HUMAN RIGHTS WATCH
BRIEFING ON THE TERRORISM BILL 2005
Second Reading in the House of Lords
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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.[1]

[1] Preface to the Guidelines on human rights and the fight against terrorism adopted by the Committee of Ministers on July 11, 2002, at the 804th meeting of the Ministers' Deputies, Directorate General of Human Rights, December 2002.

Summary

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.[2] However it is precisely in the aftermath of atrocities such as the London bombings in July that the strength of these values is most keenly tested, and the greatest vigilance is required. If those values are to be preserved, it is vital that any new measures proposed in the legitimate fight against terrorism fully respect international human rights standards.

This briefing concerns problematic new measures on speech and detention contained in the draft terrorism legislation—the fifth major piece of counter-terrorism legislation in as many years—currently being debated in the British parliament. It concentrates on two key matters: a potentially sweeping new offence of "encouragement of terrorism," and an increased detention period to twenty-eight days in terrorism cases for those who have yet to be charged with a crime, seven times longer than that allowed for any other crime.

These measures are by no means the only area of human rights concern raised by current U.K. counter-terrorism policies. Human Rights Watch is deeply concerned about efforts by the U.K. government to erode the absolute prohibition against torture, including through the assertion of the right to rely on evidence obtained under torture, and the transfer of suspects to governments with poor records of torture based on undependable, unenforceable promises ("diplomatic assurances") of humane treatment from officials of the country.[3] But Human Rights Watch considers it important to comment specifically on human rights concerns arising from the proposed legislation, in the hope that policy-makers and the public will reflect upon on them as they scrutinize the bill.

The proposed new offence of "encouraging terrorism" at best duplicates existing criminal offences that prohibit incitement of terrorism or other acts of violence. But its scope is both ill-defined, particularly in relation to "glorification," and overly broad—it uses a definition of terrorism that extends well beyond the conventional understanding of the term. As a result, it is likely to prove inconsistent with international standards guaranteeing free expression. Despite assurances from the government, it also remains unclear whether people who are unaware that their words are likely to incite violence can

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[2] See, for example, Human Rights Watch, "U.K.: Nothing Can Justify London Bombings," July 7, 2005 [online], http://hrw.org/english/docs/2005/07/07/uk11294.htm

3 See, for example, Human Rights Watch, "Still at Risk, Diplomatic Assurances No Safeguard Against Torture," April 2005 [online], http://hrw.org/reports/2005/eca0405/; Human Rights Watch, "U.K.: Highest Court to Rule on Torture Evidence," October 14, 2005 [online], http://hrw.org/english/docs/2005/10/14/uk11877.htm

be held criminally liable. The new offence is likely to have a chilling effect on free expression in the classroom, the newsroom, and the mosque.

The case for extending to twenty-eight days the time that terrorism suspects can be detained without charge has simply not been made. Britain already has the longest period of such detention in Europe. The present fourteen-day maximum—seven times longer than is permitted for other crimes, including similarly complex offences involving fraud, drugs and organized crime—came into force less than two years ago. Equally importantly, an extension is likely to be counterproductive. Many of those detained on suspicion of terrorism in the United Kingdom are eventually released without charge. The House of Lords should think very hard before approving a measure that will lead to innocent people—some of them young men from Muslim communities—serving the equivalent of an average two-month prison sentence without the state ever producing evidence sufficient even to merit a criminal charge.

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 the illusion of short-term security, but in the medium and long-term they are likely to erode confidence among minority communities, undermining their willingness to cooperate with the authorities and security services, and creating a fertile ground for messages of hate.

Background

This briefing considers the Terrorism Bill 2005 as amended by the House of Commons. It concentrates on two key matters: the offence of encouragement of terrorism (clause 1) and the increased pre-charge detention period (clauses 23 and 24).

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) (incorporated into domestic U.K. law through the Human Rights Act 1988) and the International Covenant on Civil and Political Rights (ICCPR).[4] It also takes into consideration the four guiding principles set out by Lord

[4] The United Kingdom ratified the ECHR in March 1951 and the ICCPR in August 1976. The Human Rights Act 1988 entered into force on October 2, 2000 (date of commencement).

Lloyd in his review of anti-terrorism legislation published in 1996, which remain highly relevant when assessing new legal measures in this area.[5]

Our analysis also takes account of a number of international instruments relating to human rights and anti-terrorist measures. These include: the 2002 Council of Europe's Guidelines on human rights and the fight against terrorism,[6] 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.[7]

The analysis also reflects the 1995 Johannesburg Principles on National Security, Freedom of Expression and Access to Information.[8] While not binding, the principles have been endorsed and followed by many international institutions, including the United Nations Human Rights Committee.

Clause 1: Encouragement etc. of Terrorism

Human Rights Watch remains seriously concerned about the new criminal offence contained in clause 1, despite amendments introduced during consideration of the bill in the House of Commons. Under the clause, it becomes a criminal offence for a person to intentionally or "recklessly" publish a statement which is likely to be understood "as a direct or indirect encouragement or other inducement" to commit a terrorist act. The offence carries a sentence of imprisonment of up to seven years on conviction. The bill makes it clear that statements likely to be understood as encouraging terrorism include

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[5] 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 right 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 U.K.'s obligations under international human rights law.

[6] Adopted by the Committee of Ministers on July 11, 2002, at the 804th meeting of the Ministers' Deputies.

[7] U.N. Security Resolution 1456 (2003).

[8] The Johannesburg Principles on National Security, Freedom of Expression and Access to Information, Freedom of Expression and Access to Information, U.N. Doc. E/CN.4/1996/39 (1996). Adopted on October 1, 1995, by a group of experts in international law, national security and human rights.

those that "glorify" terrorist acts, when members of the public hearing the statement would understand "what is being glorified as conduct that should be emulated by them."

In considering any proposed new speech-related offence, it is important to recognize the special status enjoyed by freedom of expression under both the ECHR and ICCPR, 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-fulfilment.[9]

And the United Nations Human Rights Committee, the body which supervises state compliance with the ICCPR, has emphasized in its General Comment on freedom of expression that "when a State party imposes certain restrictions on the exercise of freedom of expression, these may not put in jeopardy the right itself."[10]

As a consequence, any proposed restrictions must be subjected to close scrutiny to determine whether they are both "necessary" and "proportionate", requirements for limitations of the right under article 10(2) of the ECHR. According to the ECtHR, the question of whether a restriction on free speech is "necessary" must be convincingly established.

Not shown to be necessary

The government has sought to justify the introduction of the new offence by arguing that it is a requirement for ratification of the Council of Europe Convention on the Prevention of Terrorism.[11] 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."[12] 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"

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[9] *Ceylon v Turkey* 1999, para.2.

[10] U.N. Human Rights Committee, General Comment 10 - Freedom of expression (Art.19), June 29, 1983.

[11] Council of Europe Convention on the Prevention of Terrorism (CETS No. 196), Article 5(2), May 2005 [online], http://conventions.coe.int/Treaty/EN/Treaties/Html/196.htm (retrieved November 14, 2005). The United Kingdom signed the treaty on May 16, 2005. It has yet to enter into force.

[12] Ibid., Article 5(2)

that such an offence may be committed. The message may either directly or indirectly advocate terrorist offences.

In so far as this requires the U.K. to adopt an offence of *direct incitement* (where the speaker directly advocates violence), there are already a range of existing domestic offences available to cover such conduct and therefore any new offence is not necessary. Some are terrorist-specific, including the offence of incitement of terrorist violence overseas under section 59 of the Terrorism Act 2000 and the offences of inviting or displaying support in public for a proscribed organization under the same Act.[13] 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.

The fact that the proposed new offence uses "encouragement" and "inducement" rather than "incitement" is solely a matter of linguistics. A commonsense understanding of these words, and the way in which they were variously used in the discussions preceding adoption of the Convention on the Prevention of Terrorism, suggests that they cover the same or sufficiently similar behavior so as to fall within the existing offence of incitement under the 2000 Act.

The Privy Counsellor Review Committee noted in its review of the Anti-Terrorism, Crime and Security Act (ATCSA) 2001 that 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.[14] It did not identify the need for a new "speech" offence as is now being proposed. In 2004, the Joint Committee on Human Rights (JCHR) reached a similar view, arguing that the evidential problem in terrorism prosecutions "is unlikely to be helped by the creation of still more criminal offences."[15] 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 this new offence.

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[13] Terrorism Act 2000, sections 12 and 13.

[14] The Privy Counsellor Review Committee (often referred to as the "Newton Committee" after its chair, Lord Newton of Braintree) is a group of senior U.K. parliamentarians convened by the U.K. Home Secretary to review the ATCSA. Privy Counsellor Review Committee, "Anti-terrorism, Crime and Security Act 2001 Review: Report," December 18, 2003.

[15] Review of Counter-terrorism Powers, 18th Report of Session 2003-04.

The question of introducing an offence of *indirect incitement* (where the speaker does not directly advocate violence, but where the speech nonetheless is deemed somehow to be capable of inciting violence) has been the subject of considerable debate. In order for such an offence to be consistent with the Convention on the Prevention of Terrorism, its scope would have to be limited to situations where the speaker is shown to have specifically intended to incite violence.

The government has not shown that the existing offences mentioned above cannot also be used to cover intentional conduct falling within the description of *indirect incitement*. There is nothing to suggest, for example, that the offence of incitement to terrorism under section 59 of the 2000 Act is limited in such a way.

The government has yet to explain why existing criminal offences are not sufficient to meet the threat posed by speech which incites terrorist acts. In this context it has also not produced evidence showing how existing offences are in fact being used to cover such behavior. For instance, a minister of Islam known as "Sheikh Faisal" was recently convicted of offences of soliciting murder under section 4 of the 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."[16] Sheikh Abu Hamza has been charged with similar offences, including solicitation to murder of non-Muslims and incitement to racial hatred.[17] Both prosecutions suggest that existing law is sufficient to cover speech that incites violence.

Unclear mental requirement for commission of the offence

An immediate problem arising from the measure is whether a person could commit the offense of "encouraging terrorism" without realizing it. As drafted, the proposed criminal offence appears to apply not only where the speaker either (i) intended to incite terrorism or (ii) knew that terrorism was likely to be incited by his or her actions but took the action anyway, but also (iii) wherever a reasonable person would conclude that the statement was likely to incite terrorism, regardless of what the speaker intended.

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[16] *R. v El-Faisal* [2004] EWCA Crim 456.

[17] Stewart Tendler, "Abu Hamza accused of inciting hate and murder," *The Times* (London), October 20, 2004.

The amended bill defines "recklessness" in clause 1(3) as follows:

> For the purposes of this section the cases in which a person is to be taken as reckless as to whether a statement is likely to be understood as mentioned in subsection (1) include any case in which he could not reasonably have failed to be aware of that likelihood.

The use of the term "include" suggests that its application may not be confined to cases where the speaker knew that his words were likely to incite terrorism, but could also apply to situations where the speaker was unaware that his words would have that effect.

It is important to reiterate that under the Council of Europe Convention on the Prevention of Terrorism, to which the new offence is intended to give effect, acts that constitute "provocation to commit a terrorist offence" should only be criminalized if committed "intentionally." [18]

There is a strong argument that the offence as drafted is an overstretched interpretation of the requirement, in that it does not require intent to incite the commission of a terrorist act, even if "intent" is understood in its broadest sense to include those situations where a person knows that the commission of a terrorist act is likely to be the result of his or her speech.

Offence lacks legal certainty

Human Rights Watch believes that the draft offence is so vaguely worded that it will not be possible to determine what behavior constitutes the offence. It therefore violates the 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, enshrined in article 7 of the ECHR (and therefore into U.K. law through the Human Rights Act) was emphasized by Council of Europe Commissioner for Human Rights Alvaro Gil-Robles in his comments on draft article 5 (then article 4) of the Convention on the Prevention of Terrorism. He said that "if the Article were 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."[19]

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[18] Convention on the Prevention of Terrorism, Article 5(2).

[19] Opinion of the Commissioner for Human Rights, Alvaro Gil-Robles, on the draft Convention on the Prevention of Terrorism, Strasbourg, February 2, 2005, BCommDH(2005)1, para.28.

The inclusion of "glorification" as a form of indirect incitement is particularly worrying in this context. The term "glorification" is most often used in the context of *apologie du terrorisme* offences. This category of offence was addressed in a study by the Council of Europe Committee of Experts on Terrorism (CODEXTER) used to inform the negotiations leading to the Convention on the Prevention of Terrorism. The Committee examined 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 to free expression posed by such offences. The survey indicated that only three countries in Europe (Denmark, France and Spain) have such an offence.

A number of countries that participated in the survey acknowledged that the risk of infringing legitimate free expression makes criminalizing "*apologie du terrorisme"* an especially difficult task. The Netherlands in its reply explicitly states "*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."[20]

The case law of the European Court of Human Rights provides a further illustration of the difficulty of seeking to limit language that does not directly advocate violence, without restricting legitimate free expression. In a series of cases, the court has held that speech criticizing democracy and calling for the imposition of Sharia law, for example, [21] or containing separatist propaganda,[22] cannot legitimately be subject to restriction provided that it does not incite violence.

Overly broad

The new offence is overly broad. It relies on the definition of "terrorism" in the Terrorism Act 2000, which 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."[23] 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

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[20] Council of Europe, *'Apologie du Terrorisme'* and 'Incitement to Terrorism,' 2004, p.141.

[21] *Muslum Gunduz v. Turkey* (No. 1) (2003).

[22] *EKIN Association v. France* (2001); *Okcuoglu v. Turkey* (1999).

[23] Terrorism Act 2000, section 1.

which cause significant economic loss.[24] It has therefore the potential to apply even to many forms of non-violent direct action, which would not be understood as "terrorism" in the conventional meaning of the term. The potential application of the offence to speech that "encourages" acts that fall outside the conventional understanding of the term "terrorism" raises serious free expression concerns.

No causal link to violence required

Under the Convention on the Prevention of Terrorism a statement should only be subject to criminalization where it "causes 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.

As presently drafted in the Terrorism Bill, the required causal link is simply that "members of the public" to whom a statement is made "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.

As such, the causal link in the new offence fails the imminence test set down in the 1996 Johannesburg Principles on National Security, Freedom of Expression and Access to Information. Principle 6 requires that there is a direct and immediate connection between the expression and the likelihood of such violence occurring.[25]

Chilling effect on free expression generally

As a line of cases before the ECtHR confirms, it is essential for any democracy to ensure that controversial or shocking ideas, including criticisms and points of view be neither inhibited nor prohibited.[26]

The proposed legislation, however, casts a wide net and can be expected to curb a considerable amount of such speech. It is worth noting that statements made by

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[24] It is notable that protesters at the recent Labour Party conference were detained under the Terrorism Act 2000.

[25] The Johannesburg Principles on Freedom of Expression and Access to Information, U.N. Doc. E/CN.4/1996/39 (1996), Principle 6: Expression That May Threaten National Security: [E]xpression may be punished as a threat to national security only if a government can demonstrate that: (a) the expression is intended to incite imminent violence; (b) it is likely to incite such violence; and (c) there is a direct and immediate connection between the expression and the likelihood or occurrence of such violence.

[26] See, for example, *Lingens v Austria* (1986).

journalist John Pilger during a 2004 television interview in Australia—indicating that the resistance to U.S. forces in Iraq is legitimate and desirable—arguably fall within the range of speech prohibited by clause 1.[27] Whatever view one has about those statements, it is difficult to avoid the conclusion that Pilger's opinions may be seen by some as precisely the sort of "shocking ideas" that the European Court thinks merit protection.

In this context it is perhaps worth repeating the paradox raised by Douglas Hogg MP in the debate in the House of Commons: "...on the one hand, it appears that it is proper for Governments to wage war to procure regime change in Iraq, whereas on the other, if we recommended the citizens of Iraq should have risen up to destroy Saddam Hussein, we could be prosecuted in this country for doing that."[28]

There is always a danger that laws that criminalize speech will have a chilling effect on free expression generally, creating self-censorship and inhibiting political discourse, including criticism of the government. The media, 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 countering radicalism ("sunlight is the best disinfectant") and promoting understanding and tolerance with 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.

The prospect of self-censorship on the part of the media is particularly worrying. It could mean, for example, that material that is freely transmitted in other European countries or anywhere else in the world would not appear on U.K.-based broadcasting services. This could lead to consequences similar to those arising from the 1988 ban forbidding the broadcasting of statements made by members of Sinn Fein. Not only did the media render the ban 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.

Counterproductive

With all of 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

[27] ABC News (Australia), Interview transcript: "Pilger on the US and terrorism," March 10, 2004 [online], http://www.abc.net.au/lateline/content/2004/s1063309.htm (retrieved November 15, 2005).

[28] House of Commons, Hansard, Nov 2, 2005, col.853.

against terrorism will be alienated. This is particularly so in the case of the Muslim community. A recent report by the "Preventing Extremism Together" working groups underscores this concern. The working groups, containing many prominent British Muslim leaders, were established by the Home Office after the July 7 London bombings.[29] In the report, the working group on community security expressed "particular concern" about proposed counter-terrorism measures, including those related to speech:

> [T]he proposal on "inciting, justifying or glorifying terrorism," as currently formulated, could lead to a significant chill factor in the Muslim community in expressing legitimate support for self-determination struggles around the world and in using legitimate concepts and terminology because of fear of being misunderstood and implicated for terrorism by authorities ignorant of Arabic/Islamic vocabulary—e.g., a speech on "jihad" could easily be misunderstood as "glorifying terrorism." This would not only result in an inappropriate restriction around the practice of Islam but also its development in the present context. The deficiencies in the proposed legislation can be demonstrated by the fact that there is a general perception that 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.

At the same time, as part of a formal recommendation, the working group made it clear that the government must consult widely, particularly with the Muslim community, on any further anti-terrorism provisions. As the working group emphasized: "The UK must lead on and not unilaterally derogate from international principles and standards of human rights." Ifath Nawaz, the deputy convenor of the community security working group said on publication of the report: "There is huge concern about the anti-terrorism legislation—that it is excessive and is going to drive people underground. We ask for a dialogue to be opened up with the community."[30]

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[29] Home Office, "'Preventing Extremism Together' Working Groups, August – October 2005," November 10, 2005, p.77.

[30] Press Association, "Foreign Policy 'spurs Muslim extremism,'" November 10, 2005 [online], http://www.guardian.co.uk/terrorism/story/0,,1639511,00.html (retrieved November 15, 2005).

Clauses 23 and 24: Extension of Detention Period

The bill as amended by the Commons also proposes that the current maximum period that a person suspected of involvement in terrorism may be held before being charged be doubled to twenty-eight days. Human Rights Watch is strongly opposed to any extension beyond the existing maximum of fourteen days. In our view, the case for extending the time that terrorism suspects can be held without charge has not been made. Britain already has the longest such period in Europe. The present fourteen-day maximum, seven times longer than is permitted for similarly complex offences involving fraud, drugs and organized crime, came into force less than two years ago.

While provisions designed to tackle the threat of terrorism pose particularly difficult issues, the balancing process between defending public safety and the protection of individual rights cannot be stretched to the point when the very essence of individual rights is impaired. The fundamental right in question here is the right to liberty and security under article 5 of the ECHR and article 9 of the ICCPR. Unless it is shown to be strictly necessary and proportionate, a further extension in the period that suspects can be held without sufficient evidence even to warrant a criminal charge will threaten to become a form of arbitrary detention in breach of this fundamental principle. An extension is also likely to infringe a suspect's right under both treaties to be informed promptly of any case against him or her.

The history of the U.K.'s decisions to extend the pre-charge detention period for terrorist suspects is relevant to whether a further extension is necessary and proportionate. After thirty years of U.K. counter-terrorism legislation, a series of cases in the ECtHR, and extensive parliamentary debate, a period of seven days detention was confirmed in the Terrorism Act 2000. The recent extension to fourteen days was a very different matter. In May 2003, a government amendment was tabled at a late stage during parliamentary deliberation of the Criminal Justice bill.[31] The arguments put forward by the government were the same as those advanced today: the need for time to examine substances, to extract computer materials, and to undertake international investigations. At the time, concerns were expressed at the late timing of the amendment and consequent lack of parliamentary debate. And even though the Parliamentary Joint Committee on Human Rights suggested that more reasons for such an extension needed to be forthcoming, the Home Office Minister, Beverley Hughes, was unable to provide at that time the number of occasions during the previous twelve months that the police

[31] Later to become s.360 of the Criminal Justice Act 2003.

had had difficulties in completing their inquiries within the seven-day maximum.

Despite its rushed introduction into law, the measure only became effective in January 2004. The statistics show that between January 2004 and September 4, 2005,—a period of twenty months—three hundred and fifty-seven people were arrested under this provision, of whom only thirty six were held in excess of seven days and only eleven were held for the full fourteen days.[32] It has not been satisfactorily explained why, when the present fourteen-day period is only rarely resorted to by the police, that a further extended period is necessary. As already noted, it is seven times longer than that allowed for any other crime, including murder and drug trafficking, for example. It is equivalent to the average time served for a two-month prison sentence. As a point of comparison, one of the most criticized of the recently announced counter- terrorism measures in Australia is the proposal to extend their detention period from seven to fourteen days so as to bring it in line with the U.K.

The police and the Crown Prosecution Service (CPS) have sought to justify an extension on the same grounds as put forward for the fourteen-day extension in 2003, arguing that an extension is necessary to review complex material, with the problems of encryption, international networks, and possible hazardous materials being cited as examples. While the latest annual reports of both the Intelligence Services Commissioner and the Interception of Communications Commissioner throw doubt on the presumed difficulties surrounding decryption of data,[33] it is accepted that the investigation of some cases may take significant time and expertise.

But the government has not explained why these difficulties cannot be resolved with other tools at the disposal of the police. In many cases, the police should be able to charge suspects with a lesser offence, continuing their investigations and amending the charges later to reflect more serious offences. Where there is insufficient evidence for even a lesser criminal charge to be brought after fourteen days and suspects need to be released, police can seek permission to conduct forms of surveillance sanctioned by law.

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[32] Statistics on arrests under the Terrorism Act 2000, Home Office [unpublished].

[33] *Report of the Intelligence Services Commissioner for 2004*, House of Commons, November 3, 2005; *Report of the Interception of Communications Commissioner for 2004*, House of Commons, November 3, 2005. Both reports state: "the use of information security and encryption products by terrorist and criminal suspects is not, I understand, as widespread as had been expected when RIPA [Regulation of Investigatory Powers Act 2000] was approved by Parliament in the year 2000. Equally the Government's investment in the National Technical Assistance Centre—a Home Office managed facility to undertake complex data processing—is enabling law enforcement agencies to understand, as far as is necessary, protected electronic data."

It has been argued that charging suspects with lesser offenses will not work because police cannot continue to question a suspect once he or she has been charged. But Human Rights Watch can see no obvious obstacle in the rules contained in the Police and Criminal Evidence Act 1984 (PACE) to continued questioning of a suspect on matters with which he or she has not been charged. PACE certainly allows questioning of suspects on matters with which they have been charged if it is necessary "to prevent or minimise harm or loss to some other person, or the public."[34] If there are indeed serious obstacles either to upgrading charges later, or continued questioning after charge, then it is far better to look at adjustments in that area, rather than further interference with the right to liberty.

Counterproductive

The overarching objective of the "Preventing Extremism Together" initiative referred to above is "to address the problem of young people being drawn into extremism."[35] Yet there appears to be a disconnect between this laudable objective and the proposal to extend powers of detention. Since many of those held for extended periods are likely to be Muslim, extended detention without charge has the potential to alienate a community whose members already feel disproportionately affected by counter-terrorism measures.

This concern will be exacerbated if the majority of those detained for an extended period are subsequently released without charge. A report from the Institute of Race relations indicates that hundreds of Muslims arrested under terrorist powers since the introduction of the 2000 Act were subsequently released without charge.[36] The Home Office's official statistics give further cause for concern. They show that of the 756 people arrested under the 2000 Act between September 11, 2001 and June 30, 2005, almost two-thirds were released without charge and less than twenty-five were convicted.[37] The significant disparity between the numbers of arrests and prosecutions suggests that any extension of pre-charge detention is likely to result in many of those being held for extended periods being released without charge.

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[34] Police and Criminal Evidence Act 1984, Code C, section 16.5: "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…" Available at: Home Office, http://police.homeoffice.gov.uk/operational-policing/powers-pace-codes/pace-codes.html (retrieved November 16, 2005).

[35] Home Office, Preventing Extremism [online], http://security.homeoffice.gov.uk/counter-terrorism-strategy/prventing-extremism/ (retrieved November 16, 2005).

[36] Institute for Race Relations, "Arrests under anti-terrorist legislation since 11 September 2001," September 2, 2004 [online], http://www.irr.org.uk/pdf/terror_arrests_study.pdf (retrieved November 15, 2005).

[37] Home Office figures show that of the 756 people arrested, 122 people were charged with terrorism offences, 141 with other criminal offences, and 22 were convicted. Statistics on arrests under the Terrorism Act 2000, Home Office [unpublished].

It is important to note that previous counter-terrorism measures, including the indefinite detention of foreign terrorism suspects, have been regarded by many British Muslims as having had a manifestly disproportionate impact on their community. The majority of the groups proscribed under the 2000 Act are of Islamic origin, for example.[38] And the stop and search powers introduced by the same Act have resulted in reports of the disproportionate stop and search of young Muslims. A 2004 report from the Metropolitan Police Authority says that current stop and search practice in London has created deeper racial tensions and severed valuable sources of community information and criminal intelligence.[39]

The first test for any proposed counter-terrorism measure should be to balance the positive impact of its introduction in addressing the threat against its potential to alienate further communities upon whom an effective strategy most depends—a very real concern underscored by the "Preventing Extremism Together" report. The measure falls at that first hurdle and poses a serious threat to basic human rights.

[38] At the time of this writing there were 40 international organizations and 14 organizations in Northern Ireland proscribed under the Terrorism Act 2000. For a complete list, see the Home Office Security website [online], http://security.homeoffice.gov.uk/counter-terrorism-strategy/legislation/tact/proscribed-groups?version=1 (retrieved November 16, 2005).

[39] Report of the Metropolitan Police Authority, "Scrutiny on MPS Stop and Search Practice", May 2004.