing needs should be reassessed. These Commissioners should be independent of Government, their numbers could be reduced and their functions combined. The Commissioners could report to a revamped Intelligence and Security Committee, and Parliament should consider whether the Intelligence and Security Committee and the Commissioners should become more independent of the Prime Ministerial influence.

Perhaps, if the kinds of reform identified above were undertaken, then this would reduce many of the concerns that people might harbour in relation to the Government's anti-terrorism program. So it is in relation to promoting the above conclusions that this submission contains commentary on the following topics:

1. THE COURTS ALREADY DEFER TO THE HOME SECRETARY ON NATIONAL SECURITY ISSUES

The starting position is that the Courts usually defer to Minister's judgement on national security issues. This deference will have broad application as "terrorism" possesses a broad definition in the Terrorism Act 2000.

Examples of expression of deference by the Courts are not difficult to find—

— "The judicial arm of government should respect the decisions of ministers" (on national security issues) (House of Lords Appeal in "Home Department v Rehman, 2002";)

— "Decisions as to what is required in the interest of national security are self evidently within the category of decisions in relation to which the court is required to show considerable deference to

[257] Not Printed.

> the Secretary of State because he is better qualified to make an assessment as to what action is called for" *(para 40, Court of Appeal in the case of "A, X and Y and Others v. Home Secretary",* 2002).

2. Even When the Courts Clash with the Home Secretary, it is With Reluctance

The starting position of judicial deference is also self evident from comments in the House of Lords judgement last 16 December (2004) which declared that section 23 of the Anti-Terrorism, Crime and Disorder Act was incompatible with Articles 5 and 14 of the Human Rights Act. Before arriving at its conclusion (8–1 rejection of the Government's argument that the Act was compatible with the Human Rights Act), the judgement states:

— "All courts are acutely conscious that the government alone is able to evaluate and decide what counter-terrorism steps are needed and what steps will suffice. Courts are not equipped to make such decisions, nor are they charged with that responsibility" (para 79)

— "The subject matter of the legislation is the needs of national security. This subject matter dictates that, in the ordinary course, substantial latitude should be accorded the legislature" (para 81)

— "The margin of the discretionary judgment (on national security issues) that the courts will accord to the executive and to Parliament where this right is in issue is narrower that will be appropriate in other contexts" (para 108).

The point being made here is not that deference is good or bad. It is merely to suggest that if judicial supervision of the Home Secretary's actions is proffered as a safeguard, then judicial deference to the Home Secretary serves to weaken that supervision. It follows that any safeguard based on judicial supervision is also diminished.

3. The Courts are Unlikely to Challenge Article 8 Interference

An important consideration which follows from the House of Lords judgment is that Article 5 (*right to liberty and security)* and Article 14 *(prohibition of discrimination)* are absolute rights; for example, there is no provision in Article 14 that permits discrimination on the grounds of race—even for national security purposes. However, Article 8 (*interference with private and family life)* does not grant an absolute right; it provides a qualified right which permits interference on national security grounds if such interference is proportionate and necessary to protect society from terrorist and criminal acts.

Thus if the Courts usually defer to Ministerial judgements in cases where national security is an issue and when absolute rights are a consideration, it is reasonable to assume that in terms of Article 8 where interference is legitimate that it will become even harder for the Courts to do anything else but defer.

This is relevant in relation to the JCHR's consideration of the ID Card Bill (the version of the Bill which fell before the General Election). The Home Secretary wrote to the Joint Committee on Human Rights stating that "We will be under a duty, under section 6 of the Human Rights Act, to act compatibly in making the subordinate legislation and if we did not do so the courts will have the power to strike it down". (Appendix 1, 8th Report).

This reassurance will count for little if the above reasoning is correct: it is likely that the Courts will defer in the face of any interference with private and family life based on grounds of national security.

4. Both Main Parties are Considering Removing Judicial Discretion in National Security Cases

Following July 7, the Prime Minister remarked that "the rules of the game are changing" and subsequent press reports suggest that Ministers believe that even the limited discretion of the Courts to set aside Ministerial judgements on grounds of national security should be fettered.

Lord Falconer said on the BBC Radio 4 Today's programme: "I want a law which says the home secretary, supervised by the courts, has got to balance the rights of the individual deportee against the risk to national security. That may involve an act which says this is the correct interpretation of the European [human rights] convention" (ie the Court is mandated to accept a particular interpretation) (BBC news web-site Friday, 12 August 2005).

Writing in "The Daily Telegraph", Michael Howard said: "Parliament must be supreme. Aggressive judicial activism will not only undermine the public's confidence in the impartiality of our judiciary. It could also put our security at risk—and with it the freedoms the judges seek to defend. That would be a price we cannot be expected to pay." . In the article, Mr Howard cites the House of Lords' ruling that it was illegal to detain foreign terror suspects in Belmarsh Prison as an example of judicial interference. He complains in particular about Lord Hoffman's comment in the Belmarsh judgement that "the real threat to the life of the nation . . . comes not from terrorism but from laws such as these." (BBC news web-site, Wednesday, 10 August 2005).

In the House of Lords Decision last December—the 8-1 defeat ([2004]HL 56), the Attorney General is reported to have argued that—

> "The judgement on this question (on national security issues) was pre-eminently one within the discretionary area of judgement reserved to the Secretary of State and his colleagues, exercising their judgment with the benefit of official advice, and to Parliament" (para 25)

The above quotes serve merely to show that the fettering of judicial discretion is on the current political landscape. This is further evidence that a system built on a foundation of judicial safeguards, which can be changed, cannot form part of a stable structure. Judicial decisions which any future Government decides are anathema can be expected to be overturned.

This raises an important question: If the Courts are unlikely to form the central pillars of a stable system of checks and balances, what should Parliament do to establish effective scrutiny arrangements?

5. Scrutiny by Parliament of National Security Issues is Currently Limited

Although the Attorney General has referred to the scrutiny role of Parliament (see two paragraphs above) and Mr. Howard wants Parliament to be "supreme", it is clear that Parliament's scrutiny role is limited. For instance:

- Terrorism legislation is usually enacted speedily in response to events (Prevention of Terrorism Acts, Anti Terrorism, Crime and Security Act) and often with a guillotine motion. If there is any contentious issue, this is normally contested in the Lords and not the Commons.
- Parliament will naturally give Ministers a very large latitude of discretion—after all Ministers are responding to urgent events.
- There is a trend to use wide ranging statutory instruments in relation to these national security/terrorism issues (eg in the ID Card Bill or the proposed Draft Terrorism Bill). These Statutory Instruments (SIs) are not subject to detailed Parliamentary scrutiny and the JCHR has already remarked that the use of SIs makes their scrutiny role impossible. In its 12th Report it stated "1.4 We repeat, once again, our oft-repeated observation that such bald assertions of compatibility do not assist the Committee in the performance of its function of scrutinising Bills for human rights compatibility. This is the fifth Government Bill within a very short period of time containing information sharing provisions the Convention compatibility of which has been asserted but not explained in the Explanatory Notes. In respect of each we have commented that this is not satisfactory, but there has been no change in the Government's practice. This presents a very real obstacle to our scrutiny work". (As remarked above, I think that SIs which fall within the remit of Article 8 are very unlikely to be struck out by the Courts).
- Comments about the inability of Parliament to scrutinise Article 8 issues are not limited to the JCHR. For example, at the end of the last session of Parliament, the Science and Technology Committee looked at the use of the DNA database by the police. It concluded that "We are concerned that the introduction of familial searching has occurred in the absence of any Parliamentary debate about the merits of the approach and its ethical implications". (Paragraph 84 of Forensic Science On Trial).
- There is a trend to internationalise the response to terrorism. For instance, in relation to the ID Card Bill, the Government claim that there are international obligations in relation to biometric passports which arise from UK membership of the International Civil Aviation Organization (ICAO). In relation to the retention of communications data, the Government are putting great emphasis on pushing through a measure at the Council of Ministers—even though they have powers in the Anti-Terrorism Crime and Security Act 2001 to achieve that aim. The presentation of a national security issue to Parliament as an international treaty obligation obviously minimises the degree to which Parliament can scrutinise or change a measure.
- There is the Intelligence and Security Committee (ISC) but it has limited powers (although it is always pressing at the boundaries). The Committee is usually limited to the examination of the expenditure, administration and policy of the three National Security Agencies (MI5, MI6 and GCHQ). Its membership is vetted and is appointed by the Prime Minister and not by Parliament.
- The Prime Minister has the ability to censor reports to Parliament made by the Commissioners with national security oversight and from the ISC in relation to national security issues (and a similar censoring happens with the Commissioner in relation to ID Cards, and the Regulation of Investigatory Powers Act).
- By convention Parliamentary Questions about national security are usually not answered.

The conclusion reached is that Parliament needs to establish more effective supervision of the legislation which it has enacted in the field of national security by some post-enactment mechanism. It follows that the Committees and Commissioners with oversight responsibilities have an important role.

For instance, could Parliamentary scrutiny be improved by strengthening the powers of the ISC? Could the various Commissioners who supervise national security matters report to the ISC? Could the ISC, following advice, choose what to publish in any report? Should there be a special national security mechanism whereby Parliament could require Government to propose legislative changes to strengthen the protection afforded to the public?

However, such changes should not be undertaken without first looking at the current role of the various Commissioners who supervise national security matters.

6. There are Too Many Commissioners in the National Security Protection Business

The first conclusion is that there is a mish-mash of oversight arrangements. Oversight of the Intelligence Services (except interception practices) is carried out by the Intelligence Services Commissioner. Oversight of interception is carried out by the Interception of Communications Commissioner. The Office of Surveillance Commissioners is responsible for oversight of property interference under Part III of the Police Act, as well as surveillance and the use of Covert Human Intelligence Sources by all organisations bound by the Regulation of Investigatory Powers Act (RIPA) (except the Intelligence Services). To this has to be added, the Information Commissioner, the proposed National Identity Scheme Commissioner, the Commissioners who deal with Northern Ireland policing/terrorism and the Police Complaints mechanisms. The Parliamentary Ombudsman could also be drawn into the supervision business.

Whilst Government is increasingly becoming joined-up in relation to terrorism and policing, the counter-balancing safeguards represented by these Commissioners appear to be increasingly disjointed. The policy currently seems to be—"if we have a problem, let's have a Commissioner to deal with it". The result is that the role of the Commissioners appears to overlap considerably and is dependent on the techniques or technology used to monitor an individual. It is difficult to see the logic behind this—for instance, if there is personal data processed as a result of covert surveillance and telephone tapping, why should three Commissioners be potentially involved?

The Cabinet Office web-site has a helpful 16 page guide to the system of oversight (*http://www.cabinetoffice.gov.uk/publications/reports/intelligence/intel.pdf*), but one wonders whether the fact that a 16 page guide is necessary merely serves to illustrate the diversity of bodies involved in the oversight business.

It is also very difficult to get details of how the Commissioners are resourced (and the Interception of Communications Commissioner does not appear to have a web-site). However, in one answer to a PQ (18 Mar 2004: Column 494W) Harry Cohen asked the Secretary of State for the Home Department "what plans he has to increase the resources available to (a) the Surveillance Commissioner, (b) the Information Commissioner and (c) other commissioners involved in supervising the powers and operations of the home security service; and if he will make a statement". [PQ 159419]. The question was tabled after Mr. Blunkett announced 1,500 extra staff for MI5.

Mr. Blunkett, then Home Secretary, answered "There are no plans to increase the resources available to the Chief Surveillance Commissioner, who does not have oversight of the Security Service. Nor are there plans at present to increase the resources available to either the Intelligence Services Commissioner or the Interception of Communications Commissioner for their work relating to the Security Service". He added: "We are increasing the resources available to the Interception Commissioner for his work in overseeing access to communication data by public authorities including the security service".

So is the strategy of having several Commissioners the correct one? Are the Commissioners adequately resourced to provide an effective scrutiny role? Can the role of Commissioners be combined? Should there be explicit arrangements for co-operation between Commissioners? Are the Commissioners equipped to look into operational matters if this proves to be necessary? Such questions have not been addressed in the current debate about terrorism legislation—they should be.

7. The Current Complaints System Does not Appear to be Credible

Study of the annual reports of the various Commissioners (usually High Court judges) involved with national security matters show that the Commissioners appear to be mainly concerned with structural matters associated with the warrants signed by the relevant Cabinet Minister (e.g. Home Secretary). Additionally, in relation to wider issues such as inspection of public authorities authorised to use powers under RIPA, the Surveillance Commissioner seems to be limited to inspections which focus on non-operational matters.

For example, on his web-site the Commissioner notes that "inspections will vary according to the authority to be visited and will generally take one day to complete. However all inspections include the following—

- interviews with key personnel from a number of departments
- an examination of RIPA applications and authorisations for directed surveillance and Covert Human Information Source

— an examination of the central record of authorisations
— an examination of policy documents
— an evaluation of processes and procedures
— feedback to the Chief Executive (or nominee).

Recent Parliamentary Questions show that there have been around 1,100 complaints about the operations of GCHQ and the Security and Intelligence Services since 1989 (responses to Parliamentary Questions 13170 and 13171; Harry Cohen MP, July 2005). Not one complaint has been upheld—a statistic which defies credence especially as a sample of over 1,000 is not a small one.

The complainants who use the current system are those people who became aware of the fact they could have been under surveillance. Most people under surveillance are generally unaware of this and therefore cannot be in a position to complain. It follows that the statistics published by the Government and Commissioners cannot provide the true picture as to the effectiveness of the complaints or supervisory system.

Finally, it is very important that the public have assurance that judicial deference on national security matters is not applied by the Commissioners in their oversight work. This raises the question of whether the Commissioners should report to Parliament (eg the ISC) about their work—or possibly, a Commissioner should be someone other than a senior judge (eg a recently retired senior manager from MI5 who is security cleared and knows the system and who can explore operational matters).

Distance from the Prime Ministerial influence is an important component. Appointments for Commissioners could follow the model in the USA: for instance, an individual could be proposed by the Prime Minister and approved by Parliament (or the ISC). Similarly publications and Annual Reports could be from the ISC to Parliament following consultation with the Prime Minister.

8. There is a Conflict of Interest Surrounding National Security/Policing Issues

There is an inherent conflict of interest possessed by all Ministers, in particular the Home Secretary, when devising legislation which affects human rights issues. For example, the Home Secretary is also politically responsible for the public bodies (eg police, Security Service) which want to interfere with private life. Consequently, it is difficult to avoid the conclusion that there appears to be an in-built bias, in any Home Office legislation, in favour of interference.

Parliament needs to consider how this conflict of interest can be addressed. The Lindop Report (Cmnd 7341, 1979) solved this dilemma by proposing a statutory code of practice produced by a Data Protection Authority, and a person within the Authority who was cleared to deal with security issues. Lindop stated that this would help to ensure that Security Service would be "open to the healthy—and often constructive—criticism and debate which assures for many other public servants that they will not stray beyond their allotted functions" (paras 23.21–23.24).

9. There is Uncertainty in the Borders Between Policing and National Security

According to the Security Service Act 1989: "It shall also be the function of the Service to act in support of the activities of police forces, the National Criminal Intelligence Service, the National Crime Squad and other law enforcement agencies in the prevention and detection of serious crime".

So if personal data are held by the Security Service in relation to supporting the serious crime purpose—are these data subject to section 28 of the Data Protection Act (national security) or section 29 (policing)? The difference is profound: the former is exempt from much of the Act and the Information Commissioner's powers; the latter is fully included and subject to the Information Commissioner's powers (although particular exemptions apply on a case-by-case basis).

Ministers have determined that the answer is "national security" and this can be deduced from a number of answers to Parliamentary Questions—most recently on 18 Mar 2004 (Column 494W; Harry Cohen; Question 159419). Mr. Blunkett responded that "The Information Commissioner's remit extends to the Security Service in so far as it is a data controller under the Data Protection Act 1998. Most of the information held by the Service falls under the national security exemption of that Act or the Freedom of Information Act 2000".

The Security Service also has a registration under the Data Protection Act with the Information Commissioner (reference Z8881167). It does not contain a description of any processing performed for the purpose of crime prevention—this contrasts with the various police forces who each carry this purpose in their notifications.

So suppose the police and security services hold the same personal data about a suspect who is wrongly identified as being involved in serious crime. Suppose further the inaccuracy in the personal data is recognised to the satisfaction of the agencies involved. The current arrangement means that the same personal data are subject to different data protection rules in relation to the police and security service. With

the former, the Information Commissioner has the ultimate power to order the personal data to be deleted by the police and possesses powers to check whether this has been done. With the national security agencies there is no such obligation to delete and there is no supervision by the Commissioner.

The Government wants data retention on a massive scale (eg communications data, ID Card database, DNA profiles) mainly on crime prevention and national security grounds. Much of these retained personal data will relate to those who are not suspect nor have a criminal record. If data protection legislation creates the environment for good practices in relation to the processing of personal data which are acceptable to the policing bodies (and even criminal intelligence), it is difficult to see why the national security agencies should be exempt from these obligations. Such obligations to good data protection practice would serve to reassure the public.

10. What are the Recommendations Arising From my FOI Requests

My FOI requests in relation to the ID Card database can be seen to be relevant to the current terrorism debates because they related to two areas where Parliamentary scrutiny is weak. Study of the debate concerning the ID Card database led me to two general conclusions (details sent to the JCHR in another document)—

(a) when there is a substantial dispute between Parliament and the Government over the content of legal advice (as is clearly the case for the ID Card Bill), Parliament has to possess a mechanism to gain access to that advice in order to resolve that dispute and that, in FOI terms, the public interest is served by disclosure of that advice.

(b) when an amendment is tabled by parliamentarians, there is a need for these parliamentarians to have access to all the information the Government has prepared in relation to the impact of (or deficiencies in) that amendment and that the public interest is also served by disclosure of that information. This is especially the case when a guillotine motion has been applied.

11. What Could be the Impact of My Recommendations on the Current Anti-Terrorism Legislation

In relation to recommendation (a) and the forthcoming anti-terrorism legislation, one can expect that it will carry a statement of Human Rights compatibility. However, the last piece of anti-terrorism legislation carried a similar statement which now sits uneasily with a heavy 8-1 defeat in the House of Lords (last December). An 8-1 defeat is not a narrow defeat where opposing propositions are finely balanced—it is a crushing defeat.

As Home Office Ministers assured Parliament that the legislation complied with all Human Rights obligations—it is reasonable to conclude that this an example of where serious misjudgements have been made. Parliament, if it adopted my recommendation, would be able to obtain any relevant policy document including any legal advice to find out the detail of Ministerial assertions of human rights compatibility. Of course, this does not mean the legal advice is automatically published.

In relation to recommendation (b) any information in relation to the effect of proposed amendments to anti-terrorism legislation tabled for debate should be available to Parliament. It is important to note that the information falling within the scope of this request is limited and obviously does not include ALL information provided to a Minister in relation to an amendment. However, in the vast majority of cases, the set of limited but disclosable information in relation to an amendment would include—

— any recorded information given to a Minister which describes the impact or practical effects of that amendment.

— any recorded information given to a Minister which describes the technical or drafting deficiencies in that amendment.

— any recorded information, given to a Minister, which could be used in Parliament and which relates to the impact of, or deficiencies in, an amendment (eg that information which was provided to Ministers for use in foreseeable debating circumstances and thus possessed the potential to be read into the Parliamentary record even though the foreseeable circumstances did not arise during the debate).

— any recorded information which relates to the location of reference material relevant to the impact of, or deficiencies in, an amendment.

— any recorded information which was provided to Ministers for the purpose of reading into the Parliamentary record, but was not read into the record for whatever reason (eg no time; amendment not selected).

The cause of effective scrutiny would be served by this limited disclosure because the provision of the above classes of information relating to any amendment will—

— provide Parliament with a more effective means of scrutinising Government Bills as the information relating to an amendment will be extended well beyond the few sentences Ministers usually make for the record in response to amendments.

— improve the quality of debate on proposals by making available fuller descriptions of any failing in any amendment.

— permit substantive defects with early drafts of amendments to be addressed so that they can, if necessary, be resubmitted at a later Parliamentary stage; this possibility would improve the quality of scrutiny of any substantive issue.

— facilitate access to high quality information produced by civil servants which becomes available to elected representatives and Peers; Parliament would then become less reliant on information of unknown quality provided by ad-hoc pressure groups.

— encourages those with no direct lobbying access to Westminster to engage, via their elected representatives, in detailed consideration of issues associated with any Bill under scrutiny.

Obviously the above assumes that an amendment does not deal with the detail of a particular operational matter which relates to national security or serious crime issues.

12. Concluding Comments

My general conclusion is that the system of safeguards with respect to national security, established with cold-war politics in mind, also needs updating in the light of the new powers being sought to counter the terrorist menace.

My view is that the current system of supervision of national security issues is unfit for the purpose. Parliament needs to strengthen the safeguards explicitly in legislation as the judiciary cannot be expected to perform this task. The role of the various Commissioners supervising the national security agencies needs to be reviewed—their powers of scrutiny need to be strengthened and the Commissioners' resourcing needs should be reassessed. These Commissioners should be independent of Government, their numbers could be reduced and their functions combined. The Commissioners could report to a revamped Intelligence and Security Committee, and Parliament should consider whether the Intelligence and Security Committee and the Commissioners should become more independent of the Prime Ministerial influence.

4 October 2005

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26. Submission from Professor Clive Walker, School of Law, University of Leeds on the Terrorism Bill

1. Offences of Encouragement and Glorification and Wider Grounds for Proscription

1.1 The policy of closing down channels of political discourse may be counter-productive in the long-term. Surely, the experience with Sinn Fein has taught the United Kingdom government the folly of proscription of political fronts (and Sinn Fein was proscribed until 1974), of "broadcasting bans" and of seeking to prohibit representative figures from political channels of communication. The broadcasting ban of 1988 had to be lifted as part of what became the "Peace process". Whilst much of what the representatives of extreme Irish Republicanism or Jihadism have to say is unpalatable or even reprehensible, their views must be engaged with. In this way, the onlooking public (including those who might be influenced by them, such as the bombers from Leeds) can be educated and can hear opposing views. In addition, the representatives can be engaged with in political processes. These processes cannot occur if views cannot be aired.

1.2 Offences of "apology of terrorism" have been attempted in other jurisdictions and have fallen foul both of their national constitutional guarantees of free speech and also article 10 of the European Convention on Human Rights. Article 10 of the Spanish Organic Law 9/1984 is comparable, and it produced findings of unconstitutionality within a year or so of its passing. An example of the kind of difficulties arising (not under that Act) is the case of *Castells v Spain.*[258] The applicant was an elected Senator who represented a Basque constituency on behalf of Herri Batasuna, the main separatist political party. He wrote an article in a weekly magazine, *Punto y Hora de Eskalherria*, voicing severe criticisms of the state security agencies in the Basque region, including allegations that they had murdered separatists. He was convicted of criminal libel under an offence which did not admit truth as a defence. On conviction, the applicant was imprisoned and disbarred from public office. The Court found a breach of Article 10(1), especially having regard to the importance of political speech by elected politicians: "While freedom of expression is important for everybody, it is especially so for an elected representative of the people. He represents his electorate, draws attention to their preoccupations and defends their interests. Accordingly, interferences with the freedom of expression of an opposition Member of Parliament, like the applicant, call for the closest security on the part of the Court . . . In the case under review Mr Castells did not express his opinion from the senate floor, as he might have done without fear of sanctions, but chose to do so in a periodical. That does not mean, however, that he lost his right to criticise the Government." More generally, it felt that "the dominant position which a government occupies makes it necessary for it to display restraint in resorting to criminal

[258] App. No. 11798/85, Ser. A, vol. 236 (1992).

proceedings, particularly where other means are available for replying to the unjustified attacks and criticisms of its adversaries or the media." The Court was further disturbed that he had not been allowed to prove the truth of his factual allegations, since truth was legally inadmissible as a defence, a restriction which was not compatible with a democratic society. One might argue that had the allegations been made by a private individual, then their offensiveness and implied incitement to violence against the police may have convinced the Court otherwise.

1.3 It is clear that there is already a myriad of offences which circumscribe extremist speech relating to proscribed organisations, of which al Qa'ida is deemed to be one. One is not doubting that speech directly encouraging violence is harmful and should be stopped. One might here contrast the *Castells* case. In *Gunduz v Turkey,*[259] the leader of Tarikat Aczmendi (an Islamic sect) criticised in a newspaper an Islamic intellectual known for his moderate views and called his supporters comic and deserving to have "one brave man among the Muslims to plant a dagger in their soft underbelly and run them through twice with a bayonet". Even as a metaphor, such language will not rouse any support from the European Court. But one can easily foresee that in existing UK law such a threat would amount to an incitement or a threat to murder or some form of criminal harassment, all already covered by the law without resort to anything in the Prevention of Terrorism Bill. The Government has not clearly explained where there are gaps in the law where harm can be caused. In so far as the proposed crimes and powers deal with the causing of offence, however keenly felt, then that should be distinguished as not a proper use for the criminal law.

2. Three Month Detention

2.1 The evidence for such an extended period is weak. Whilst one can concede that terrorism investigations can be complex in many of the ways suggested in the Annex to the Letter of the Home Secretary of 15 September 2005, there is no evidence produced that these problems have prevented prosecution in any given case. If one takes the Leeds bombers of 7 July as an example, if they had survived the bombing, there would surely have been ample evidence for a charge aside from what might have been gathered later from computers or from searches of houses. So, the first submission is that there is a lack of proportionality between the claim of a need for three months' detention and the progress in actual cases to date.

2.2 This point can be underscored by the fact that control orders can to some extent fill any gap. Control orders can provide strict regimes of limited liberty whilst at the same time allowing further evidence gathering to proceed. Furthermore, the control order is not subject to the standard of proof of a criminal prosecution.

2.3 If points, 2.1. and 2.2 are not accepted, and it is felt that more powers are required for effective terrorist investigations, then it is next submitted that the tactic adopted of extending police detention is inappropriate. It is unacceptable that persons should be held for lengthy periods on the authority of the police. There are several reasons for this view:

- It gives the impression that the liberty is enjoyed at the behest of the police—the United Kingdom government would no doubt call this practice a characteristic of a repressive police state if, for instance, "extremist" opposition figures were arrested in Zimbabwe and held for three months without charge. It is fundamentally contrary to notions of liberty that persons should be held for so long without charge and due process of law.
- The fact that a judge periodically sanctions the detention does no more than alleviate these concerns. The judge, unlike in Continental Europe, will not be in charge of the investigation, and will find it difficult to gainsay what the police contend about the exigencies of the investigation.
- The police do not have the physical facilities to hold people in humane conditions for such a length of time. As a result, a breach of article 3 is likely.
- Any statement obtained in circumstances where a person has been subjected to the extraordinary conditions of detention for beyond, say, four days, is likely to be viewed as inadmissible by reasons of unfairness under section 78 of the Police and Criminal Evidence Act 1984. Even with all the safeguards of PACE, the Royal Commission on Criminal Procedure[260] was of the view that it was only fair to detain for the purposes of interrogation for four days.

2.4 There may be a more proportionate alternative to the proposal in the Bill. If it is the case that (i) evidence is being found at a point later than the current 14 day limit and (ii) the police want to ensure that the suspect is available for interrogation (the issue of uncontrolled release being averted by control orders), then this could be achieved by adapting the procedure under section 6 of the Explosive Substances Act 1883 by which a judicial examination can be conducted on the order of the Attorney General when it is reasonably suspected that an offence under the Act has been committed. The 1883 Act could be amended by extending the range of possible offences for which examination is permitted. A number of substantial advantages would flow from this tactic. The person would have to be released from police custody after 14 days, meaning that existing limits could remain. At that point, the person would be charged or be subject to a control order

[259] App.no.59745/00, 2003-XI.
[260] Cmnd.8092, 1981.

or set free. If further evidence arose from investigations, further questioning would be possible by reference to judicial examination, which would have the major benefit of ensuring that the responses would be admissible evidence. It would also ensure clearer circumstances of fairness and humanity for the suspect.

October 2005

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27. Further submission from Professor Clive Walker, School of Law, University of Leeds to the JCHR's inquiry into counter-terrorism policy and human rights

1. INTRODUCTION

1.1 The Committee has called for evidence on the human rights implications of developments in counter-terrorism policy in the UK since 7 July 2005 and potential future developments in that policy, including but not restricted to—

(i) the new list of "unacceptable behaviours" drawn up after consultation indicating some of the circumstances in which the Home Secretary may exercise his powers of exclusion or deportation;

(ii) the Government's intention to deport non-UK nationals suspected of terrorism on the basis of diplomatic assurances and the potential conflict with Article 3 ECHR;

(iii) the various measures announced by the Prime Minister at his press conference on 5 August (available in full at www.number-10.gov.uk)

(iv) the possibility of allowing sensitive evidence, including intercept evidence, to be adduced in criminal trials

(v) the possibility of establishing a judicial role in the investigation of terrorist crimes

(vi) the overall social and political context in which human rights standards are understood and applied by the courts, the Government and others, and in which the requirements of security are reconciled with those standards.

1.2 Account should also be taken of the measures contained in the Prevention of Terrorism Bill 2005–06,[261] which is relevant to points (iii) to (v) above.

1.3 Point (vi) will be answered with concrete examples in the other points. It would be wholly wrong to assume that the courts have not been confronted with hard cases dealing with requirements of security and rights or that they are unversed in the difficulties posed by both values.

2. NEW LIST OF "UNACCEPTABLE BEHAVIOURS" FOR EXCLUSION OR DEPORTATION

2.1 *Arguments of principle*

A liberal democracy should start with the premise that state coercion or restraint should apply in the sphere of expression to speech which harms rather than speech which offends. It follows that one can find principled support for measures which seek to restrict speech which can be shown to have a dangerous intended impact on others—to provoke them into terrorism or to foment criminal activity. But the expression of despicable ideas is best countered by better ideas.

2.2 *Arguments under the European Convention on Human Rights, Article 10*

Offences of "apology of terrorism" have been attempted in other jurisdictions and have fallen foul both of their national constitutional guarantees of free speech and also article 10 of the European Convention on Human Rights. This point will be expanded upon below in connection with proposals in clause 1 of the Prevention of Terrorism Bill.

2.3 *Arguments under the European Convention on Human Rights, Article 14*

There is a danger that placing greater restrictions on the speech of non-citizens compared to the national population will be found to be in breach of Articles 10 and 14 of the European Convention on Human Rights. Just as the House of Lords applied this principle to liberty in *A v Secretary of State for the Home Department,*[262] so it will be applied to freedom of expression. In short, unless there is an equivalent criminal offence for British citizens, the policy may be found to be discriminatory under article 14 of the European Convention. This danger is not solved by the proposed offences in clause 1 of the Prevention of Terrorism Bill 2005–06. Indeed, clause 1 highlights rather than removes the discrimination. Offences applicable in the Bill carry a requirement of *mens rea*—that the offender "(i) he knows or believes, or (ii) he has reasonable

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[261] 2005–06 HC 55.

[262] [2004] UKHL 56.

grounds for believing, that members of the public to whom the statement is or is to be published are likely to understand it as a direct or indirect encouragement or other inducement to the commission, preparation or instigation of acts of terrorism or Convention offences."[263] But under the Home Office August 2005 guidance about "public good" exclusions or deportations, the justification or glorification of terrorism need only be "views which the government considers" to be thus. In other words, there is certainly no requirement of *mens rea* and, one might argue, no objective test at all, though government opinion forming is subject to a requirement of rationality in administrative law.

3. Deportation and Diplomatic Assurances

3.1 *Arguments under the European Convention on Human Rights, Article 3*

Should the diplomatic assurances offer credible and effective safeguards against abuse, then they would provide an effective means of ridding the country of radical sheikhs and others. The strategy[264] stumbles over (i) being able to write in sufficient assurances to be credible and then (ii) being able to trust in the assurances which have been given.

3.2 A good example of the difficulties of being able to write in sufficient assurances concerns the case of *Hani El Sayed Sabaei Youssef v Home Office.*[265] Youssef, an Egyptian, was detained under the Immigration Act 1971 with a view to deportation on national security grounds that he was a senior member of Egyptian Islamic Jihad. The case relates the efforts made in 1998 and 1999 to reach an agreement with the Egyptian government. There is revealed the repeated insistence of the Prime Minister that diplomatic assurances should be obtained and that it would be sufficient to base the agreement on the simple promise not to torture which would be taken at face value given that Egypt was a party to the UN Convention against Torture and had passed domestic legislation to ban torture.[266] This line was seemingly opposed by the Home Office and Foreign and Commonwealth Office who warned that accepting such guarantees would not satisfy obligations under article 3 of the European Convention on Human Rights. In any event, the Egyptian authorities refused to make even a basic assurance, let alone the assurance sought in earlier negotiations about procedural rights and monitoring of conditions by British officials and lawyers.

3.3 To what extent are the agreements of 2005 more sufficient than the attempted agreement of 1999? We have the example of the agreement with Jordan of 10 August 2005.[267] This represents a considerable improvement on the Egyptian experience. There are procedural safeguards, requiring, *inter alia*, treatment in a humane and proper manner and in accordance with internationally accepted standards and a fair and public hearing. Furthermore, there is provision for visits by the representative of an independent body nominated jointly by the UK and Jordanian authorities, but consular visit are not permitted where the returned person is arrested, detained or imprisoned. There is also no specific guarantee in respect of the death penalty.

3.4 International law is rightly demanding when it comes to state protection under Article 3, as affirmed in a number of recent cases. In *N v Finland*,[268] the European Court of Human Rights stated that:

> "As the prohibition provided by Article 3 against torture, inhuman or degrading treatment or punishment is of absolute character, the activities of the individual in question, however undesirable or dangerous, cannot be a material consideration."

It would seem that the "rules of the game" have certainly not changed in the eyes of international judges, though it is understood that there might be a further attempt to sway the Court in *Mohammad Ramzy v Netherlands*.[269]

3.5 Another example of the difficulties of meeting international law standards concerns the cases of *Ahmed Agiza and Mohammed al-Zari v Sweden* before the UN Committee against Torture.[270] These asylum-seekers were deported from Sweden to Egypt aboard a U.S. government-leased airplane, following written assurances from the Egyptian authorities that they would not be subject to the death penalty, tortured or ill-treated, and would receive fair trials and would also benefit from regular visits to the men in prison by Swedish diplomats Agiza was tried before a military court which patently lacked some fundamental

[263] The absence of *mens rea* from clause 2 of the previous draft Bill (glorification offence) was one of the reasons for widespread criticism.

[264] It was proposed in Home Office, Counter-Terrorism Powers (Cm. 6147, London, 2004) para. 38.

[265] [2004] EWHC 1884 (QB). See also the survey by Human Rights Watch, Still at Risk: Diplomatic Assurances No Safeguard Against Torture (New York, 2005).

[266] Ibid. para. 38.

[267] Memorandum Of Understanding Between The Government Of The United Kingdom Of Great Britain And Northern Ireland And The Government Of The Hashemite Kingdom Of Jordan Regulating The Provision Of Undertakings In Respect Of Specified Persons Prior To Deportation. A corresponding agreement with Libya was reported on 18 October 2005.

[268] App.38885/02, 26 July 2005 para.159. The applicant was seeking asylum from the Congo.

[269] App. no.25424/05. He is accused of fomenting terrorism on behalf of the GSPC.

[270] CAT/C/34/D/233/2003, 24 May 2005.

requirements of due process in April 2004. Al-Zari was released without charge or trial in October 2003. Both complained of torture, and there is evidence that the Swedish diplomats concurred in at least some of these allegations.[271] The UN Committee against Torture found Sweden to be in breach of its obligations:[272]

> "The Committee considers at the outset that it was known, or should have been known, to the State party's authorities at the time of the complainant's removal that Egypt resorted to consistent and widespread use of torture against detainees, and that the risk of such treatment was particularly high in the case of detainees held for political and security reasons. The State party was also aware that its own security intelligence services regarded the complainant as implicated in terrorist activities and a threat to its national security, and for these reasons its ordinary tribunals referred the case to the Government for a decision at the highest executive level, from which no appeal was possible. The State party was also aware of the interest in the complainant by the intelligence services of two other States: according to the facts submitted by the State party to the Committee, the first foreign State offered through its intelligence service an aircraft to transport the complainant to the second State, Egypt, where to the State party's knowledge, he had been sentenced in absentia and was wanted for alleged involvement in terrorist activities. In the Committee's view, the natural conclusion from these combined elements, that is, that the complainant was at a real risk of torture in Egypt in the event of expulsion, was confirmed when, immediately preceding expulsion, the complainant was subjected on the State party's territory to treatment in breach of, at least, article 16 of the Convention by foreign agents but with the acquiescence of the State party's police. It follows that the State party's expulsion of the complainant was in breach of article 3 of the Convention. The procurement of diplomatic assurances, which, moreover, provided no mechanism for their enforcement, did not suffice to protect against this manifest risk."

3.6 One must conclude that mere paper assurances are not sufficient to give protection against breaches of article 3. Governments, including the United Kingdom Prime Minister, seem to be engaging in cynical manipulations of international law which, fortunately for international law, have failed. Of course, those who are deported are still being sacrificed, despite the fine words of the judges. Until states such as Algeria, Egypt. and Jordan can demonstrate sustained and practical reforms, then diplomatic assurances will not prevent the United Kingdom from being condemned in international law for having a hand in torture.

4. Prevention of Terrorism Bill 2005–06, Including (iii) Measures Announced by the Prime Minister (iv) Intercept Evidence (v) A Judicial Investigative Role

4.1 These issues are grouped together since some inter-relate and since the agenda is now set by the Bill.

4.2 *Offences of encouragement and glorification and wider grounds for proscription*

4.2.1 As mentioned previously, the policy of closing down channels of political discourse may be counter-productive in the long-term. Surely, the experience with Sinn Fein has taught us the dubious utility of "broadcasting bans" and seeking to prohibit and demonise representative figures from political channels of communication.[273] The broadcasting ban of 1988 had to be lifted as part of what became the "Peace process" in October 1994. Whilst much of what the representatives of extreme Republicanism or Jihadism have to say is unpalatable or even reprehensible to many people, their views must be engaged with so that the onlooking public (including those who might be influenced by them, such as the bombers from Leeds) can be educated and can hear opposing views. These processes cannot occur if views cannot be aired in public. Driving such views underground leads to one-sided presentations which are left unchallenged.

4.2.2 There exist already broad offences relating to support for terrorism under the Terrorism Act 2000—

- First, even persons who cannot be shown directly to be members of proscribed organisations but have provided support commit an offence under section 12. The commission can come about through an number of distinct forms of involvement. First, forbidden by section 12(1) is the act of inviting support. It is declared that the support is not, or is not restricted to, the provision of money or other property (since that activity is expressly within the meaning of section 15). Thus, the provision of labour and services (such as helping with money laundering or digging a hole for weapons) could fall in this category.

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271 Human Rights Watch, *Still at Risk: Diplomatic Assurances No Safeguard Against Torture* (New York, 2005) fn.178.

272 para.13.4.

273 See: Michael, J., "Attacking the easy platform" (1988) 138 *New Law Journal* 786; Thompson, B., "Broadcasting and terrorism" [1989] *Public Law* 527; Jowell, J., "Broadcasting and terrorism, human rights and proportionality" [1990] *Public Law* 149; Halliwell, M., "Judicial review and broadcasting freedom" (1991) *Northern Ireland Legal Quarterly* 246; Morgan, D.G., "Section 31: the broadcasting ban" (1990-92) 25-27 *Irish Jurist* 117; Parpworth, NJ, "Terrorism and broadcasting" (1994) 15 *Journal of Media Law & Practice* 150; Banwell, C, "The courts" treatment of the broadcasting bans in Britain and the Republic of Ireland" (1995) 16 *Journal of Media Law & Practice* 21. The ban was attacked both in domestic courts and under the European Convention: *R. v. Secretary of State for the Home Department, ex p. Brind* [1991] 2 W.L.R. 588, *In re McLaughlin's Application* (1991) 1 B.N.I.L. n. 36 (1990) 6 NIJB 4; *Purcell v. Ireland*, App. no. 15404/89; *Brind v UK*, App no.18714/91, *McLaughlin v.UK*, App no.18759/91; *R v BBC ex p McAliskey* (LEXIS,1994).

— Secondly, by section 12(2), a person commits an offence if he arranges, manages or assists in arranging or managing a meeting which he knows is (a) to support a proscribed organisation, (b) to further the activities of a proscribed organisation, or (c) to be addressed by a person who belongs or professes to belong to a proscribed organisation.

— By section 12(3), a person commits an offence if he addresses a meeting and the purpose of his address is to encourage support for a proscribed organisation or to further its activities.

— By section 13(1), a person in a public place commits an offence if he (a) wears an item of clothing, or (b) wears, carries or displays an article, in such a way or in such circumstances as to arouse reasonable suspicion that he is a member or supporter of a proscribed organisation.

It is true that clauses 1 and 2 of the Bill are not tied to proscribed organisations (though that is a burgeoning category and includes al Qa'ida). But if the support for terrorism is not specific and has no tangible outcome, should the speech be criminalised? There is a line to be drawn between free speech and incitement and the position in the Terrorism Act 2000 is to be preferred.

4.2.3 The current version of the Bill (clauses 1 and 2) is certainly preferable in many aspects to the draft produced in September. However, it should be confined to the lines adopted by the Council of Europe Convention on the Prevention of Terrorism,[274] which is said to be the reason for clause 1 according to the Explanatory Memorandum. It is clear that clauses 1 and 2 go well beyond article 5 of the Convention (Public provocation to commit a terrorist offence):

"1. For the purposes of this Convention, 'public provocation to commit a terrorist offence' means the distribution, or otherwise making available, of a message to the public, with the intent to incite the commission of a terrorist offence, where such conduct, whether or not directly advocating terrorist offences, causes a danger that one or more such offences may be committed.

2. Each Party shall adopt such measures as may be necessary to establish public provocation to commit a terrorist offence, as defined in paragraph 1, when committed unlawfully and intentionally, as a criminal offence under its domestic law."

Article 5 differs significantly from clause 1 in these respects:

— it requires a specific intent in all cases, whereas under clause 1 it is sufficient for the perpetrator to have reasonable grounds for believing, that members of the public to whom the statement is or is to be published are likely to understand it as a direct or indirect encouragement or other inducement to the commission, preparation or instigation of acts of terrorism or Convention offences;

— it requires the intended outcome to be the commission of a terrorist offence and not just its preparation or instigation.

4.2.4 The reasons for the restraint in Article 5 resulted from the concern during the discussions leading to the Article that a widely-drawn provision would unduly stifle legitimate public debate. This concern was warranted by experience of offences of "apology of terrorism", which have been attempted in other European jurisdictions and have fallen foul both of their national constitutional guarantees of free speech and also article 10 of the European Convention on Human Rights. An example might be Article 10 of the Spanish Organic Law 9/1984 (now repealed) is comparable, and it produced findings of unconstitutionality within a year or so of its passing. An example of the kind of difficulties arising (under related legislation) is the case of *Castells v Spain*.[275] The applicant was an elected Senator who represented a Basque constituency on behalf of Herri Batasuna, the main separatist political party.[276] He wrote an article in a weekly magazine, *Punto y Hora de Eskalherria*, voicing severe criticisms of the state security agencies in the Basque region, including allegations that they had murdered separatists. He was convicted of criminal libel under an offence which did not admit truth as a defence. On conviction, the applicant was imprisoned and disbarred from public office. The Court found a breach of Article 10(1), especially having regard to the importance of political speech by elected politicians: "While freedom of expression is important for everybody, it is especially so for an elected representative of the people. He represents his electorate, draws attention to their preoccupations and defends their interests. Accordingly, interferences with the freedom of expression of an opposition Member of Parliament, like the applicant, call for the closest security on the part of the Court . . . In the case under review Mr Castells did not express his opinion from the senate floor, as he might have done without fear of sanctions, but chose to do so in a periodical. That does not mean, however, that he lost his right to criticise the Government." More generally, it felt that "the dominant position which a government occupies makes it necessary for it to display restraint in resorting to criminal proceedings, particularly where other means are available for replying to the unjustified attacks and criticisms of its adversaries or the media." The Court was further disturbed that he had not been allowed to prove the truth of his factual

[274] ETS 196, 2005.

[275] App. No. 11798/85, Ser. A, vol. 236 (1992).

[276] The party was banned under LEY ORGA[acute]NICA 6/2002, de 27 de junio, de Partidos Pol[doti][acute]ticos (the ban was upheld in Sentencia Tribunal Supremo, de 28 de Marzo de 2003, Recurso n° 6/2003 y 7/2003, Ponente Francisco Jose[acute] Hernando Santiago, Id. vLex: VLEX-BA313) but is being contested before the European Court of Human Rights.

allegations, since truth was legally inadmissible as a defence, a restriction which was not compatible with a democratic society. One might argue that had the allegations been made by a private individual, then their offensiveness and implied incitement to violence against the police may have convinced the Court otherwise.

4.2.5 One is not doubting that speech directly encouraging violence is harmful and should be stopped. One might here contrast the *Castells* case. In *Gunduz v Turkey*,[277] the leader of Tarikat Aczmendi (an Islamic sect) criticised in a newspaper an Islamic intellectual known for his moderate views and called his supporters comic and deserving to have "one brave man among the Muslims to plant a dagger in their soft underbelly and run them through twice with a bayonet". Even as a metaphor, such language will not rouse any support from the European Court. But one can easily foresee that in existing UK law such a threat would amount to an incitement or a threat to murder or some form of criminal harassment, all already covered by the law without resort to anything in the Prevention of Terrorism Bill. The government has not clearly explained where there are gaps in the law where harm can be caused. In so far as the proposed crimes and powers deal with the causing of offence, however keenly felt, then that should be distinguished as not a proper use for the criminal law.

4.2.6 The same criticisms apply to the proposed extension to the grounds of proscription in clause 21 of the Bill. Once again, the criminal law should require a closer link to harms than is present in activities such as "glorification". Just as the government was persuaded to drop clause 2 of the draft Bill, so this provision should be dropped.

4.2.7 In conclusion, clause 1 is too broad and should be redrawn to reflect the precise and careful wording of Article 5 of the Council of Europe Convention on the Prevention of Terrorism. The result would serve some symbolic purpose, though, like offences of proscription in general, would not make much impact on the prevention of terrorism.

4.3 *Preparatory and training offences*

4.3.1 The Bill deals with these matters in clauses 5 to 8.

4.3.2 The main question here is what practically will be achieved by these measures? Once again, one should not imagine that the law is a *tabula rasa* on such activities.

- The Terrorism Act 2000, section 54(1), deals with weapons training. A person commits an offence if he provides instruction or training in the making or use of (a) firearms, (aa) radioactive material or weapons designed or adapted for the discharge of any radioactive material, (b) explosives, or (c) chemical, biological or nuclear weapons (as amended by section 120 of the Anti-terrorism, Crime and Security Act 2001, which added (aa)).
- It is correspondingly an offence under section 54(2) to receive instruction or training, or, under section 54(3) to invites another to receive instruction or training contrary to sub-section (1) or (2) even if the activity is to take place outside the United Kingdom, such as in Afghanistan, Pakistan and elsewhere. By way of interpretation, by section 54(4), "instructions" and "invitations" can be general (such as by a pamphlet or via the Internet) or to one or more specific persons.
- By section 113(1) of the Anti-terrorism, Crime and Security Act 2001, it is an offence for a person to use or threaten to use a noxious substance or thing to cause serious harm in a manner designed to influence the government or to intimidate the public.
- Section 114 deals with hoaxes with reference to "a noxious substance or other noxious thing".

4.3.3 Now one can imagine some differences in some cases between the existing and proposed offences—say, between section 54 and, say, clauses 6 and 8. Section 54 is essentially concerned with munitions training whereas clauses 6 and 8 can cover instruction in targeting and military strategy. It will immediately be seen that the agenda of clauses 6 and 8 are extremely wide and fail to link directly to harm, unlike section 54, and this calls into question whether the widening is desirable. There is a danger that the clauses will be used as a weapon to cast suspicions on all persons attending madrasses and other foreign institutes which are not under close state control.

4.3.4 Similar arguments apply to clause 5, which proposes to enact a new offence where, with the intention of (a) committing acts of terrorism, or (b) assisting another to commit such acts, a person engages in any conduct in preparation for giving effect to his intention. How does this compare to section 57 of the Terrorism Act 2000, by which a person commits an offence if he possesses an article in circumstances which give rise to a reasonable suspicion that his possession is for a purpose connected with the commission, preparation or instigation of an act of terrorism. The difference is that there must be something tangible under section 57 but not under clause 5. So, there is a real distinction but it once again pushes the criminal law into very vague realms where the conduct is far removed from any harm and may be equivocal. Indeed, the drafters of clause 5 themselves find it difficult to say where it would bite in ways where section 57 does not bite. The Explanatory Memorandum states wholly erroneously that "At the moment the law does not cover preparatory acts . . ."[278] and then goes on to give as an example of its use as follows:

[277] App.no.59745/00, 2003-XI.

[278] para.49.

> "Under the new offence created by this clause acts of preparation with the relevant intention will be caught, for example if a person possesses items that could be used for terrorism even if not immediately and that person has the necessary intention he will be caught by the offence."

That scenario is exactly covered by section 57.

4.4 *Radioactive and nuclear offences*

4.4.1 One is once again hard-pressed to see the gaps in the existing law which are being filled. But there are two disturbing measures hidden away.

4.4.2 By clause 12, it is proposed that the trespassing offence in section 128 of the Serious Organised Crime and Police Act 2005 be extended to all nuclear sites. One might predict that this will result in the widescale arrest of "peace" protestors and their attempted demonisation as terrorists. Trespass to such nuclear sites as are not already protected as prohibited places under the Official Secrets Act 1911 should be dealt with under other legislation (in the same was as trespass on an aerodrome is dealt with under section 39 of the Civil Aviation Act 1982).

4.4.3 It is startling to find clause 15, which deals with offences under section 53 of the Regulation of Investigatory Powers Act 2000, in this section at all. It has nothing to do with radioactive or nuclear issues. One might also ask why it is necessary to increase the penalties for an offence which the government has failed to bring into force for half a decade. It is occasionally claimed the wickedly cunning terrorists are using encryption to thwart the security forces. There is very little evidence that encryption is in wide use or, where it has been used, either that the encryption could not be broken or that there was so much encrypted evidence as to thwart the investigation.

4.5 *Commission abroad*

4.5.1 A wide range of offences committed abroad can already be tried in the United Kingdom. Such is the effect of sections 59 to 61 of the Terrorism Act, which seek to give United Kingdom courts jurisdiction over offences of incitement of terrorism abroad. This notion of extended jurisdiction is builds upon sections 5 to 7 of the Criminal Justice (Terrorism and Conspiracy) Act 1998, giving the United Kingdom courts jurisdiction over acts of conspiracy in the United Kingdom relating to offences committed or intended to be committed abroad.

4.5.2 Clause 17 is broader still—it applies to the act itself as well as inchoate offences. The result might be calls for the British government to do the dirty work of dubious foreign governments. For example, what if Saddam Hussein were still in power and called upon the British government to take action against any surviving "terrorists" of Dujail who, in 1982, had attempted to assassinate him? Clause 19 seeks to allow the Attorney General to discern the good guys from the bad guys. Whilst there can be comity within the European Union and with some other states, this universal jurisdiction is better serviced by international courts.

4.6 *Three month detention*

4.6.1 The evidence for such an extended period is weak. First, one should ask what has so radically altered since 2003, when the Criminal Justice Act 2003, section 306 extended the maximum permissible detention period from seven days to 14 days. The main arguments for the change were marshalled by Lord Carlile and related to the difficulties of identifying foreigners and interpreting what they say as well as arranging specialist legal advice and attending to their spiritual welfare, plus the delays in forensic testing and computer analysis.[279] The alike ministerial explanations were challenged by Lord Lloyd: "There is nothing new in any of those grounds. . . . Moreover, there is nothing unique about terrorism in respect of those three grounds . .".[280] It is submitted that Lord Lloyd was right then, and the same applies now. Whilst one can concede that terrorism investigations can be complex in many of the ways suggested in the Annex to the Letter of the Home Secretary of the 15 September 2005, there is no evidence produced that they are "so completely different" (p.1) to the position in October 2003 nor that these problems have prevented prosecution in any given case. Looking further at some of the cases raised in that letter, one must conclude that a proportionate case is not made out:

— Does it take longer to obtain communications data about terrorists than it does about drug dealers in the Netherlands? The tracking of Osman after 21 July did not seem to cause undue problems even across two or three countries. In so far as cases founder on the lackadaisical attitude of foreign governments (as alleged in Operation Springbourne), then of course there is a problem. But it is part of the philosophy of the criminal law only to proceed with clear and present dangers. Time-limited charging procedures exist because there is a need to respect liberty and because police suspicions about crime are not always reliable.

[279] House of Lords Debates vol.653 col.957-9 15 October 2003.

[280] House of Lords Debates vol.653 col.955 15 October 2003.

— Operation 2005 (July bombings)—These bombings produced much evidence. The fact that some premises could not be immediately searched is not exceptional and does not wipe out the mounds of evidence which was recovered from searches, including of the crime scenes and the homes of the bombers. A similar argument applies to allegations about encrypted evidence; only one case, Operation 2004, mentions encryption, but it does not say how this hampered the investigation nor is it revealed how long it took to decipher. Several of these cases suggest that the poor management of operational resources was more acute than any legal deficiency. Next, the paper complains that the defence of lack of intention to kill (put forward later by Osman) might be taken up by others, but it is too late to question them. If other defendants wish to put this defence, they can be cross examined at trial, and if they refuse, then section 35 of the Criminal Justice and Public Order Act 1994 can be invoked. Silence in police custody is also evidence under section 34 (relevant to Operation 2004). And why was there no forensic evidence within 14 days when entire bags of explosives were found within a day or two? Did that finding have no bearing on the questions about their intentions?

— Theoretical case study—One can all imagine hard cases but it has not been shown that they occur in reality. As mentioned above, if the police are being overwhelmed, then that is more a matter for operational management of resources than changes in the law.

So, the first submission is that there is a lack of proportionality between the claim of a need for three months' detention and the progress in actual cases to date.

4.6.2 This point can be underscored by the fact that control orders can to some extent fill any gap. Control orders can provide strict regimes of limited liberty whilst at the same time allowing further evidence-gathering to proceed. Furthermore, the control order is not subject to the standard of proof for a criminal prosecution.

4.6.3 If points, 4.6.1.and 4.6.2 are not accepted, and it is felt that more pre-charge time is required for effective terrorist investigations, then it is next submitted that the tactic adopted of extending police detention is an inappropriate answer. It is unacceptable that persons should be held for lengthy periods on the authority of the police. There are several reasons for this view:

— It gives the impression that the liberty is enjoyed at the behest of the police. It is fundamentally contrary to notions of liberty that persons should be held for so long without charge and judicial control of their fate.

— The fact that a judge periodically sanctions the detention does no more than alleviate these concerns. The English judge who periodically reviews and approved detention, unlike in Continental Europe, will not be in charge of the investigation, and will find it difficult to gainsay what the police contend about the exigencies of the investigation.

— The police do not have the physical facilities to hold people in humane conditions for such a length of time. As a result, a breach of article 3 is likely.

— Any statement obtained in circumstances where a person has been subjected to the extraordinary conditions of detention for beyond, say, four days, is likely to be viewed as inadmissible by reasons of unfairness under section 78 of the Police and Criminal Evidence Act 1984. Even with all the safeguards of PACE, the Royal Commission on Criminal Procedure[281] was of the view that it was only fair to detain for the purposes of interrogation for four days.

— The useful survey recently published by the Foreign and Commonwealth Office[282] reveals that no other country allows three month detentions for the purposes of interrogation by the police and in pursuance of an investigation under police control. Two other jurisdictions not mentioned in that paper are Sri Lanka and Zimbabwe, neither of which has garnered a reputation for showing great restraint in the use of emergency measures. Section 7 of the Sri Lankan Prevention of Terrorism (Temporary Provisions) Act allows for police detention limited to just 72 hours. As for Zimbabwe, in February 2004, President Mugabe used regulations under the Presidential Powers (Temporary Measures) Act 1990 to amend the Criminal Procedure and Evidence Act 1974, section 32. The result was to allow for pre-trial detention of 28 days (up from 7 days) of people suspected of certain economic crimes or certain offences under the Public Order and Security Act 2002. This period was later reduced to 21 days by the Criminal Procedure and Evidence (Amendment) Act 2004.

4.6.4 If, contrary to the view expressed at 4.6.1, it is felt that lengthy investigative periods are inevitable, then two problems must be overcome.

— One is to ensure the availability and security of the suspect throughout the period of police investigation.

— The other is to allow for questioning even after the normal period of questioning must have ceased. This will be 14 days under the Terrorism Act. At the end of that period the person must be charged or released. But the police will then rightly point out that, if the person is charged with such

[281] Cmnd.8092, 1981.

[282] Counter-terrorism legislation and practice: a survey of selected countries (2005).

evidence as they can muster at that point, they cannot question further about the evidence since Code C para.16.5 of the Police and Criminal Evidence Act 1984 states that "A detainee may not be interviewed about an offence after they have been charged with, or informed they may be prosecuted for it, unless the interview is necessary: to prevent or minimise harm or loss to some other person, or the public; to clear up an ambiguity in a previous answer or statement; in the interests of justice for the detainee to have put to them, and have an opportunity to comment on, information concerning the offence which has come to light since they were charged or informed they might be prosecuted."

4.6.5 It is submitted that the first problem can be overcome through the use of control orders. These require a lower burden of proof than a criminal conviction and can certainly guard against uncontrolled release. In any event, the complaint of the police has primarily concerned the inability to charge with a comprehensive range of offences rather than an inability to charge with any offences. So this problem may not arise in most cases, since the suspect will be remanded on other charges.

4.6.6 Later post-charge questioning could be achieved by adapting the procedure under section 6 of the Explosive Substances Act 1883 by which a judicial examination can be conducted on the order of the Attorney General when it is reasonably suspected that an offence under the Act has been committed. The 1883 Act could be amended by extending the range of possible offences for which examination is permitted and by subjecting the "witness" to the same conditions as to compulsion as would apply in the police station. This would require an amendment to section 6(2) by which "A witness examined under this section shall not be excused from answering any question on the ground that the answer thereto may criminate, or tend to criminate, [that witness or the husband or wife [spouse or civil partner] of that witness]; but any statement made by any person in answer to any question put to him [or her] on any examination under this section shall not, except in the case of an indictment or other criminal proceeding for perjury, be admissible in evidence [against that person or the husband or wife [spouse or civil partner] of that person] in any proceeding, civil or criminal." The purpose is to make the answer admissible, so this clause should be replaced by the usual provisions about silence in the Criminal Justice and Public Order Act 1994, sections 34, 36 and 37. Another reason for avoiding compulsion is that it may contravene article 6 of the European Convention where other criminal proceedings are pending. In *Shannon v United Kingdom*:[283]

> "If the requirement to attend an interview had been put on a person in respect of whom there was no suspicion and no intention to bring proceedings, the use of the coercive powers [to examine and demand answers] might well have been compatible with the right not to incriminate oneself . . . The applicant, however, was not merely at risk of prosecution in respect of the crimes which were being examined by the investigators: he had already been charged with a crime arising out of the same raid. In these circumstances, attending the interview would have involved a very real likelihood of being required to give information on matters which could subsequently arise in the criminal proceedings for which the applicant had been charged. The security context—the special problems of investigating crime in Northern Ireland—cannot justify the application of the [coercive powers]."

The same case conduces against the proposed use of disclosure notices under clause 32 of the Bill.

4.6.7 It should be emphasised that a judicial examination of this kind is not the same as appointing a judge as investigator. Under the proposal, the judge can retain the role of umpire, with a prosecutor putting the questions. It is submitted that this is far preferable to the confusion of roles which would be represented by a judge-investigator. Judges have no training in police investigation. Furthermore, they would have to rely on police sources of intelligence and evidence, assuming they were forthcoming from the police which may not always be true where an "outsider" is involved, and so could not really act independently. To be viable, a judge-investigator would therefore need independent resources as well as training. Furthermore, it would be contrary to the rules about bias if such a person appeared at the same time as a judge in other cases, for their independence would be fatally compromised during the period of office as investigator.

4.6.8 A number of substantial advantages would flow from judicially-managed examinations. The person would have to be released from police custody after 14 days, meaning that existing limits could be respected. At that point, the person would be charged or be subject to a control order or be set free. If further evidence arose from investigations, further questioning would be possible by reference to judicial examination, which would have the major benefit of ensuring that the responses would be admissible evidence and ensuring respect for the independence of the judiciary. It would also ensure clearer circumstances of fairness and humanity for the suspect.

4.7 *Intercept evidence*

4.7.1 It would assist in many cases to have intercept evidence as admissible. No serious debate on the issue can be held without information. As a first step, the Home Office should publish the reports from the inquiries held to date, including the most recent in 2004. It should be explained why the normal procedures for dealing with public interest immunity cannot satisfactorily deal with any concerns.

[283] Shannon v United Kingdom, App. no.6563/03, 4 October 2005.

5. Miscellaneous

5.1 *Review*

5.1.1 It is vital that counter terrorism measures be kept under close review. Clause 35 is inadequate in two respects:

- There is no mention of relevant measures in the Anti-Terrorism, Crime and Security Act 2001, nor in the Prevention of Terrorism Act 2005.
- The sole reviewer, Lord Carlile, is an excellent choice. But the work should be undertaken by a panel of three reviewers, appointed to different terms, to ensure that a fresh look is constantly taken.

5.2 *Public justice*

5.2.1 The Terrorism Act 2000 was designed to consolidate all measures into one Act. But there are now, or will be, four different sources. The government should commit to tidying up the statute book so that citizens can readily ascertain their legal position.

5.2.2 The government should be open about its use of powers such as detention without trial or deportation on grounds of national security. Just as the courts must operate under the principle of open justice, so should executive decision-making which affects the rights of individuals. Thus, the spectacle of a Home Office Minister refusing to name the deportees on spurious or undisclosed grounds should not be repeated. The rule of law requires accountability and accountability requires information.

5.3 *Judicial justice*

5.3.1 Since many of the powers in the counter-terrorism legislation can be expected to last indefinitely, normal principles of constitutionalism should apply. These require that decisions affecting the rights of individuals should be subject to judicial decisions and not executive decisions so far as possible. Thus, there should be no warrant powers exercisable by Ministers. This principle has been recognised in relation to search warrants in Schedules 4 and 5 of the Terrorism Act. It should also apply to Part I of the Regulation of Investigatory Powers Act 2000.

5.4 *Victims*

5.4.1 The counter-terrorism legislation ignores the plight of victims, the shabbiness of which has been highlighted by the July 7 bombings in London. There is a need for special regulations for various reasons. One is that mass casualties can otherwise be kept waiting for unacceptable periods. The other concerns the principles of social solidarity with the victims of an attack on the public and also the need for the recovery of normality. Finally, they types of losses from terrorism may be different to other crimes.

5.4.2 It is the contention of this paper that the laws and policies on this topic are grossly under-developed. Such laws as do exist fall broadly into two categories—personal injury and property or other financial loss.

5.4.3 The aspect of personal injury is dealt with by two non-statutory schemes—the Criminal Injuries Compensation Authority[284] and the Compensation Agency (Northern Ireland).[285] So far as personal injury is concerned, the schemes are both very similar. A victim may make an application if:[286]

(a) a victim of a crime of violence, or injured in some other way covered by the Scheme;

(b) physically and/or mentally injured as a result;

(c) in England, Scotland or Wales at the time when the injury was sustained; and

(d) injured seriously enough to qualify for at least the minimum award available under the Scheme; or

(e) a dependant or relative of a victim of a crime of violence who has since died."

There is a variety of limitations inherent in this scheme which make it neither generous nor wholly appropriate when dealing with the victims of terrorism. Consider the following shortcomings.

5.4.4 One is that the emphasis on "crime of violence" does not capture the whole of the definition of terrorism. Though part of the controversy surrounding the definition in section 1 of the Terrorism Act 2000 is that it extends well beyond violence, there seems to be a mismatch between what is criminalised as terrorism and what might be compensated as terrorism. For example, the definition includes actions which creates a serious risk to the health or safety of the public or a section of the public or which is designed seriously to interfere with or seriously to disrupt an electronic system. According to the rules of the system:[287]

[284] http://www.cica.gov.uk.
[285] www.compensationni.gov.uk.
[286] Guide to the 2001 Criminal Injuries Compensation Scheme, para.2.3.
[287] Para.7.9.

> There is no legal definition of the term but crimes of violence usually involve a physical attack on the person, for example assaults, wounding and sexual offences. This is not always so, however, and we judge every case on the basis of its circumstances. For example, the threat of violence may, in some circumstances, be considered a crime of violence.

5.4.5 Next, there is the problem that the victim must be in England, Scotland or Wales at the time when the injury was sustained. This leaves out, for example, of British diplomats or military attache[acute]s who have been targeted abroad (such as in Greece in 2000) and also persons unattached to the British state who are selected for attack simply as British or even Western European residents—hostages in Lebanon, for example. Though many other Western European countries operate similar schemes of state compensation,[288] the victim may find that to make claims abroad is cumbersome, and outside Western Europe and North America one cannot be sure that such systems exist at all.

5.4.6 Thirdly, the victim must be injured seriously enough to qualify for at least the minimum award available under the Scheme. According to note 12 in the Tariff of Awards:

> Minor multiple physical injuries will qualify for compensation only where the applicant has sustained at least 3 separate physical injuries of the type illustrated below, at least one of which must still have had significant residual effects 6 weeks after the incident. The injuries must also have necessitated at least 2 visits to or by a medical practitioner within that 6-week period.

In addition to the minimum, there is also a maximum payment of £500,000.[289] It is also the case that compensation is not payable for the first 28 full weeks of lost earnings or earning capacity,[290] and that persons convicted of an unspent offence are disqualified, even if the offence is wholly unrelated to terrorism.[291]

5.4.7 Even greater qualifications apply to the second aspect of victimology, property or other financial loss. The troubled situation in Northern Ireland, and the fact that it has for many decades scared away insurance companies from offering cover for terrorist-related damage means that the Northern Ireland scheme (which is based on the Criminal Damage (Compensation) (Northern Ireland) Order 1977)[292] does allow for compensation for terrorist acts. However, there are again limits. The terrorism must arise from activities by or on behalf of an unlawful association. It follows that isolated individuals, such as David Copeland, who planted three nail bombs in 1999, may not be covered.[293] In addition, Compensation will not be paid in respect of:[294]

(a) any damage to, destruction or theft of
  - (i) coins, bank notes, foreign currency, postal orders, money orders, or any postage stamps;
  - (ii) any articles of personal adornment, including watches and jewellery unless kept by the owner as part of stock in trade; or

(b) property taken from a damaged vehicle or building except in certain circumstances eg if the property was stolen from a damaged building in the course of a riot.

As far as claims within Great Britain within the purview of the Criminal Injuries Compensation Authority, there is no scheme whatsoever for compensation where the property or other financial loss is unrelated to personal injury. In such cases, the only state aid is by way of the Pool Re scheme which is designed to ensure that, unlike in Northern Ireland, insurance cover remains available. The scheme arose from bombings in the City of London in St Mary Axe 1992 and Bishopsgate in 1993 which produced a response from the government, concentrated around the Reinsurance (Acts of Terrorism) Act 1993.[295]

5.4.8 In conclusion, it could be argued that the present structures for dealing with the victims of terrorism suffer from two defects. First, there are the gaps and shortcomings which have already been listed. Provision and cover are far from total or generous. The second issue arises from a wider perspective and is the overall impression given of a legalistic and grudging attitude, in which victims must fight every step of the way to win compensation. It may be that in context of the victims of crime, no other stance is affordable. However, the same attitude in regard to terrorism arguably fails to give due prominence to social solidarity and the state's interest in restorative measures as an aspect of anti-terrorism policy.

5.4.9 One might contrast, with some hesitation, the US Department of Justice's Office for the Victims of Crime,[296] which has a Terrorism and International Victims Unit to provide positive assistance to individuals and communities, as well as responding to financial claims. A whole array of changes to the Victims of Crime

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288 European Convention on the Compensation of Victims of Violent Crimes of 1983 (ETS 116, 1983; Cm.1427, 1991; Katsoris, C.N. (1990–91) "The European Convention on the Compensation of Victims of Violent Crime", *Fordham International Law Review* 14: 186; Greer, D.S. (1996) (ed.) *Compensating Crime Victims*, Freiburg: Edition Iuscrim.

289 Criminal Injuries Compensation Scheme 2001, para.24.

290 Guide to the 2001 Criminal Injuries Compensation Scheme, para.4.13

291 Criminal Injuries Compensation Scheme 2001, para.13(e)

292 SI No. 1247. See Greer, D.S. and Mitchell, V.A. (1982) *Compensation For Criminal Damage*, Belfast: SLS Legal Publications

293 (2000) *The Times* 1 July p.1; Wolkind, M., and Sweeney, N., "*R v David Copeland*" (2001) 41 *Medicine Science and Law* 185.

294 A Guide to Criminal Damage Compensation in Northern Ireland, para.10

295 See Walker, C., "Political violence and commercial risk" (2004) 56 *Current Legal Problems* 531.

296 http://www.ojp.usdoj.gov/ovc/familycallcenter.htm

Act of 1984, as amended,[297] affecting the Antiterrorism and Emergency Assistance Program, were brought about by the Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act of 2001 (commonly called the USA PATRIOT Act).[298] The list of potential applicants has been expanded to include not only eligible State crime victim compensation and assistance programs, but also victim service organisations, public agencies, and non-governmental organisations that provide assistance to victims. Prior amendments allowed for payment to victims of international terrorism outside the US.[299] The scheme also encourages support for victim participation in criminal justice proceedings against terrorists by including travel costs to court or closed-circuit viewing facility, counselling, and advocacy. Available funding includes:

A. Crisis Response Grant. Funding to help rebuild adaptive capacities, decrease stressors, and reduce symptoms of trauma immediately following a terrorism or mass violence incident.

B. Consequence Management Grant. Funding to help victims adapt to the trauma event and to restore the victims' sense of equilibrium.

C. Criminal Justice Support Grant. Funding to help facilitate victim participation in an investigation and prosecution related to an act of terrorism or mass violence.

D. Crime Victim Compensation Grant. Funding to reimburse victims for out-of-pocket expenses related to an act of terrorism or mass violence. Emergency Fund dollars may not be used to cover property loss or damage.

E. Training and Technical Assistance. Funding to assist in identifying resources, assessing needs, coordinating services to victims, and developing strategies for responding to an act of terrorism or mass violence.

Moving to business and property victimisation, this aspect is taken up by the recently maligned Federal Emergency Management Agency (FEMA).[300] The agency co-ordinates emergency planning and response but also makes Federal grants to assist state governments to overcome disasters. In the case of September 11, one might compare Pool Re and the ad hoc UK government grants to FEMA's Mortgage and Rental Assistance (MRA) Program.[301] The program covers the rent or mortgage payments for those who suffer financial hardship as a result of a major disaster declared as such by the President.[302] The household must have suffered at least a 25 per cent loss of income and be in peril of eviction, dispossession, or foreclosure as a result of the disaster. In the case of New York, this could apply to a business (or its employees) in the World Trade Center area that was either physically damaged or inaccessible or even someone who suffered because their company did business with a World Trade Center area firm, even someone outside New York and even a non-US national.

October 2005

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[297] 42 U.S.C. 10601.

[298] PL 107-56

[299] Antiterrorism and Effective Death Penalty Act of 1996.

[300] http://www.fema.gov/

[301] Section 408(b) of the Robert T. Stafford Disaster Relief and Emergency Assistance Act.

[302] http://www.fema.gov/diz01/d1391tp07.shtm.

Printed in the United Kingdom by The Stationery Office Limited
12/2005 320323 19585