UNITED KINGDOM

Amnesty International's Memorandum to the UK Government on Part 4 of the Anti-terrorism, Crime and Security Act 2001

Introduction

In this memorandum Amnesty International expresses its concern about a number of provisions of the Anti-terrorism, Crime and Security Act 2001 (the ATCSA) and the consequences of its implementation. Amnesty International believes that some provisions of the ATCSA are inconsistent with a number of international human rights and refugee law standards, including treaty provisions by which the UK is bound. The organization considers that serious human rights violations have taken place as a consequence of the ATCSA's enactment.[1]

This memorandum focuses on Part 4 of the ATCSA.[2] Part 4 lays out powers of the Secretary of State to certify people as "suspected international terrorists and national security risks", and for their consequent detention without charge or trial, for an unspecified and potentially unlimited period of time. As such powers are inconsistent with the right to liberty and security guaranteed under international human rights treaty provisions to which the UK is bound, the UK government has derogated from (i.e. temporarily suspended) its obligations under these provisions.

Amnesty International believes that detention without charge or trial, for an unspecified and potentially unlimited period of time, under the ATCSA, is tantamount to charging a person with a criminal offence, convicting the person concerned without a trial and imposing on him/her an open-ended sentence. The organization opposes indefinite detention without charge or trial and continues to call on the UK government to release all persons detained under the ATCSA unless they are charged with a recognizably criminal offence and

[1] For Amnesty International's concerns about human rights violations suffered by those arrested and detained under the ATCSA, see "*Rights Denied: the UK's Response to 11 September 2001*", issued on 5 September 2002 and available at www.amnesty.org. In that report, Amnesty International raises its concern also in relation to other serious human rights violations that have taken place as a consequence of the UK authorities' response to the 11 September 2001 attacks in the United States of America.

[2] Part 4 features 16 sections, from section 21 to section 36. See Part 4, entitled "Immigration and Asylum", the ATCSA 2001. Non-governmental organizations and others have raised concern in relation to other parts of the ATCSA, including those dealing with police powers, retention of communication data and race and religion.

tried by an independent and impartial court in proceedings which meet international standards of fairness.

In addition, under Part 4 of the ATCSA, those who were either recognized refugees or asylum-seekers prior to being certified as "suspected international terrorists" are denied the opportunity to enjoy refugee protection under the 1951 Convention relating to the Status of Refugees.[3] In particular, ATCSA detainees are not afforded the opportunity to challenge, in the context of fair proceedings, any decisions pursuant to the ATCSA which negatively affects their status or rights as recognized refugees or asylum-seekers in the UK.

Background

Emergency legislation in the UK has been of concern to Amnesty International since the 1970s. The organization has documented throughout the years how provisions of such legislation have violated international human rights law and have facilitated abuses of human rights, including torture, cruel, inhuman or degrading treatment and unfair trials.

The UK government stated that in the aftermath of the 11 September 2001 attacks in the United States of America (USA) the threat posed to the UK by the *al-Qa'ida* network to the UK made it necessary for the authorities to enact new "anti-terrorist" legislative measures.[4] In asserting the existence of "a public emergency" in the UK, the government stated that

[3] Asylum-seekers, as well as refugees, are entitled to enjoy protection, including from *refoulement*, under the Refugee Convention unless or until they have been found, as a result of a final decision, not to be in need of it.

[4] Amnesty International has strongly condemned the attacks of 11 September 2001 in the USA and has called for those allegedly responsible to be brought to justice. However, the organization believes that this must be done in accordance with international human rights and humanitarian law.

> [*t*]*here exists a terrorist threat to the United Kingdom from persons suspected of involvement in international terrorism. In particular, there are foreign nationals present in the United Kingdom who are suspected of being concerned in the commission, preparation or instigation of acts of international terrorism, of being members of organisations or groups which are so concerned or of having links with members of such organisations or groups, and who are a threat to the national security of the United Kingdom.*[5]

As a result of this "public emergency", on 13 November 2001 the UK government laid before the UK Parliament the "Anti-terrorism, Crime and Security Bill", the ATCSA legislative precursor. The ATCSA was passed by the UK Parliament and enacted on 14 December 2001.

Both prior to and in the wake of the ATCSA's enactment, Amnesty International expressed grave concern that some of its provisions were draconian and would have far-reaching repercussions for the protection of human rights in the UK. The organization expressed concern that ATCSA effectively created a shadow criminal justice system devoid of a number of crucial components and safeguards present in both the ordinary criminal justice system and national procedures for the determination of refugee status.[6] In light of human rights violations that have taken place in the course of the ATCSA's enforcement over nearly nine months, Amnesty International's concern in this respect has greatly deepened.

Since the introduction of the ATCSA, the organization has been monitoring its implementation. For example, on 24 June 2002 Amnesty International observed the bail proceedings before the Special Immigration Appeals Commission (SIAC) brought on behalf of Mahmoud Abu Rideh, one of the nine non-UK nationals currently detained under the ATCSA;[7] and the open sessions of the challenge to the lawfulness of the ATCSA before the SIAC, commenced on 17 July 2002 by eleven men, all non-UK nationals, on the grounds that it violated their human rights. In addition, on 26 June 2002, representatives of the

[5] See "the Human Rights Act 1998 (Designated Derogation) Order 2001,No. 3644", which came into force on 13 November 2001.

[6] See "*United Kingdom: Rushed legislation opens door to human rights violations*", AI-index: EUR 45/027/2001, issued on 14 December 2001 and available at www.amnesty.org.

[7] Under the ATCSA, the SIAC is empowered to grant bail to ATCSA detainees; it hears appeals against detention under the ATCSA, challenges to its lawfulness, and reviews the lawfulness of detention under the ATCSA. For more details see below under section entitled "Part 4 of the ATCSA".

organization visited five ATCSA detainees, including Mahmoud Abu Rideh, at HMP Belmarsh (Prison) in London.[8]

1. Part 4 of the ATCSA

1.1. *Certification of non-UK nationals as "suspected international terrorists"*

[8] For Amnesty International's concerns about the detention conditions of ATCSA detainees and, in particular, the case of Mahmoud Abu Rideh, see "*Rights Denied: the UK's Response to 11 September 2001*", cited at 1 *supra*.

Part 4 of the ATCSA empowers the Secretary of State to certify an individual as an "international terrorist" if the Secretary of State "reasonably": a) believes that the concerned individual's presence in the UK "is a risk to national security"; and b) "suspects that the person is a terrorist".[9]

1.2. *Detention of non-UK nationals without charge or trial, for unspecified and potentially unlimited duration*

[9] ATCSA, Part 4, Section 21(1) reads as follows: "[t]he Secretary of State may issue a certificate under this section in respect of a person if the Secretary of State reasonably – (a) believes that the person's presence in the United Kingdom is a risk to national security, and (b) suspects that the person is a terrorist."

Under Part 4 of the ATCSA, upon certification as "a suspected international terrorist", a non-UK national can be detained without charge or trial, for unspecified and potentially unlimited duration, if the concerned individual's removal or deportation from the UK cannot be effected.[10] As such detention is inconsistent with the right to liberty and security as guaranteed under Article 5(1) of the European Convention for the Protection of Human Rights and FundamentalFreedoms (ECHR)[11] and Article 9 of the International Covenant on Civil and Political Rights (ICCPR),[12] the UK government has derogated from its obligations under these provisions.[13]

1.3. *Removal and deportation of non-UK nationals*

[10] ATCSA, Part 4, Section 23(1) reads as follows: "[a] suspected international terrorist may be detained under a provision specified in subsection (2) despite the fact that his removal or departure from the United Kingdom is prevented (whether temporarily or indefinitely) by – (a) a point of law which wholly or partly relates to an international agreement, or (b) a practical consideration."

[11] Article 5(1) of the ECHR states: "[e]veryone 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: (....) the lawful arrest or detention of a person to prevent his effecting an unauthorised entry into the country or of a person against whom action is being taken with a view to deportation or extradition."

[12] Article 9 of the ICCPR states:
"1. Everyone has the right to liberty and security of person. No one shall be subjected to arbitrary arrest or detention. No one shall be deprived of his liberty except on such grounds and in accordance with such procedure as are established by law.
2. Anyone who is arrested shall be informed, at the time of arrest, of the reasons for his arrest and shall be promptly informed of any charges against him.
3. Anyone arrested or detained on a criminal charge shall be brought promptly before a judge or other officer authorized by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release. It shall not be the general rule that persons awaiting trial shall be detained in custody, but release may be subject to guarantees to appear for trial, at any other stage of the judicial proceedings, and, should occasion arise, for execution of the judgement.
4. Anyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings before a court, in order that court may decide without delay on the lawfulness of his detention and order his release if the detention is not lawful.
5. Anyone who has been the victim of unlawful arrest or detention shall have an enforceable right to compensation."

[13] See at 5 *supra*.

Removal or deportation from the UK could be prevented by, for example, the fact that the individual concerned may be a stateless person or because the UK authorities are unable to find another country willing to accept him or her. The fact that the individual concerned has been certified by the Secretary of State as a "suspected international terrorist" may make finding another country a difficult task.

The UK government may also be prevented from effecting deportation or removal of anyone certified as a "suspected international terrorist" as a result of the UK's international obligations. In November 1996, the European Court of Human Rights ruled that the UK government's attempt to deport Karamjit Singh Chahal to India was in violation of the ECHR.[14] He had been detained pending deportation on "national security" grounds since 1990. The Court stated that the prohibition of torture -- enshrined in Article 3 of the ECHR -- was absolute and that allegations of national security risk were immaterial to a determination of whether a person faced "a real risk" of torture if returned.[15] In addition, removal or deportation to a country where the individual concerned may face the death penalty is also prevented by the UK's obligations under Protocol 6 to the ECHR.[16]

1.4 *The SIAC and its powers under the ATCSA*

Under the ATCSA, the SIAC has been established as a tribunal with the same status as the High Court.[17] The SIAC is empowered to grant bail to ATCSA detainees.[18] It hears appeals against certification by the Secretary of State of non-UK nationals as "suspected international terrorists".[19] The SIAC also regularly reviews the certificate issued by the Secretary of State.[20] The SIAC is chaired by a High Court judge who sits with two others on appeals.

[14] *Chahal v. United Kingdom* (1997) 23 E.H.R.R. 413.

[15] Article 3 of the ECHR states: "[n]o one shall be subjected to torture or to inhuman or degrading treatment or punishment".

[16] The UK is a party to Protocol No. 6 to the ECHR concerning the Abolition of the Death Penalty.

[17] ATCSA, Part 4, section 35 entitled "Special Immigration Appeals Commission – Status of the Commission", subsection (3), which states: "[t]he Commission shall be a superior court of record". In criminal cases the High Court of England and Wales is a court of second instance which hears appeals from the Crown Courts (i.e. indictable offences) and the Magistrates' Courts (i.e. summary offences).

[18] ATCSA, Part 4, section 24 entitled "Bail", subsection (1), which states: "[a] suspected international terrorist who is detained .... may be released on bail".

[19] ATCSA, Part 4, section 25 entitled "Certification: appeal", subsection (1), which

1.5. *Appeal against certification as a "suspected international terrorist"*

states: "[a] suspected international terrorist may appeal to the Special Immigration Appeals Commission against his certification under section 21".

[20] ATCSA, Part 4, section 26 entitled "Certification: review".

Under the ATCSA there is only one appeal to SIAC against certification.[21] Appeals against certification must be commenced within three months "beginning with the date on which the certificate is issued",[22] unless the SIAC grants leave to do so after the end of that period "but before the commencement of the first review".[23] ATCSA detainees can only be released if the certificate is either revoked by the Secretary of State or cancelled by the SIAC on appeal if the SIAC finds that the Secretary of State's belief and suspicion upon which the certificate had been issued were not reasonable. The SIAC can also cancel the certificate if it believes that for some other reasons it should not have been issued, for example, if it considers that the evidence is capable of withstanding a criminal trial. Appeals against judgments by the SIAC confirming the Secretary of State's certification, exclusively on a point of law, not on facts, are heard by the Court of Appeal and there is also an appeal to the House of Lords from the Court of Appeal.

1.6. *Review of the certificate*

Under the ATCSA, the first review of the Secretary of State's certificate has to take place "as soon as it is reasonably practicable" after six months from the issuance of the certificate have elapsed.[24] If the SIAC has confirmed the certificate after hearing an appeal against it, then the SIAC must hold a review of the certificate "as soon as it is reasonably practicable" after six months have elapsed from its final determination on appeal.[25] Thereafter, the SIAC must hold reviews of the certificate at regular three-month intervals. However, in between times, the individual concerned can apply for a review, which the SIAC would hold if it considers that the circumstances have changed.[26]

2. Amnesty International's concerns about provisions of Part 4 of the ATCSA that violate international human rights law

2.1. *Rushed legislation*

[21] ATCSA, Part 4, section 25(5).

[22] *Ibid*.

[23] *Ibid*.

[24] ATCSA, Part 4, section 26(1).

[25] *Ibid*, subsection (2)(a).

[26] *Ibid*, subsection (4)(a) and (b).

The ATCSA was enacted on 14 December 2001, barely a month after draft legislation had been laid before Parliament.[27] Such a rushed legislative process raises doubts as to the thoroughness, adequacy and effectiveness of the legislative scrutiny that the ATCSA was afforded by the UK Parliament. At the time of debating the draft legislation, Amnesty International expressed concern at the extraordinarily short time made available for parliamentary and public scrutiny of the complex draft legislation, particularly as most of its provisions were permanent, and the temporary provisions allowed for potentially indefinite deprivation of liberty without charge or trial.

2.2. *The UK derogations*

The UK government justified -- and continues to do so -- the need for the ATCSA by stating that the UK is facing a "public emergency threatening the life of the nation".

On 30 July 2002 the SIAC issued its judgment in the case brought by eleven men, all non-UK nationals – nine of whom are currently detained under the ATCSA – who had challenged the lawfulness of the ATCSA on the grounds that it violated their human rights.[28] The SIAC held that the UK government "was entitled to form the view that there was and still is a public emergency threatening the life of the nation and that the detention of those reasonably suspected to be international terrorists involved with or with organisations linked to Al Qa'ida is strictly required by the exigencies of the situation".[29] As clarified in the judgment itself, in reaching its decision in respect of the task at hand, namely to review the UK derogation to determine whether it was lawful, the SIAC relied on the precedent set by the House of Lords in the *Rehman* case.[30] In *Rehman*, the House of Lords held that the SIAC should have granted the primary decision-maker, i.e. the Home Secretary, considerable discretion with respect to his decision to remove *Rehman* from the UK on national security grounds. Amnesty International is concerned that the *Rehman* precedent may prevent an effective judicial scrutiny of executive decisions in cases involving national security.

[27] "The Anti-terrorism, Crime and Security Bill" laid before the UK Parliament on 13 November 2001.

[28] See the SIAC judgment in *A and others v Secretary of State for the Home Department*, 30 July 2002, Appeal No: SC/ 1-7/2002.

[29] See the official summary of its judgment of 30 July 2002 issued by the SIAC.

[30] See *Home Secretary v Rehman* [2001] 3 W.L.R. 877.

Against this backdrop, Amnesty International believes that whether the UK is currently facing a "public emergency threatening the life of the nation"[31] – the test required by Article 15 of the ECHR to justify the taking of measures derogating from Convention rights – continues to remain an open question.[32] Likewise in relation to the test which the UK authorities have to meet under Article 4 of the ICCPR with respect to the derogation from Article 9 of the Covenant.[33] In announcing the proposal for the legislation in October 2001, the Secretary of State for the Home Department stated that "[t]here is no immediate intelligence pointing to a specific threat to the United Kingdom…". In addition, the UK remains the only country that has derogated from the ECHR in the aftermath of the 11 September 2001.

2.3. *The discriminatory nature of the derogating measures*

[31] In the wake of the attacks of 11 September 2001 in the United States, the government issued an Order, to come into force on 13 November 2001, on the UK's derogation from Article 5(1) of the ECHR. See, the Human Rights Act 1998 (Designated Derogation) Order 2001, laid before Parliament on 12 November 2001. Article 5(1) of the ECHR enshrines the right to liberty and security of person. In addition, on 18 December 2001 the UK notified the Secretary-General of the United Nations of its derogation from Article 9 of the ICCPR to the extent that the ATCSA detention powers may be inconsistent with the obligations under this provision of the Covenant.

[32] Article 15(1) of the ECHR states: "[i]n time of war or other public emergency threatening the life of the nation any High Contracting Party may take measures derogating from its obligations under this Convention to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with its other obligations under international law".

[33] Article 4(1) of the ICCPR states: "[i]n time of public emergency which threatens the life of the nation and the existence of which is officially proclaimed, the States Parties to the present Covenant may take measures derogating from their obligations under the present Covenant to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with their other obligations under international law and do not involve discrimination solely on the ground of race, colour, sex, language, religion or social origin".

In the wake of the 11 September 2001 attacks, the UK government has justified the enactment of the ATCSA as a necessary measure to counter adequately the international "terrorist" threat allegedly posed by the *al-Qa'ida* network, and those associated with it, to the UK. Furthermore, the UK government has also stated that the international "terrorist" threat to the UK emanates predominantly, although not exclusively, from non-UK nationals.[34] Such rationale supposedly explains why detention without charge or trial, for unspecified and potentially unlimited duration under the ATCSA -- i.e. the derogating measure -- applies exclusively to non-UK nationals. Reportedly, however, the "evidence" relied upon heavily by the UK authorities to identify some of the ATCSA detainees as "suspected international terrorists" purportedly depicts them as associates of UK nationals known to the UK authorities to be reportedly connected with the *al-Qa'ida* network. Notwithstanding this, no such measures have either been proposed or taken against UK nationals.

The purported rationale for the ATCSA targeting exclusively non-UK nationals is further thrown into question by evidence presented by the Secretary of State to the SIAC, which refers to a number of UK nationals who are associated with *al-Qa'ida and* points out that "the background of those detained show the high level of involvement of British citizens .... in the terrorist networks".

[34] Lord Goldsmith, the Attorney General, made statements to this effect in addressing the SIAC in the context of the challenge to the lawfulness of the ATCSA, commenced on 17 July 2002 by eleven men, all non-UK nationals, nine of whom are currently detained under the ATCSA, on the grounds that the ATCSA violates their human rights. An Amnesty International's representative observed the open proceedings of the challenge.

Amnesty International considers that by providing for detention without charge or trial, for unspecified and potentially unlimited duration exclusively of non-UK nationals, the ATCSA violates the rights to be free from discrimination,[35] equality before the law and equal protection of the law without any discrimination, enshrined in, *inter alia*, Articles 2(1)[36] and 26 of theICCPR,[37] and in Articles 1[38] and 14 of the ECHR.[39] The UK has not derogated from any of these provisions.

The Human Rights Committee has clarified that "not every differentiation of treatment will constitute discrimination, 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".[40] However, by targeting non-UK nationals exclusively, Amnesty International

[35] 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. The Human Rights Committee is the body of 18 independent experts established pursuant to Article 28 of the ICCPR to monitor States Parties' implementation of the provisions of the Covenant. The Human Rights Committee issues authoritative interpretations on the implementation of the ICCPR provisions, known as General Comments.

[36] 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."

[37] 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."

[38] Article1 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."

[39] 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."

[40] Human Rights Committee, General Comment 18, paragraph 13, cited at 35 *supra*.

believes that the different treatment provided for under the ATCSA cannot possibly amount to legitimate differential treatment as identified by the Human Rights Committee. In any event, Amnesty International believes that in this respect the ATCSA falls foul of the non-discrimination provision on the grounds of nationality enshrined in international law such as Article 2(1) of the ICCPR and Article 14 of the ECHR. Thus, because the ATCSA is discriminatory on the grounds of nationality in its letter and application, the UK is violating rights enshrined in international treaty law by which it is bound and from which it has not sought to derogate. Amnesty International notes that, in fact, the UK's derogation from the ECHR refers exclusively and specifically to Article 5(1), while its derogation from the ICCPR makes reference only to Article 9 of the Covenant.[41]

[41] Article 5(1) of the ECHR, cited at 11 *supra*.

Furthermore, in its 30 July 2002 judgment, the SIAC ruled that exclusive targeting under the ATCSA of non-UK nationals was "not only discriminatory and so unlawful under Article 14 [of the ECHR]"[42] but also disproportionate given that it was based on an unreasonable assessment of the appropriateness of the means employed (i.e. detention without charge or trial, for unspecified and potentially unlimited duration of non-UK nationals) to counter the so-called "terrorist threat", given that such a threat did not, in fact, emanate exclusively from non-UK nationals. Consequently, the SIAC held that the ATCSA, "which is the measure derogating from obligations under the Convention [the ECHR], to the extent that it permits only the detention of foreign suspected international terrorists is not compatible with the Convention".[43] This SIAC decision has been appealed by the Secretary of State.

In light of the above, Amnesty International further believes that both of the UK's derogations are defective and, therefore, unlawful under international law since both Article 15(1) of the ECHR[44] and Article 4(1) of the ICCPR[45] require that derogating measures be consistent with the state's other obligations under international law.

2.4. *Detention without charge or trial, for unspecified and potentially unlimited duration*

Amnesty International considers that detention without charge or trial, for unspecified and potentially unlimited duration under the ATCSA violates a number of other rights of those detained by which the UK remains bound.

In particular, Amnesty International is concerned that under the ATCSA, there are no explicit provisions according to which those arrested and detained under it have the right to bring proceedings to have a court determine speedily the lawfulness of detention, and order release if detention is deemed unlawful as required by Article 5(4) of the ECHR,[46] and Article 9(4) of ICCPR. This safeguard, known as *habeas corpus*, is a fundamental protection against arbitrary detention and torture and has been deemed non-derogable at all times.[47]

[42] See the SIAC official summary of its judgment of 30 July 2002 cited at 29 *supra*.

[43] *Ibid*.

[44] Article 15(1) of the ECHR, cited at 32 *supra*.

[45] Article 4(1) of the ICCPR, cited at 33 *supra*.

[46] Article 5(4) of the ECHR states: "[e]veryone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings by which the lawfulness of his detention shall be decided speedily by a court and his release ordered if the detention is not lawful".

[47] See, for example, the 1987 Advisory Opinion of the Inter-American Court of Human Rights on the non-derogability of *habeas corpus* in emergency situations, as well as General Comment

Having monitored bail proceedings before the SIAC, Amnesty International is concerned about the content of the right to apply for bail under the ATCSA. The organization understands that under the ATCSA, bail could only be granted if the detention conditions were such as to fall within the ambit of Article 3 of the ECHR, which enshrines the prohibition of torture or other ill-treatment. Amnesty International believes that the detention of Mahmoud Abu Rideh in a high security prison was cruel, inhuman and degrading and, therefore, fell squarely within the ambit of Article 3 of the ECHR. Furthermore, in Mahmoud Abu Rideh's case, release from detention was being sought on humanitarian grounds as a way of: a) ensuring the provision of appropriate medical care; b) diminishing the risk of suicide and acts of self-harm; and c) removing him from a high security prison environment whose harsh conditions triggered frequent flashbacks of his torture. Under these circumstances, the fact that the UK government opposed the granting of bail in his case raises the legitimate question as to what exactly the content of the right to apply for bail under the ATCSA is.

Amnesty International also notes that the ATCSA does not contain explicit provisions which would allow people -- certified as "suspected international terrorists", who "voluntarily" agree to be deported instead of remaining in detention -- to appeal against the certification from abroad. To date, as far as the organization is aware, two people have "voluntarily" left the UK. Amnesty International welcomes the decision by the SIAC to grant leave to appeal from abroad to those who have "voluntarily" left the UK, after being arrested and detained.

29 adopted by the Human Rights Committee on 31 August 2001, CCPR/C/21/Rev.1/Add.11, para. 16.

In addition, Amnesty International is concerned that the ATCSA does not contain explicit provisions which would give those arrested and detained pursuant to certification as "suspected international terrorists", the right to immediate access to a solicitor. Amnesty International expressed concern that, for example, upon their arrest and detention at Belmarsh Prison, none of the detainees was provided with the means, information or facilities to contact solicitors. All were refused permission to make telephone calls to solicitors, whether they had pre-existing solicitors or not. This is despite the fact that the ATCSA detainees received not only an order of certification under the Act, but also an order for deportation, printed in English, informing them they had five days to appeal. The denial of prompt access to legal assistance is in breach of international human rights standards.[48] In addition, the ATCSA does not contain provisions for legal aid to be afforded to those detained.

[48] For example, Principle 17(1) of the Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment states: "[a] detained person shall be entitled to have the assistance of a legal counsel. He shall be informed of his right by the competent authority promptly after arrest and shall be provided with reasonable facilities for exercising it".

Amnesty International considers that detention without charge or trial, for an unspecified and potentially unlimited period of time, under the ATCSA, is tantamount to charging a person with a criminal offence, convicting the person concerned without a trial and imposing on him/her an open-ended sentence. The organization believes that its analysis in this respect finds support in the jurisprudence of the European Court of Human Rights.[49] As a result, Amnesty International believes that the ATCSA also violates the right to a fair trial, enshrined in, *inter alia*, Article 6 of the ECHR[50] and Article 14 of the ICCPR. This right,

[49] Since its judgment in the case *Engel v. Netherlands*, the European Court of Human Rights has established that, under the Convention, there exists an autonomous meaning of the term "criminal" applicable to any proceedings instituted to determine the veracity of an accusation, irrespective of the way in which such proceedings are characterized domestically. One of the criteria established by the European Court in *Engel v. Netherlands* to determine whether proceedings are "criminal" for Convention purposes hinges on the severity of the potential penalty. In the context of the Convention jurisprudence, this criterion is often decisive, especially when deprivation of liberty is at stake. In *Engel* the Court held that, as far as the Convention is concerned, proceedings have to be deemed "criminal" in nature unless their potential outcome by its "nature, duration or manner of execution, cannot be appreciably detrimental" for the individual concerned (*Engel v. Netherlands,* at para. 82). If, in light of the test established by the Court in *Engel*, the proceedings in point are criminal, then all the due process guarantees applicable in the context of criminal proceedings should be accorded to the individual concerned. See, *Engel v. Netherlands* (1979-80) 1 E.H.R.R. 647.

[50] Article 6 of the ECHR states:
"1. In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. Judgment shall 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.
2. Everyone charged with a criminal offence shall be presumed innocent until proved guilty according to law.
3. Everyone charged with a criminal offence has the following minimum rights:
a) to be informed promptly, in a language which he understands and in detail, of the nature and cause of the accusation against him;
b) to have adequate time and facilities for the preparation of his defence;
c) 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;
d) to examine or have examined witnesses against him and to obtain the

includes, *inter alia*, the right to be brought promptly before a judge, as well as the right to trial within reasonable time or to release pending trial, guaranteed in, *inter alia*, Article 5(3) of the ECHR.[51]

In particular, detention without charge or trial, for unspecified and potentially unlimited duration and not pursuant to a conviction for a recognizably criminal offence following proceedings meeting international fair trial standards violates the presumption of innocence, guaranteed in Article 6(2) of the ECHR and Article 14(2) of the ICCPR. Furthermore, Amnesty International notes that the presumption of innocence has been deemed non-derogable at all times.[52] The Human Rights Committee, for example, has opined that "the principles of legality and the rule of law require that fundamental requirements of fair trial must be respected during a state of emergency. Only a court of law may try and convict a person for a criminal offence. The presumption of innocence must be respected."[53]

attendance and examination of witnesses on his behalf under the same conditions as witnesses against him;

e) to have the free assistance of an interpreter if he cannot understand or speak the language used in court."

[51] Article 5(3) of the ECHR states: "[e]veryone arrested or detained in accordance with the provisions of paragraph 1.c of this article shall be brought promptly before a judge or other officer authorised by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release pending trial. Release may be conditioned by guarantees to appear for trial".

[52] The Human Rights Committee has stated in its General Comment 29 on states of emergency (Article 4 of the ICCPR) that "[s]tates parties may in no circumstances invoke article 4 of the Covenant as justification for acting in violation of humanitarian law or peremptory norms of international law, for instance by ....deviating from fundamental principles of fair trial, including the presumption of innocence." See General Comment 29 at 47 *supra*, para. 11.

[53] *Ibid*, para. 16.

On appeal the SIAC can cancel the certificate issued by the Secretary of State, providing that it is satisfied that the Secretary of State's belief and suspicion for issuing such a certificate were unreasonable.[54] Therefore, as long as the SIAC finds that the grounds for the Secretary of State's belief and suspicion were reasonable, non-UK nationals can be held without charge or trial, for an indefinite period of time. Reasonableness alone clearly falls short of the criminal trial standard, i.e. beyond reasonable doubt, required under domestic and international law for a criminal conviction.[55] In this respect too, therefore, proceedings before SIAC violate the presumption of innocence. In addition, given the precedent set by the House of Lords in *Rehman* with respect to the latitude that should be afforded to the Secretary of State in cases involving national security, Amnesty International is concerned at the degree and extent of discretion that the SIAC may give to the Secretary of State in considering appeals against or reviewing certifications.

In addition, Amnesty International is concerned that under the ATCSA the reasonableness of the Secretary of State's belief and suspicion upon which someone is certified as a "suspected international terrorist" may be based in part or entirely on evidence not disclosed to the person concerned or her or his lawyer of choice. Consequently, detention without charge or trial, for unspecified and potentially unlimited duration may be based in part or entirely on evidence which ATCSA detainees or their legal representatives of choice may never get to see or know about and cannot, therefore, be effectively challenged or scrutinized. Furthermore, the Secretary of State's certification that someone is "a suspected international terrorist" may then be confirmed by the SIAC, again on the basis of secret evidence which the Secretary of State is entitled to introduce before the SIAC in the course of secret hearings from which the ATCSA detainees and their legal representatives of choice are excluded. Given that secret evidence can be withheld from those against whom it has been adduced, the SIAC proceedings violate the right to a fair hearing.

Despite the appointment under the ATCSA of Special Advocates "to represent the interests" of the ATCSA detainees, Amnesty International believes that Special Advocates are no substitute for legal counsel of one's choice. Once the Special Advocate sees the secret evidence, s/he cannot discuss it with the individual concerned or her or his legal representatives unless SIAC gives her/him permission to do so. This secrecy undermines the

[54] See at 19 *supra*.

[55] In its General Comment on Article 14 of the ICCPR, the Human Rights Committee has stated that "[b]y reason of the presumption of innocence, the burden of proof of the charge is on the prosecution and the accused has the benefit of doubt. No guilt can be presumed until the charge has been proved beyond reasonable doubt. Further, the presumption of innocence implies a right to be treated in accordance with this principle." See, General Comment 13, "Equality before the courts and the right to a fair and public hearing by an independent court established by law" adopted by the Human Rights Committee on 13 April 1984.

ATCSA detainees' ability to challenge effectively the evidence on which they may be held indefinitely. Moreover, if the Special Advocate is not permitted to discuss the content of the evidence with the individual concerned, it is not possible for the Special Advocate effectively "to represent the interests" of the detainee.

Furthermore, Special Advocates are appointed by the Attorney General, a UK government minister. Amnesty International believes that the involvement of a member of the executive is a further incursion in the right to counsel of choice. The organization considers that the Special Advocate system established under the ATCSA undermines the idea that justice should not only be done but be seen to be done and it leads to a reasonable apprehension of bias inherent in the whole system.

If the SIAC confirms the certificate the detainee may appeal to the Court of Appeal, exclusively on a point of law, not on the facts, and from the Court of Appeal to the House of Lords. In this respect, given that further appeals cannot review the facts of the case in any way, Amnesty International is concerned that the facts are not challengeable, thereby further curtailing the right to a fair trial.[56]

Amnesty International believes that detention without charge or trial, coupled with the fact that those detained under the ATCSA have no way of knowing for how long they will be detained, but are nevertheless aware that, potentially, they could be held indefinitely for the rest of their life, amounts to a violation of the right not to be subjected to torture or other ill-treatment, enshrined in, *inter alia*, Article 3 of the ECHR, and non-derogable at all times. In addition, the organization is concerned that ATCSA detainees are immediately classified as Category A (i.e. high risk) and subjected to a very restrictive regime, which can amount to cruel, inhuman or degrading treatment.

[56] Article 14(5) of the ICCPR states that "[e]veryone convicted of a crime shall have the right to his conviction and sentence being reviewed by a higher tribunal according to law" thus requiring a review of law and facts. See Manfred Nowak, 'U.N. Covenant on Civil and Political Rights - CCPR Commentary', N.P. Engel, Publisher, 1993, section on commentary to Article 14.

ATCSA detainees may also "voluntarily" leave the UK if they can find another country willing to accept them, although this is likely to prove difficult once a person has been labelled a "terrorist" by the UK Secretary of State. Of the nine people who were originally arrested and detained under ATCSA, two have since "voluntarily" left the UK. Their departure from the UK calls into question the UK authorities' stated commitment that the ATCSA would be used solely as a measure of last resort. Specifically, prior to the ATCSA's enactment, Lord Rooker, a UK government Minister, gave assurances to Parliament that the ATCSA was "designed to cover cases where insufficient admissible evidence can be brought forward that points to a person being a terrorist. Our aim throughout has been that our first priority would be to prosecute alleged terrorists; secondly, if we cannot prosecute them, to remove them; and thirdly, failing the opportunity, wherewithal and appropriate circumstances to remove such people, to detainee them" under the ATCSA.[57]

2.5. *Amnesty International's concerns in relation to recognized refugees and asylum-seekers detained under the ATCSA*

The UK has not, and indeed cannot, derogate from its obligations under the 1951 Convention relating to the Status of Refugees (the Refugee Convention). In addition, the ECHR and the ICCPR state that any derogation must not be inconsistent with the UK's other obligations under international law (see above). This would include its obligations under international refugee law. It is important to emphasize that the grant of refugee status is declaratory. The process for undoing such a declaration is therefore only available in certain circumstances. Such circumstances would include the following:

(i) where evidence can be adduced that the declaration was inaccurately or improperly made;
(ii) where the Article 1C cessation clauses apply;
(iii) where Article 33(2) applies. However, it must be emphasized that in this last instance, although refugee status cannot be withdrawn in such circumstances, the individual may not enjoy the protection of Article 33(1).[58]

Amnesty International is concerned that ATCSA detainees are not being afforded the opportunity to challenge, in a fair procedure, any decision made pursuant to the ATCSA which negatively affects their status or rights as recognized refugees or asylum-seekers.

[57] Lord Rooker, Hansards [HL] 29 November 2001, Column 459.

[58] Such an approach would not of course absolve the United Kingdom of its wider obligations in relation to the principle of *non-refoulement*, in particular the prohibition on *refoulement* of people to countries where they face the risk of torture.

Amnesty International recognizes that in some circumstances refugee status may be withdrawn on the basis of information which, had it been known at the time, would have resulted in the denial of refugee status. However, the organization is concerned that the UK should be stopped from withdrawing refugee status on the basis of information which was, or should have been, already known to the decision-maker at the time the decision to grant refugee status was taken. In further support of this position, if such information did not at the time provide a basis for denying international protection, for it to do so at a later date would constitute an '*ex post facto'* ground for denying refugee status.

Amnesty International is concerned that the certification by the Secretary of State and its confirmation by the SIAC that a detainee is not entitled to protection under the Refugee Convention could result in the denial to asylum-seekers of access to fair and satisfactory refugee status determination procedures. This would apply to those whose asylum claims were being processed prior to detention under the ATCSA as well as to current detainees who wish to apply for asylum. Were this to result in *refoulement*, it would constitute a violation of a fundamental principle of international refugee law.

Amnesty International is also concerned that the ATCSA does not provide safeguards against *refoulement* as required by Article 33 of the Refugee Convention, if the refugees and asylum-seekers concerned had not been provided with the full reasons upon which such a decision was based, and an opportunity to challenge the merits and lawfulness of the decision.

3. Amnesty International's recommendations to the UK government

In light of the above-mentioned serious concerns about provisions of Part 4 of the ATCSA that are in violation of international human rights and refugee law, and given the serious human rights violations that the implementation of the ATCSA has given rise to, Amnesty International calls on the UK government to:

- repeal Part 4 of the ATCSA;

- immediately release all those currently detained under the ATCSA unless they are charged with a recognizably criminal offence and tried by an independent and impartial court in proceedings which meet international standards of fairness; and

- ensure that those recognized refugees and asylum-seekers who have been certified as "suspected international terrorists" under the ATCSA are not denied international protection, including protection under the 1951 Convention relating to the Status of Refugees,[59] where they would otherwise be entitled to it as a matter of international law.

[59] It is a fundamental principle of international refugee law that an asylum seeker is

entitled to enjoy protection under the Refugee Convention unless or until he or she is found, by a final decision and pursuant to fair and satisfactory procedures, not to be in need of such protection.