UNITED KINGDOM
Briefing on the Terrorism Bill

The UK government has issued, for parliamentary debate, the "Terrorism Bill" in which it seeks to introduce -- into permanent legislation -- provisions which either directly contravene international human rights treaties to which UK is a party[1], or may result in human rights violations. Most of them are present in current emergency or temporary legislation[2], which in the past facilitated serious abuse of human rights, extensively documented by the organization throughout the years. As a result, Amnesty International has grave concerns about this Bill.

The creation of a permanent distinct system of arrest, detention and prosecution relating to "terrorist offences" may violate the right of all people to be equal before the courts (article 14 of the International Covenant on Civil and Political Rights (ICCPR)). This different treatment is not based on the seriousness of the criminal act itself but rather on the motivation behind the act, defined in the Bill as "political, religious or ideological". Some of the provisions that Amnesty International is concerned about in particular are the following:

* wide-ranging powers of arrest;
* denial of a detainee's access to a lawyer upon arrest;
* denial of the right to have a lawyer present during interrogation;
* the maximum period of detention without charge being seven days, with an extension of up to five days being granted by a judicial authority after the initial 48 hours;
* the shifting of the burden of proof from the prosecution to the defence in various provisions of the Bill.

Definition

[1] This includes provisions within the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR), the incorporation of which will come into effect in October of this year.

[2] These are the Emergency Provisions Act, which was first introduced in 1973 and the Prevention of Terrorism Act, which was first introduced in 1974.

The proposed definition of "terrorism" widens the existing legal definition[3] to include "the use or threat ... of action which involves serious violence against any person or property" for the purpose of advancing a "political, religious or ideological cause".[4] As such the definition is therefore vaguely worded and could be extended to include supporters of, for example, animal liberation or anti-nuclear campaigns and others. The inclusion of "violence to property" as opposed to the existing criminal offence of "damage to property" appears to equate people and property, whereas in the past terrorism provisions have been reserved for crimes involving the most serious injury to people, including injury resulting in death. The whole notion of "violence to property" remains unclear; it is not spelt out and therefore could lead to abuse.

The lack of a clear definition gives cause for concern because the decision to bring a prosecution for such offences could be seen to be political.

Incitement

The risk of politically-motivated prosecutions is also to be seen in the new offence of "inciting terrorism overseas", because decisions may be affected by government foreign policy. This provision is in response to pressure by other governments to deal with their opponents who reside in the UK and who are involved in oppositional activities; such activities may or may not include support for the use of violence abroad. The offence of "incitement" may be committed by words alone. Whether or not the person incited is present in the UK at the time of the incitement or not is immaterial. There is a great danger that prosecuting such "inciters" may be prompted by overseas repressive governments targetting opponents based in this country. Thus these provisions may infringe the rights to freedom of expression and of association. Furthermore, there is 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 through the use of public interest immunity certificates.

[3] The current definition of terrorism in the Prevention of Terrorism Act is: "the use of violence for political ends ... for the purpose of putting the public or any section of the public in fear".

[4] Under the Terrorism Bill, Clause 1(1) states:
"In this Act 'terrorism' means the use or threat, for the purpose of advancing a political, religious or ideological cause, of action which --
a) involves serious violence against any person or property,
b) endangers the life of any person, or
c) creates a serious risk to the health or safety of the public or a section of the public."

Proscription

The powers to proscribe organizations not only make it a criminal offence to belong to "a terrorist organisation", but they also criminalize anyone speaking at a meeting where a member of a proscribed organization is also speaking even if the speech opposes the activities of such organization. The "meeting" could consist of three people "whether or not the public are admitted". The penalty for the latter offence could be imprisonment for up to ten years.[5] Amnesty International is concerned that these powers may infringe on the rights to freedom of association and expression and, if anyone were to be imprisoned for speaking at such a meeting in such circumstances, the organization would consider him/her to be a prisoner of conscience.

Powers of arrest

The powers of arrest in the Terrorism Bill are derived from current emergency legislation. Of the thousands of people who have been detained in Britain under the Prevention of Terrorism Act, the vast majority were released without charge; only a fraction of them were charged with offences linked to terrorism.

Under the Bill, a police officer "may arrest without a warrant a person whom he reasonably suspects to be a terrorist". The powers of arrest are too wide, because they do not specify that the police officer has to have "reasonable suspicion" that the person committed an offence or was about to commit one. They contravene the ECHR because the purpose for the arrest may be other than to bring the person before a competent legal authority, for example, for questioning for the purpose of gathering intelligence. Article 5(1)(c) of the ECHR permits arrest to bring the person before a competent legal authority on three specific grounds: a) on a "reasonable suspicion" of their having committed an offence; b) as a necessary measure to prevent them from committing an offence; or c) to prevent them fleeing after having done so. The second ground, to prevent them from committing an offence, has been interpreted by the European Court of Human Rights as meaning that the anticipated offence must be a "concrete and specific act" (in *Guzzardi v Italy*). The wide-ranging powers of arrest may also contravene Article 5(2) of the ECHR which requires anyone arrested "to be informed .. of the reasons for his arrest".

The various police powers to stop, question and search people and to search property are similar if not identical to emergency provisions which have been abused to commit human rights violations in the past in Northern Ireland. Such powers should always be

[5] An offence under the different sections of Clause 11 carries, on summary conviction, a prison term of up to six months, or fine or both; or on conviction on indictment, a prison term of up to 10 years, or fine or both.

counterbalanced by adequate safeguards in order to ensure that a person's rights to liberty (Article 5, ECHR) and to respect for one's private life (Article 8, ECHR) are protected from abuse. Safeguards for such powers should include the grounds of "reasonable suspicion" of committing an offence before any action can be taken. Instead, the powers in the Bill allow police officers to stop and search pedestrians and vehicles at random for articles which could be used in connection with terrorism; the search can take place "whether or not the constable has grounds for suspecting the presence of articles of that kind". These powers breach the ECHR's requirement of "reasonable suspicion" before a search can take place.

Detention

Amnesty International opposes any proposal which deviates from international standards relating to detention. These standards were adopted to protect people against human rights violations -- including being subjected to torture and ill-treatment -- which, as has been documented, occurred in special interrogation centres in Northern Ireland while people were held in detention without charge and virtually incommunicado without the supervision of a court. International standards require that any person detained be:
- promptly informed at the time of arrest of the reasons for the arrest (ICCPR Article 9(2))
- informed of their rights (Principles 13 and 14 of the Body of Principles[6])
- allowed to notify the family or an interested person of the fact and place of detention without delay (Principle 16 Body of Principles; Rule 92 European Prison Rules)
- promptly informed of the specific charges against them (ICCPR Article 9(2), ECHR Article 5(2))
- granted full legal assistance (see section below)
- promptly brought before a court (ICCPR Article 9(3), ECHR Article 5(3))
- and be granted access to a court to challenge the legality of their detention (ICCPR Article 9(4), ECHR Article 5(4)).

Schedule 8 of the Terrorism Bill sets out the provisions concerning detention and the treatment of persons while in detention. Under it, the Secretary of State has the power to direct "the place where a person is to be detained". This is of concern if it means that people arrested under this legislation could be detained at special interrogation centres, as opposed to designated police stations. In the past, Amnesty International called for the closure of the special interrogation centres in Northern Ireland and welcomed the announcement in December 1999 of the closure of Castlereagh holding centre and the closure of the two other centres as soon as practicable. The Independent Commission for

[6] (UN) Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment

Policing in Northern Ireland, under Chris Patten, also called for the closure of the interrogation centres and for suspects to be held in designated police stations with monitoring by "Lay Visitors" (ordinary citizens appointed to visit police stations).

The Bill fails to provide explicitly for detainees to be informed, upon arrest, of all of their rights. However, the Bill provides for the right of a detainee to inform one person of his/her detention and the place of detention. The detainee is also entitled to consult a solicitor "as soon as is reasonably practicable". Both of these rights can be delayed, up to 48 hours, if the police believe the granting of these rights may impede the investigation (seven detailed reasons are listed in the Bill). The provisions regarding judicial supervision of detention are still significantly weaker than under ordinary legislation. Under the Bill, a person can be detained for 48 hours before a judicial authority shall determine whether an extension of that detention can be granted; this is longer than the 36 hours in ordinary criminal legislation. Under the Bill, the maximum period of detention without charge is seven days, whereas it is four days under ordinary legislation. Under ordinary legislation, the request for further detention, beyond 36 hours, can only be granted by a court for a further 36 hours and then the court would have to approve the final 24-hour detention, to a maximum of four days. Under the Bill, however, further detention beyond the initial 48 hours could only be granted by a judicial authority within 48 hours of the arrest; it would appear that the judicial authority could, at that first 48-hour stage, then grant an extension of up to five days. If so, this may be in violation of the ECHR which ruled that detention beyond 4 days and 6 hours without judicial supervision breached Article 5(3).

The grounds upon which the judicial authority would decide to issue a warrant for further detention are less stringent than under ordinary legislation; they include belief that further detention is necessary to obtain relevant evidence including through questioning and that the investigation is being conducted diligently.[7] In addition, in contrast to ordinary legislation, the Bill allows for the detainee and the lawyer of their own choice to be excluded from any part of the judicial hearing concerning the reasons for the extension. This violates fair trial standards[8]. Anyone deprived of their liberty has the right to be

[7] Under ordinary legislation, information would have to be submitted to the court indicating: a) the nature of the offence; b) the general nature of the evidence on which the person was arrested; c) what inquiries were being made in relation to the offence; and d) the reasons for believing that further detention were necessary.

[8] This includes the right to prepare one's defence, and have legal representation, throughout the entire pre-trial detention stage. Moreover, Principle 11(1) of the Body of Principles states that "A person shall not be kept in detention without being given an effective opportunity to be heard promptly by a judicial or other authority"; and 11(2) states "A detained person and his counsel, if any, shall receive prompt and full communication of any order of detention, together with the reasons therefor."

brought promptly before a judge, so that their rights to liberty and freedom from arbitrary arrest or detention can be protected. This procedure often provides the detained person with their first opportunity to challenge the lawfulness of their detention and to secure release if the arrest or detention violated their rights. This safeguard would be severely undermined if the detained person were to be excluded from this judicial hearing and thus excluded from challenging the lawfulness of his/her detention. The safeguard of a judicial hearing would also be undermined if the detainee and his/her lawyer were excluded from the hearing while the court is deciding on whether to order the non-disclosure of information relied upon by the police officer applying for a warrant of extension.This amounts to an *in camera* hearing where police officers present evidence or allegations which could not be challenged by the detainee or his/her lawyer. Amnesty International is very concerned that these clauses undermine the very essence of this safeguard.

Scotland and Children
Schedule 8 of the Bill concerns the detention of people arrested under this legislation. Several clauses within it apply exclusively to Scotland, and within those, some apply specifically to children in Scotland. Under the Bill, children in Scotland (defined as under the age of 16) have the right to have a lawyer notified "without delay" of their arrest and place of detention, and the right to consult a solicitor "without delay". Children also have the right to have their parents notifed of their arrest and place of detention "without delay" and to have access to their parents "without delay". However, the implementation of all of these rights can be delayed if a police officer authorizes a delay of up to 48 hours on grounds that such information or such access may not be in the interests of the investigation or prevention of crime.

Amnesty International is concerned that children in Scotland, under the age of 16, may be arrested and detained for up to 48 hours without their parents or a solicitor being notified and without them having access to their parents or a solicitor. Article 9(4) of the Convention on the Rights of the Child requires that a child be allowed to notify his/her parents or guardian immediately of his/her arrest and detention.

Children
Under the Bill children can be detained for up to seven days without charge. The Committee on the Rights of the Child, in its Concluding observations on the UK implementation of the Convention on the Rights of the Child, at its January 1995 session, expressed concern that under emergency legislation, enforced in Northern Ireland, children, from the age of 10 upwards, could be detained for up to seven days without charge.The Committee recommended that emergency legislation should be reviewed to ensure its consistency with the principles and provisions of the Convention. Thus, the provisions in the Bill for seven-day detention without charge of children would not be consistent with the Convention.

Access to a lawyer

The Terrorism Bill permits a delay of up to 48 hours before the detained person can gain access to a lawyer (compared to a maximum of 36 hours under ordinary legislation).

The right to have a lawyer present during interrogation is not referred to explicitly in the Bill, except in relation to Scotland. Schedule 8(2) states: "where a person detained has been permitted to consult a solicitor [in Scotland], the solicitor shall be allowed to be present at any interview...". The Bill does not appear to give detainees in Northern Ireland the right to have their lawyer present during questioning, whereas the right appears to continue to exist in England and Wales. Although not explicitly stated in the Bill, one assumes that in England and Wales, the provisions concerning detention under the Terrorism Bill will continue to be governed by the Codes of Practice attached to the Police and Criminal Evidence Act (in the same way that these Codes governed arrests under the PTA). These Codes of Practice include the right to have a lawyer present during interviews. However, in Northern Ireland, the Codes of Practice were part of emergency legislation which will no longer exist once the Bill comes into force. In the absence of those Codes of practice, the Bill does not make clear whether the Codes of Practice attached to the Police and Criminal Evidence (Northern Ireland) Order will apply or whether the Secretary of State will draw up new Codes of Practice.

Amnesty International believes that the Bill should state clearly that all suspects will have the right to immediate access to legal advice and to have their lawyers present during interrogation, because these provisions, as they stand, are contrary to recommendations made by international treaty bodies, including the UN Human Rights Committee and the Committee against Torture, which have urged the government to remove all restrictions on immediate access to lawyers and on lawyers being present during interrogation. Such measures are inconsistent with international standards including the UN Basic Principles on the Role of Lawyers and the (UN) Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment, which establish the right of all detained people to have access to a lawyer during pre-trial phases and the investigation. The Human Rights Committee has also stated that "all persons must have immediate access to counsel".[9] Similarly, in July 1996, the European Court concluded in the case of *Murray v. UK* that delay of 48 hours in granting a detained person access to counsel violated the European Convention in circumstances in which the detainee was being questioned by police and his decision to exercise his right to remain silent could result in adverse inferences being drawn against

[9] UN Doc. CCPR/C/79/Add.74, 9 April 1997, para 28.

him. Indeed, the right to have counsel present during interrogation is so fundamental that it has been guaranteed for persons suspected or accused of genocide, crimes against humanity and war crimes in the Rome Statute of the International Criminal Court and the Rules of Procedure and Evidence of the International Criminal Tribunals for the former Yugoslavia and for Rwanda.

The Bill allowes 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. Separate provisions, in relation to Scotland, similarly allow for an officer "to be present during a consultation". These powers breach international standards; Principle 18(4) of the Body of Principles states: "Interviews between a detained or imprisoned person and his legal counsel may be within sight, but not within the hearing, of a law enforcement official."

Reversal of burden of proof

The onus should always be on the prosecution to prove all the elements of a criminal offence in accordance with the standard of "beyond reasonable doubt". However, numerous provisions in the Bill shift the burden of proof from the prosecution to the defence, where it would be up to the accused to prove their innocence. Such provisions undermine the fundamental right to a presumption of innocence (article 6(2) of the ECHR).

The following are examples from the Bill of the reversal of the burden of proof:
* it is a criminal offence to possess an "article" in circumstances which give rise to a reasonable suspicion that its possession is for a purpose connected with an act of terrorism; if it is proved that the "article" was "on any premises of which the accused was the occupier or which he habitually used otherwise than as a member of the public, the court may assume that the accused possessed the article, unless he proves that he did not know of its presence on the premises or that he had no control over it";
* it is a criminal offence to collect or make a record of or possess information likely to be useful to a person committing or preparing an act of terrorism, including a photographic or electonic record; it is a defence for the accused "to prove that he had a reasonable excuse" for possession;[10]
* it is a criminal offence to withhold from police any knowledge of terrorist activities.

[10] These two clauses are very similar to clauses in the Prevention of Terrorism Act which were heavily criticized by the Court of Appeal under Lord Chief Justice Bingham; the judgment stated that "both sections undermined in a blatant and obvious way the presumption of innocence" (Regina v DPP, Ex parte Kebilene and Others, March 1999).

Freedom of expression

Amnesty International has been concerned in the past that the police have used emergency powers 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. In fact, Amnesty International believes that these powers have been used in order to intimidate journalists from pursuing certain lines of inquiry which may be embarrassing for the authorities; these cases have mainly involved investigative journalists who have refused to hand over information which was obtained in confidence from their sources or who have refused to reveal the name of their source. These journalists were exposing possible human rights violations by agents of the state and the attempts by the authorities to force journalists to reveal their sources or confidential information could have a chilling effect on freedom of expression. Amnesty International considered that such journalists, if imprisoned, would have been prisoners of conscience. Therefore the organization is concerned that such emergency powers have now been made permanent in Schedule 5 of the Bill. The organization is also concerned that, with the widening of the definition of terrorism, these powers could be used against much wider circles of people in connection with a broader range of activities.

Part VII (exclusively for Northern Ireland)

Amnesty International is concerned that Part VII of the Terrorism Bill provides for additional emergency powers which would apply only in Northern Ireland. The effect of this section is to totally undermine the spirit of human rights protection in the Multi-Party Agreement of April 1998, in which the government committed itself "to make progress towards the objective of as early a return as possible to normal security arrangements in Northern Ireland, consistent with the level of threat".

Part VII extends, for up to five years, many of the existing provisions in emergency law, provisions which have resulted in unfair trials and other human rights violations. Such provisions would not be subject to annual independent review and parliamentary renewal, as is currently the case with emergency legislation. These provisions include:

* the non-jury, single-judge "Diplock Court" for trials for "scheduled" offences;
* a lower standard of admissibility for confessions as a basis for prosecution and conviction than in ordinary courts;
* powers to admit, as evidence of membership of a proscribed organization, oral evidence by a senior police officer and corroborated by the suspect's remaining silent in the face of questioning about such membership;
* general police powers of arrest, entry, search and seizure without a warrant;
* general army powers of arrest, entry, search and seizure without a warrant;
* general powers to stop and question any person (it is an offence to refuse to disclose one's movements);

* the limitation of the power to grant bail.

The "Diplock Courts"

Amnesty International has documented, since the early 1980s, concerns about unfair procedures in the single-judge, juryless "Diplock Courts" and has, more recently, called for them to be abolished. The organization believes that the continuing existence of a special court is normalising what is intended under national law to be an exceptional and temporary measure and is contrary to the spirit of international law. International standards prohibit the establishment of special courts which do not use the duly established procedures of legal process and displace the jurisdiction of ordinary courts (Principle 5 of the UN Basic Principles on the Independence of the Judiciary). International human rights bodies have stated that the trial of civilians outside of the ordinary court system is prohibited apart from "exceptional" cases. Moreover, international instruments and guidelines require that these courts operate in a manner strictly consistent with fair trial requirements. All courts must be "competent, independent and impartial". Under UN Basic Principles on the Independence of the Judiciary, adjudication must be based on facts and "in accordance with the law, without any restrictions". Individuals are entitled to a trial by ordinary courts or tribunals, "in accordance with the law".

Amnesty International has several concerns regarding the use of the "Diplock Courts" for "scheduled" offences. The "juryless" system, combined with the lower standard for the admission of evidence allowed under emergency legislation, is incompatible with the right to a fair trial.

Under English law, there is a distinction between the jury, which serves as a trier of fact, and the judge who rules on the admissibility of evidence and matters related to the law. Under the Diplock Courts, the judge must take on both roles -- to weigh the evidence **and** apply the law. There are some serious questions regarding the fairness of such an approach as applied in Diplock Courts. Amnesty International notes that in a number of cases, an alleged confession comprised the primary evidence against an individual. In cases where the defendant denies having made a confession or maintains that the confession was obtained under duress, a *voire dire* is entered.[11] In an ordinary court during a *voire dire* a judge, in the absence of the jury, listens to the evidence to determine whether a confession was obtained lawfully and whether it should be admissible as evidence. However, in the Diplock Courts, the judge and trier of fact are one and the same. Therefore, if a trial judge decides that a confession is admissible, he/she must formally warn himself/herself to discount anything that

[11] A *voire dire* is a trial within a trial, a procedure whereby a defendant challenges the admissibility of his/her confession evidence.

he/she heard during the *voire dire* that would be inadmissible in court. If he/she chooses not to admit the confession, then he/she must disregard everything the judge heard during the *voire dire*. This raises a second, related matter, which is the conditions in which the confession has been obtained. The Terrorism Bill allows for questioning up to seven days. It is during this period, in the absence of a solicitor, that involuntary or false confessions have been made in the past.

The standard of admissibility of confession evidence is lower under the Bill than the standard under the ordinary criminal law, and would permit confession evidence even if it was obtained through oppressive or other unfair questioning. The standard for the admissibility of confession evidence should always be high because the conditions in which such confessions have been obtained can be open to abuse if there are insufficient safeguards to protect the rights of the detainee. In Northern Ireland the consequence has been convictions based solely on confessions which were obtained through coercion, or threats of violence, or psychological pressure; these confessions were obtained in the absence of the solicitor. Such confessions would not be admissible under ordinary law.

There are only a small number of judges hearing cases in the Diplock Courts. As Douwe Korff observed, the fact that these judges hear cases alone increases the risk that subjective factors come to influence the findings of fact, especially in cases of confession-based evidence. "Such subjective factors need not constitute bias on the part of the judge, but may include "case-hardening": the negative effect of constant involvement in the administration of justice on the objectivity of judges."[12] In a number of cases, Amnesty International has documented instances in which Diplock judges have made prejudicial or adverse comments. One example is at the trial of the "Ballymurphy 7" when the judge stated, upon their acquittal, that their release was not a "resounding vindication on their innocence". Another statement was by a judge who acquitted three police officers of the murder of Eugene Toman, in an alleged shoot-to-kill case, and then commended them for "their courage and determination in bringing the three deceased men to justice, in this case, the final court of justice".

Evidence of membership

In Northern Ireland, the evidence for membership of a proscribed organization can consist of a senior police officer's oral statement of his opinion combined with an inference drawn from the silence of the suspect in respect of membership charges. Under the Criminal Justice (Terrorism and Conspiracy) Act, these measures are currently in operation throughout the UK, but the Bill proposes to repeal this Act and the measures will only be applicable in Northern Ireland under Part VII of the

[12] The Diplock Courts in Northern Ireland: A Fair Trial?, by Douwe Korff, SIM, 1983.

Terrorism Bill. Amnesty International is opposed to measures which allow proof of membership of a proscribed organization to consist solely of the opinion of a senior police officer and the corroboration of such a membership to be inferences drawn from a person's failure to respond to questioning. The provisions, which allow presumptions to be made as a result of a person's failure or refusal to provide answers to police questioning, violate the presumption of innocence, and the right not to be compelled to testify against oneself or admit guilt enshrined in Articles 14(2) and 14(3)(g) of the ICCPR. They also violate the right to remain silent which has been deemed to be inherent in these two fundamental rights. The provisions which allow the main basis for a conviction of membership to be the opinion of a senior police officer are incompatible with the right to a fair trial under Article 6 of the ECHR because it is unlikely that the defendant will have an opportunity to cross-examine effectively the police officer about the basis for his opinion, i.e. his sources of information.

Additional powers of arrest and search.
The proposed powers of the police and soldiers to arrest without warrant, and without "reasonable" suspicion that a person has committed, or is about to commit, a particular identified offence, may violate Article 5 of the ECHR. The proposed powers to stop and search do not require officers to have reasonable grounds for conducting a search. Such a search may not comply with Article 8 of the ECHR. Furthermore, provisions allowing searches do not clearly state that a search should be confined to material which is relevant to an investigation under the Act.

Conclusion

Amnesty International is concerned that many provisions in the Terrorism Bill contravene UK obligations under international human rights law. Furthermore, many provisions are open to abuse by law enforcement officials; and the Bill fails to provide adequate safeguards against such abuse.