TABLE OF CONTENTS

United Kingdom
Amnesty International's briefing on the Counter-Terrorism Bill 2008

1. Introduction

Since 1997 Amnesty International has produced briefings on the Bills that subsequently became the Terrorism Act 2000[1]; the Anti-Terrorism, Crime and Security Act 2001[2]; the Prevention of Terrorism Act 2005[3]; and the Terrorism Act 2006[4].

Amnesty International regrets that many of the concerns expressed in these briefings, and in other documents produced by Amnesty International and other organizations in recent years, have needed to be repeated in this document, in relation to the Counter-Terrorism Bill 2008. If enacted this will be the fifth major piece of legislation in the UK aimed at countering terrorism since 1997[5]. The Counter-Terrorism Bill represents a missed opportunity. Rather than repairing the damage done to the protection of human rights in the UK by previous counter-terrorism legislation, it seeks to entrench and to extend some of the most damaging provisions of that legislation. Amnesty International considers that a number of provisions of the Counter-Terrorism Bill as introduced into Parliament are inconsistent with the UK's obligations under domestic and international human rights law and standards, particularly those concerned with the rights to liberty and to the presumption of innocence, and that, if enacted as introduced in Parliament, the Bill may lead to serious human rights violations.

Underlying all of Amnesty International's concerns about this Bill is a recognition that states have an obligation to take measures to prevent and protect

[1] See *UK: Briefing on the Terrorism Bill*, AI Index: EUR 45/043/2000.
[2] See *UK: Creating a shadow criminal justice system in the name of "fighting international terrorism"*, AI Index: EUR 45/019/2001, and *UK: Amnesty International's Memorandum to the UK Government on Part 4 of the Anti-terrorism, Crime and Security Act 2001*, AI Index: EUR 45/017/2002.
[3] See *UK: The Prevention of Terrorism Bill: A grave threat to human rights and the rule of law in the UK*, AI Index: EUR 45/005/2005.
[4] See *UK: Amnesty International's briefing on the draft Terrorism Bill 2005*, AI Index: EUR 45/038/2005.
[5] This figure does not include less wide-ranging legislation, such as the Criminal Justice (Terrorism and Conspiracy) Act 1998; nor legislation – such as the Regulation of Investigatory Powers Act 2000, or the Special Immigration Appeals Commission Act 1997 – which, whilst not aimed explicitly or primarily at countering terrorism, nonetheless has had a significant impact on the implementation of counter-terrorism measures in the UK.

against attacks on civilians; to investigate such crimes; to bring those responsible to justice in fair proceedings; and to ensure prompt and adequate reparation to victims.

An integral aspect of fair proceedings is the requirement for anyone arrested and detained to be charged promptly with a recognizably criminal offence, or released. Since 2000 the maximum length of time for which a person suspected of a terrorism-related offence can be detained without charge in the UK has increased from seven to 14 to 28 days. If enacted in its current form the Bill would give the Home Secretary a power to further extend, to 42 days (that is, six weeks), the maximum period for which people suspected of involvement in terrorism-related offences can be detained without charge or trial. Amnesty International considers that prolonged detention under this so-called 'reserve power' would violate the right to liberty and freedom from arbitrary detention, as protected by the European Convention on Human Rights (ECHR) and other international human rights instruments, by failing to give effect to one of the crucial components of those rights – the right of the person detained to be promptly informed of any charges against her or him. Detention in police custody without charge or trial for up to six weeks could also undermine the presumption of innocence and the right to silence.

The right to silence is further threatened, and protection against oppressive or coercive questioning further undermined, by the proposal in the Bill to extend the use of post-charge questioning, and to allow the court to draw adverse inferences from the failure to mention during such questioning facts later relied on in court. Amnesty International is concerned that, when looked at in the context of the overall legislative framework governing arrest and detention for individuals suspected of involvement in terrorism, this proposal could lead to violations of the rights to silence and the privilege against self-incrimination.

The Counter-Terrorism Bill also contains provisions relating to the conduct of coroners' inquests. The potential impact of these provisions goes far beyond the context of counter-terrorism, and raises a number of serious concerns relating to the obligation on states to conduct prompt, independent, impartial and thorough investigations into all alleged violations of the right to life.

This briefing highlights only some of the most pressing concerns about the Bill, but does not purport to be an exhaustive analysis. For the purposes of this briefing, the version of the Bill referred to is that brought forward from the third reading in the House of Commons on 11 June 2008[6].

[6] Available in full at http://www.publications.parliament.uk/pa/ld200708/ldbills/065/08065.i-v.html.

2. Pre-charge detention (ss.22 – 33 and Schedule 2)

2.1. The proposal

Schedule 2 of the proposed Bill, as given effect by s.23, would amend the Terrorism Act 2000 to create a so-called 'reserve power' for the Home Secretary to extend the maximum period of pre-charge detention in custody for individuals suspected of terrorism-related offences up to 42 days. The Home Secretary could bring this power into effect by order, without prior parliamentary approval, provided that she or he had received a joint report from the Director of Public Prosecutions (DPP) and the chief constable of the relevant police force stating, and giving grounds for, their belief that there were "reasonable grounds for believing that the detention of one or more persons beyond 28 days will be necessary" for one or more of the following reasons: to obtain, whether by questioning or otherwise, evidence that relates to the commission by the detained person or persons of a serious terrorist offence[7]; to preserve such evidence; or pending the result of an examination or analysis of any such evidence. The joint report must also state that the prosecution service and the police are satisfied that the investigation in connection with the individuals concerned are detained "is being conducted diligently and expeditiously".

Before bringing the reserve power into force, the Home Secretary is required to obtain legal advice from a lawyer (who must not be a government lawyer), as to whether the Home Secretary can "properly be satisfied" that a "grave exceptional terrorist threat[8] has occurred or is occurring; that the reserve power is needed for the purpose of investigating the threat and bringing to justice those responsible; that the need for that power is urgent; and that the provision in the order is compatible with [ECHR] rights"[9]. The Home Secretary is under no obligation to accept that legal advice; she or he is, however, required to make the advice public, subject to any redaction the Home Secretary considers necessary in the public interest.

Once the power has been brought into force, the Home Secretary must make a statement to Parliament, stating that she or he is satisfied that a grave exceptional

[7] A "serious terrorist offence" is defined by the Bill as any offence created by the Terrorism Acts 2000 and 2006, or other offence with a "terrorist connection", for which the court could impose a sentence of life imprisonment on conviction (s.24 (4)).

[8] Defined at s.22 of the Bill as "event or situation involving terrorism which causes or threatens (a) serious loss of human life; (b) serious damage to human welfare in the United Kingdom; or (c) serious damage to the security of the United Kingdom". An event or situation causes or threatens "serious damage to human welfare" if it causes or threatens "(a) human illness or injury; (b) homelessness; (c) damage to property; (d) disruption of a supply of money, food, water, energy or fuel; (e) disruption of a system of communication; (f) disruption of facilities for transport, or (g) disruption of services relating to health". The "event or situation" may occur inside or outside the UK, and may consist in "planning or preparation for terrorism which if carried out would meet one or more of the conditions" listed.

[9] S.25.

terrorist threat has occurred or is occurring, that the reserve power is needed, that the need is urgent and that the use of the power is compatible with the ECHR. That statement must not include any details which could prejudice any criminal prosecution, including those which could arise from the investigation which led to the power being invoked. Once the Home Secretary has made this statement, both Houses of Parliament must approve the order bringing the reserve power into force within seven days; if they do not do so, or if they vote against the order, then the power lapses automatically, and anyone detained under it must be released immediately.

The Counter-Terrorism Bill specifically provides that anyone detained under the reserve power will not be deemed to have been unlawfully detained by virtue of the fact that Parliament disapproved the Home Secretary's decision to bring it into force[10], notwithstanding the fact that Parliament will, in effect, have disagreed with the assessment of the Home Secretary that there was any "grave exceptional terrorist threat" giving rise to an "urgent" need to extend pre-charge detention beyond 28 days. Moreover, nothing would prevent the Home Secretary from making a new order immediately following a Parliamentary vote disapproving the original order[11]. The reserve power lapses automatically after 30 days, even if approved by Parliament; again, nothing in the Bill would prevent the Home Secretary from making a new order at the end of those 30 days, provided the conditions set out above were met[12].

When the Home Secretary has made an order to bring the reserve power into force the DPP, or a Crown Prosecutor acting with the DPP's consent, can apply to court for permission to detain beyond 28 days any person then held on suspicion of a serious terrorism-related offence. It would appear from the wording of the Bill[13] that such an application can be made whether or not that person is detained in connection with the investigation which led to the reserve power being brought into force.

Applications to extend detention beyond 28 days will be given no greater judicial scrutiny than is already given to applications to extend detention beyond 14 days under the current system; as the parliamentary Joint Committee on Human Rights (JCHR) noted in its report on this Bill, the Bill as introduced in Parliament contains "no additional judicial safeguards"[14].

[10] S.28(3)(b), "Nothing in this section […] affects anything done by virtue of the order before it lapsed".
[11] S.28(3)(a), "Nothing in this section […] prevents the making of a new order".
[12] S.30(3)(a), "Nothing in this section […] prevents the making of a new order".
[13] See s.23(3): "The effect of an order under this section is that the reserve power is exercisable in the case of **all persons (a) then detained under section 41 [sc. of the Terrorism Act 2000], or (b) subsequently detained under that section at a time when the order is in force**".
[14] Joint Committee on Human Rights, *Counter-Terrorism Policy and Human Rights*: *Counter-Terrorism Bill*, HL 50/HC 199, February 2008, para. 20.

Finally the Bill requires that the government-appointed 'reviewer of terrorism legislation'[15] should produce a report each time the reserve power is used, assessing whether the Secretary of State followed the procedure set out above, and whether "in the opinion of the person carrying out the review the decision of the Secretary of State to make the order was, in all the circumstances, reasonable". The report should also consider whether the correct procedures were followed in each case where someone was held beyond 28 days[16], although it will not make any assessment of whether that extended period of detention was, in fact, necessary in those cases.

2.2. Amnesty International's concerns

Amnesty International opposes unreservedly any further extension of the already very long maximum period of detention during which people can be held without charge under anti-terrorism legislation in the UK. Amnesty International therefore opposes the creation of any power giving a government minister the discretion and the power to bring into force such an extension at some future date.

2.2.1. No effective safeguards against arbitrary detention

People who are arrested are entitled to be charged promptly and tried within a reasonable time in proceedings which fully comply with internationally recognized fair trial standards, or to be released[17]. The fact that the power to detain people for up to six weeks would be, or is said to be intended to be, used only sparingly, in situations of "grave exceptional terrorist threat", does nothing to mitigate the fundamental unfairness suffered by an individual detained under these provisions. Nor is it mitigated by Parliament being given the chance to approve or disapprove retrospectively the Home Secretary's decision to authorize such extensions. Moreover, the information placed before Parliament would be necessarily very limited, as the Bill recognizes, by the need to avoid prejudicing any future legal proceedings; as such the 'parliamentary scrutiny' for which the Bill provides would appear to have no practical effect as a safeguard of individual rights.

Amnesty International notes that the proposed judicial authorization of extensions beyond 28 days would be, as at present, simply a review of the reasons given by the Crown Prosecution Service (CPS) of the need for such extensions. The judge hearing the application for extension need only be satisfied that the investigation is being conducted "diligently and expeditiously", and that there are reasonable grounds for believing that further detention is necessary:

[15] Currently Lord Carlile of Berriew Q.C.
[16] S.31.
[17] Article 5 – Right to liberty and security – of the ECHR requires in paragraph 5(2) that: "Everyone who is arrested shall be informed promptly, in a language which he understands, of the reasons for his arrest and of any charge against him." (emphasis added)

"(a) to obtain relevant evidence whether by questioning [the detained person] or otherwise;

(b) to preserve relevant evidence; or

(c) pending the result of an examination or analysis of any relevant evidence or of anything the examination or analysis of which is to be or is being carried out with a view to obtaining relevant evidence."[18]

The CPS is therefore not required to convince a judge that there are any reasonable grounds to believe that the person whose extended detention is sought has, in fact, committed a terrorism-related offence. Indeed if there were reasonable grounds to suspect that, and if there was sufficient admissible evidence to support that suspicion, then it is to be expected that the CPS would proceed to charge the individual concerned, applying the so-called 'threshold test'. The 'threshold test' allows the CPS to charge an individual when there is at least a reasonable suspicion that the suspect has committed an offence[19]. The power to detain beyond 28 days will therefore, presumably, be exercised over individuals against whom there is, after four weeks in detention, no admissible evidence to justify even a reasonable suspicion that they have committed any criminal offence with which they could eventually be charged.

Moreover, the CPS can apply to have the person who is detained, and his lawyer, excluded from the hearing of the application for an extension to his detention on a number of grounds, including that there are "reasonable grounds" for believing that disclosure of the information advanced to justify extending detention would interfere with "gathering of information about the commission, preparation or instigation of an act of terrorism"[20]. As such Amnesty International considers that the judicial scrutiny of extended pre-charge detention, both under the current system and as envisaged under the reserve power proposed in the Bill, is insufficient to protect the person detained from the risks of arbitrary detention.

[18] See s.32, Schedule 8, Terrorism Act 2000; Schedule 2 of the Counter-Terrorism Bill 2008 provides that this would be the test applicable to applications to hold someone past 28 days under the reserve power. It further provides that 'relevant evidence' for these purposes means 'evidence relating to the commission by the detained person or persons of a serious terrorist offence', as defined above – see footnote 8.

[19] The 'threshold test' requires the CPS to have regard to a number of factors, including the evidence available at the time; the likelihood and nature of further evidence being obtained; the reasonableness for believing that evidence will become available; the time it will take to gather that evidence and the steps being taken to do so; the impact the expected evidence will have on the case; and the charges that the evidence will support.

[20] See s.33(3) and 34(1), Schedule 8, Terrorism Act 2000; again, Schedule 2 of the Counter-Terrorism Bill 2008 provides that these powers would also be available for applications to hold someone past 28 days under the reserve power.

2.2.2. The risk of abuse

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

Amnesty International is further concerned that the proposed extension could lead to other abusive practices, including detaining people without the intention or realistic prospect of bringing charges against them, in a way which would effectively amount to internment in all but name. Amnesty International considers that the longer the period of pre-charge detention, the greater will be the suspicion that people are being detained not with the intention of promptly charging them and bringing them to trial in relation to an offence that has already been committed, but with the intention of preventing them from committing an offence in the future. The organization notes that the government has disclaimed any such intention, on the grounds that it considers – quite rightly – that preventive detention would be incompatible with its obligations under Article 5 of the ECHR[21]; nonetheless, Amnesty International considers that each further extension of the maximum period of pre-charge detention strengthens the grounds for suspecting that what is being created is, in fact, a power of preventive detention.

In parliamentary debate at the second reading of the Bill, the Home Secretary said: "In much police work, investigation necessarily follows the crime. […] Terrorism is different. Because of the severe consequences of an attack, the police and the Security Service often need to intervene before a planned crime takes place."[22]

[21] See *Government Reply to the Twenty-Fourth Report from the Joint Committee On Human Rights Session 2005-06*, HL 240 / HC 1576, September 2006, para. 14: "While an arrest may have a preventative or disruptive effect on a terrorist or network of terrorists, and while this may be the impetus for executing arrests in the first instance, the legislation does not allow continued detention on this basis. […] We have no plans to amend the Terrorism Act 2000 to include 'prevention' in the statutory grounds for detention. […] we consider that this would not be permissible under Article 5(1) of the ECHR".

[22] *House of Commons Hansard*, Vol. 474, Column 653, 1 Apr 2008.

Amnesty International is concerned that the government and law-makers in the UK should not lose sight of the important principle that anyone arrested should be arrested on suspicion of having already committed all the elements of a recognizably criminal offence, albeit in some cases an offence defined as conspiracy to commit a further offence in the future. Clearly there is the strongest possible public interest in preventing conspiracies to commit terrorist attacks coming to fruition, and it is the duty of governments to do all that they lawfully can to protect that interest. It is for this reason, however, that the law in the UK, as in most other countries, contains offences of conspiracy: indeed the UK has recently created a number of conspiracy-type offences related specifically to terrorism, some of which, such as the offence of 'acts preparatory to terrorism' created by s.5 of the Terrorism Act 2006, or 'possession of material likely to be of use to a person preparing an act of terrorism' created by s.58 of the Terrorism Act 2000, are drawn extremely broadly – in many respects, worryingly broadly[23]. The need for the police to act before attacks are carried out cannot, therefore, be relied on as if such offences did not exist, as justification for turning the principles of criminal law on their head.

2.2.3. A power for emergency use only?

Prolonged detention without charge or trial undermines the right to liberty and the right to a fair trial, which includes the presumption of innocence, including the right to silence, the right to be promptly informed of any charges, freedom from arbitrary detention, and the right to be free from torture or other ill-treatment. It is in recognition of the importance of these rights, and the scope for abuse to which prolonged detention without charge gives rise, that international human rights standards delimit very strictly the circumstances in which governments can lawfully and temporarily derogate from their obligation to protect in full the right to liberty. Both the ECHR and the International Covenant on Civil and Political Rights (ICCPR), which enshrine the right to liberty in similar although not identical terms[24], impose on states which are a party to those treaties, as the UK is, an obligation to respect, protect and fulfil the right to liberty in full. However, they recognize that, in a "time of public emergency which threatens the life of the nation" (Article 4 ICCPR) or a "time of war or other public emergency threatening the life of the nation" (Article 15 ECHR), states may need to take measures which derogate from some of their obligations

[23] In a recent case, *K v R* [2008] EWCA Crim 185, the Court of Appeal of England and Wales felt the need to restrict the interpretation of s.58 of the Terrorism Act 2000, if it was not to be "so uncertain as to offend against the doctrine of legality".

[24] Article 9(2) of the ICCPR requires that "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".

under those treaties, including some of those related to the right to liberty[25]. States can only take such measures when they have made an official declaration that such a state of public emergency exists; and even then can only derogate from certain of their treaty obligations "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" (Article 4 ICCPR).

The bringing into force of the reserve power would not be dependent on, nor necessarily accompanied by, a derogation from the relevant provisions of the ECHR or the ICCPR[26]. Amnesty International considers that the UK should not, by establishing a system of quasi-emergency powers triggered at a comparatively low threshold (that of "grave exceptional terrorist threat", as assessed by the police and prosecutors and approved by the Home Secretary), attempt to escape from and undermine the safeguards built into international human rights law to ensure that vital rights, such as the right to liberty, should only be restricted in genuine public emergencies threatening the life of the nation.

3. Post-charge questioning (ss.34 – 39)

3.1. *The proposal*

Sections 34, 35 and 36 of the Bill create a power for the police in England and Wales, Scotland and Northern Ireland respectively to continue to question an individual after he has been charged with a terrorism-related offence. The provisions related to England and Wales and Northern Ireland also extend the provisions of the Criminal Justice and Public Order Act 1994 (CJPOA), and the equivalent applicable legislation in Northern Ireland, which allowed the court to draw "such inferences [...] as appear proper" – in practice, almost always adverse inferences – from an individual's failure to mention something which they "could reasonably have been expected to mention"

[25] It should be noted that the UN Human Rights Committee has expressed the opinion that "States parties [to the ICCPR] may in no circumstances invoke article 4 of the Covenant [that is, the power of derogation] as justification for acting in violation of […] peremptory norms of international law, for instance by taking hostages, by imposing collective punishments, through **arbitrary deprivations of liberty** or by **deviating from fundamental principles of fair trial, including the presumption of innocence**" (emphasis added): Human Rights Committee General Comment 29, *States of Emergency*, CCPR/C/21/Rev.1/Add.11, 31 August 2001, para. 11.

[26] The statement made by the Home Secretary to Parliament on the invocation of the 42 day limit would be required to include an assertion that she or he was "satisfied […] that the provision in the order is compatible with Convention rights" (See s.27(2) of the Counter-Terrorism Bill).

during (pre-charge) questioning which was later relied on in their defence, to allow the same inferences to be drawn from silence during post-charge questioning.

Amendments introduced into the Counter-Terrorism Bill in the course of its passage through the House of Commons would require questioning post-charge to be authorized by a senior police officer, for the first 24 hours, and by a magistrate for every subsequent period of five days during which such questioning took place[27]. Before authorizing such questioning, the magistrate would have to be satisfied that it was "in the interests of justice", and that the investigation was being conducted "diligently and expeditiously". The Bill requires a Code of Practice under the Police and Criminal Evidence Act 1984 (PACE) to be drawn up to regulate the practice of post-charge questioning[28].

3.2. Amnesty International's concerns

Amnesty International considers that, when viewed in the context of the overall framework of legislation governing the arrest and detention of individuals suspected of involvement in terrorism in the UK, these proposals risk undermining the presumption of innocence, the right to silence and the privilege against self-incrimination. They also increase the risk of oppressive or coercive questioning. Amnesty International shares the concern expressed by a senior former UK judge, Lord Lloyd of Berwick, that "if post-charge questioning is allowed, there is a very real risk that the suspect will not get a fair trial"[29].

There are two primary elements which constitute the right of silence under international law. The first, and most basic, is that an individual may not be compelled, during pre-trial investigations or at trial, to answer questions put to him or her. Specifically, in pre-trial investigations an accused may, when questioned by police, decline to answer all queries, may decline to answer some queries or may wish to remain silent when asked about specific pieces of information. During trial, an accused may choose to remain silent under questioning or may refuse to testify in his or her defence.

The second component follows; the exercise of this right does not establish evidence against the defendant. Permitting adverse inferences drawn from an individual exercising a right of silence is one method of compulsion, as it allows law enforcement officials to take "undue advantage of the situation of a detained or imprisoned person for the purpose of compelling him to confess, or otherwise to

[27] See s.34 of the Counter-Terrorism Bill.
[28] See s.34(6) of the Counter-Terrorism Bill: "Codes of practice under section 66 of the Police and Criminal Evidence Act 1984 must make provision about the questioning of a person by a constable in accordance with this section".
[29] *House of Lords Hansard*, Vol. 696, Column 263, 12 November 2007.

incriminate himself" [30]. By definition, post-charge questioning will relate to the offence with which the individual has been charged[31]: it is therefore highly likely that it will touch on matters which the defendant will seek to raise in his defence, on which he will in effect be compelled to answer questions, at peril of having adverse inferences drawn against him if he fails to do so. In this context Amnesty International notes concerns expressed jointly by the Law Reform Committee of the General Council of the Bar and the Criminal Bar Association that "[i]t is potentially oppressive to allow the prosecution unlimited opportunities to question suspects, and to repeat the questioning, with a sanction of the adverse inference if they elect not to answer"[32].

Amnesty International considers that the power to draw negative or adverse inference from the defendant's silence is incompatible with Article 6 of the ECHR[33], as well as provisions in Article 14 of the ICCPR. The provisions allowing adverse inferences to be drawn from silence during pre-charge questioning were criticized by the UN Human Rights Committee in its last review of the UK's implementation of the ICCPR: "the Committee remains troubled by the principle that juries may draw negative inferences from the silence of accused persons. The [UK] should reconsider, with a view to repealing it, this aspect of criminal procedure, in order to ensure compliance with the rights guaranteed under article 14 of the [ICCPR]" [34].

Amnesty International considers that these provisions, and their extension to cover post-charge questioning, are also inconsistent with the principles underlying Article 67 of the Rome Statute of the International Criminal Court. This Statute, which established a permanent International Criminal Court with jurisdiction to try people accused of the worst possible crimes – genocide, other crimes against humanity and war crimes – expressly provides that the accused has the right to remain silent, without such silence being a consideration in the determination of guilt or innocence: "In the determination of any charge, the accused shall be entitled to […]

[30] Concluding Document of the 1991 Moscow Meeting of the Conference on the Human Dimension of the Conference on Security and Co-operation in Europe, Paragraph 23.1 (vii). This document was signed by the United Kingdom, and is available at http://www.osce.org/documents/odihr/1991/10/13995_en.pdf.

[31] S.34(2) of the Counter-Terrorism Bill provides (emphasis added) that "a constable may question a person about a **terrorism offence** after the person has been charged with **the offence**".

[32] *Joint Response of the Law Reform Committee of the General Council of the Bar and the Criminal Bar Association to the Home Office consultation on proposals for the Counter Terror Bill 2007*, para. 31.

[33] The European Court of Human Rights has concluded that there can be "no doubt that the right to remain silent under police questioning and the privilege against self-incrimination are generally recognised international standards which lie at the heart of the notion of a fair procedure"; the Court considers the right to silence not to be "absolute", however, and has found that a power to draw adverse inferences from a failure to explain certain facts may not, depending on the circumstances of the case, necessarily be "unfair" or amount to a violation of Article 6,: *Murray v UK* 22 E.H.R.R. 29, 1996..

[34] *Concluding Observations of the Human Rights Committee : United Kingdom of Great Britain and Northern Ireland*. 12 June 2001, CCPR/CO/73/UK, para. 17.

the following minimum guarantees, in full equality: […] Not to be compelled to testify or to confess guilt and to remain silent, without such silence being a consideration in the determination of guilt or innocence"[35]. The UK ratified the Rome Statute in 2001; Amnesty International has urged and continues to urge the government to bring laws and practice throughout the UK in line with the practice it has agreed should be followed by the ICC.

Amnesty International has advanced many of these same arguments in relation to the change in the law brought about by the CJPOA and the equivalent legislation in Northern Ireland[36], and is therefore opposed to its further extension to cover post-charge questioning.

The organization's concerns are exacerbated by the current lack of safeguards around the exercise of the proposed power to continue questioning after charge. Although the Bill provides for a Code of Practice under PACE to be drawn up to regulate the practice of post-charge questioning, the Bill as it stands appears to set no limit to the duration of such questioning. Despite the safeguard of requiring judicial authorization for every five-day period of questioning, nothing in the Bill limits the overall length of questioning, since the authorization can be repeatedly renewed. Individuals are often held for months on end following charge before they are brought to trial, particularly in complex investigations, as terrorism-related investigations often are[37]: if questioning were allowed to continue throughout this period there is an obvious risk that it could become seriously oppressive.

Moreover, it should be borne in mind that, whilst extended pre-charge detention and post-charge questioning are covered by separate provisions of the Bill, they will be experienced by the individual detained as a continuum: there is, therefore, a high risk that the continued questioning of a person who had already been detained and questioned over a period of up to four weeks (or six weeks, if the reserve power created by the Bill is brought into law and exercised) before they were even charged would be, or would quickly become, oppressive. As noted above, this could have the unintended consequence of rendering any answers given during such questioning inadmissible at trial, thereby defeating the purported object of increasing the scope of post-charge questioning.

[35] Rome Statute of the International Criminal Court, available at http://untreaty.un.org/cod/icc/statute/romefra.htm.
[36] See, for a detailed statement of the organization's position, *UK: Northern Ireland: Submission by Amnesty International to the Criminal Justice Review*, AI Index: EUR 45/023/1999, May 1999.
[37] For instance, the trial of the individuals charged in August 2006 in connection with an alleged plot to detonate liquid explosives on board aeroplanes began only in April 2008.

4. Inquests (ss. 77-81)

4.1. *The proposal*

Section 77 of the Bill as brought forward from the House of Commons would insert a s.8A into the Coroners Act 1988, creating a broad power for the Secretary of State to issue a certificate requiring a coroner's inquest to be held without a jury, if the Secretary of State considers that the inquest will involve the "consideration of material that should not be made public (a) in the interests of national security, (b) in the interests of the relationship between the United Kingdom and another country, or (c) otherwise in the public interest". This certificate would override s.8 of the Coroners Act, which currently requires that inquests into deaths in prison or in police custody, among others, must be held with a jury.

A certificate would require the coroner to hold the inquest to which it applies without a jury. It would also require the family of the deceased, and any legal representatives that they might have, and the public at large, including journalists, to be excluded from those parts of the inquest that relate to the material which led the Secretary of State to issue the certificate. This is implicit, although not expressly stated, in the wording of the Bill, and was confirmed in a letter to Amnesty International from Home Office Minister Tony McNulty dated 28 April 2008 (emphasis added): "in the very few cases which the Secretary of State certifies will involve consideration of material that could not be disclosed publicly without damaging the public interest, **it will be necessary for the part of the inquest to which the evidence relates to be held in private and in the absence of the interested parties and their legal representatives**".

The existing secondary legislation governing the conduct of coroners' inquests in England and Wales – the *Coroners Rules* 1984 – provide that "every inquest shall be held in public: provided that the coroner may direct that the public be excluded from an inquest or any part of an inquest if he considers that it would be in the interest of national security so to do". A similar power exists under the equivalent legislation for Northern Ireland[38], the *Coroners (Practice and Procedure) Rules (Northern Ireland)* 1963[39]. It should be noted that the decision to exclude the public in these circumstances rests, under the existing rules, with the coroner, an independent judicial officer, not with a member of the government. Moreover, these

[38] An entirely separate system exists in Scotland.

[39] As originally introduced in Parliament, the provisions of the Counter-Terrorism Bill would not have affected inquests held in Northern Ireland, which are governed by separate legislation, the Coroners Act (Northern Ireland) 1959. However, during the Public Committee stage of the passage of the Bill, an amendment was introduced which would extend the system of certification to include inquests held in Northern Ireland – see s.78.

powers appear not to be currently understood by coroners to extend to excluding the family of the deceased, as opposed to the public at large, from the proceedings.[40]

Section 79 of the Bill gives the Secretary of State a power to have a 'certificated' inquest heard by a specially appointed coroner – that is, a coroner other than the one within whose jurisdiction the body of the deceased would ordinary fall. It also gives the Secretary of State the power to revoke the appointment of a specially-appointed coroner and to appoint a replacement, if "the Secretary of State considers that the specially appointed coroner is unable to hold, or to continue to hold, the inquest", or on the grounds of the specially appointed coroner's "misbehaviour".

Section 81 of the Bill allows coroners hearing 'certificated' inquests to consider information obtained by the interception of communications, which they are currently prevented from doing by the Regulation of Investigatory Powers Act 2000. The Bill provides for such information to be disclosed to the coroner and to the person appointed as counsel to the inquest, provided that the coroner is satisfied that the "exceptional circumstances of the case make the disclosure essential to enable the matters that are required to be ascertained by the inquest to be ascertained". (Section 80 allows similar disclosure to be made to the panels of public inquiries held under the Inquiries Act 2005, and to counsel to such inquiries, where the panel so orders; there is no parallel requirement for "exceptional circumstances" to justify disclosure.)

4.2. Amnesty International's concerns

The right to life is protected by Article 2 of the ECHR, and other provisions of international human rights law. In order for that right to be given proper effect it must be accompanied by an obligation on states to initiate prompt, effective, independent and impartial investigations into cases where there are credible allegations that the right may have been violated.[41] Without this attendant obligation the right to life is stripped of much of its value, since it can be violated with effective impunity.

The essential elements of this obligation to investigate are, as set out by the European Court of Human Rights in the case of *Jordan v UK*:

[40] See, for instance, comments made by André Rebello, HM Coroner for the City of Liverpool, in the Memorandum submitted by the Coroners Society of England and Wales to the Public Committee considering the Counter-Terrorism Bill: "I had not considered excluding properly interested persons [i.e. including the family of the deceased] as 'the public.' I suppose that because the nature of the Coroner's jurisdiction is to allay rumour and suspicion and to find facts of public importance arising from the death, such an interpretation would be far off my radar."

[41] See, *inter alia*, the judgments by the European Court of Human Rights in the cases of *Jordan, McKerr, Kelly and others, Shanaghan v. UK* and *McShane v. UK*, in which the Court concluded that the UK had violated the applicants' right to life as a result of its failure to ensure effective investigations into their deaths.

- the "authorities must act of their own motion, once the matter has come to their attention";
- the "persons responsible for and carrying out the investigation [should] be independent from those implicated in the events";
- the investigation should be "capable of leading to a determination of whether the force used in such cases was or was not justified in the circumstances [...] and to the identification and punishment of those responsible";
- the investigation should respect "a requirement of promptness and reasonable expedition";
- there must be a "sufficient element of public scrutiny of the investigation or its results to secure accountability";
- "the next-of-kin of the victim must be involved in the procedure to the extent necessary to safeguard his or her legitimate interests".[42]

In cases of alleged violations of the right to life in the UK, including deaths in police custody or in prison, the Article 2 obligation is often discharged by way of a coroner's inquest. Amnesty International recognizes that there are particular challenges posed by the holding of inquests in cases which might require the consideration of material which could, if disclosed, endanger the lives or safety of others, or could threaten legitimate national security interests. (In his letter to Amnesty International Home Office Minister Tony McNulty refers to "circumstances in which a coroner's inquest may need to consider material that cannot be disclosed publicly for public interest reasons, for example because its disclosure might damage national security and place sources' lives in danger"[43].) Nonetheless, Amnesty International is concerned that the provision for certificated inquests made in the Bill could lead to inquests which fall short of the requirement for a full, independent, impartial and thorough investigation into deaths caused by agents of the state.

In his letter to Amnesty International, Home Office Minister Tony McNulty acknowledged the need for the system of coroners' inquests to satisfy the requirements identified by the European Court in *Jordan v UK*, including the requirement to protect the legitimate interests of the family of the deceased. He set out the ways in which the UK government considers that those interests would be protected in an inquest held under a certificate:

> "First [...] only those parts of the inquest concerning material that cannot be disclosed publicly will be held in private. The remainder of the inquest will be public and the next of kin will be able to attend all public sessions with their

[42] *Jordan v UK* [2001] ECtHR (24746/94, 4 May 2001), paras. 102 – 109.
[43] Letter to Amnesty International, dated 28 April 2008.

> legal representatives, if they have legal representation. Second, as regards those parts of the inquest that have to take place in private, the coroner will be responsible for ensuring that the process as a whole remains compliant with Article 2 and that the interests of the next of kin are protected. The coroner will be able to examine the material which cannot be disclosed publicly in order to do this and will have no restrictions on the questions he can put to witnesses giving oral evidence in private. Third, if the coroner believes the interests of the next of kin are not already sufficiently protected, counsel to the inquest can be appointed, one of whose functions will be to represent the interests of the next of kin. Counsel to the inquest in such cases will be able to see all material, including the material that cannot be disclosed publicly. Counsel will be aware of the concerns of the next of kin and will be able to ensure that their interests are properly represented, including the opportunity for unrestricted questioning of any witnesses giving evidence in private."

Although Amnesty International notes the confirmation that the government's intention is not that an inquest held under a certificate should, as a matter of course, take place in its entirety in the absence of the family of the deceased, their legal representatives and the public, the organization remains concerned that an inquest held under a certificate could fail to protect the legitimate interests of the family of the deceased and fail to adequately independent. It would also fail to ensure the adequate public scrutiny required to give effect to Article 2.

4.2.1. Protecting the interests of the family of the deceased; ensuring public scrutiny

Amnesty International considers that counsel to the inquest plays a different role in the proceedings to that played by the legal representatives of the family of the deceased, where the family has such representation; allowing counsel to the inquest, and the coroner, to see material considered in private in an inquest held under a certificate would not, therefore, necessarily be enough to safeguard the legitimate interests of the family of the deceased. The risk that the interests of the family will not be adequately protected is heightened by the extremely broad grounds, discussed below, on which the Secretary of State can issue a certificate in relation to material which will be considered by the inquest, preventing (in effect) that material being disclosed to the family. In a case where the Secretary of State decided that much, or even all, of the material to be considered by an inquest should not be made public – as could very conceivably be the case where there were, for instance, allegations that the death arose from collusion between agents of the state and paramilitary armed groups, or involved agents of the security and intelligence services of the UK or of other countries – it is hard to see how the interests of the family of the deceased could be adequately protected by the involvement of counsel to the inquest.

The interests of the family of the deceased which should be protected in an investigation which is compliant with Article 2 ECHR include, above all, an interest in

knowing, as far as possible, all of the circumstances in which their relative came to meet his death. Moreover, as a senior UK judge, Lord Bingham, noted in the landmark case of *Amin*, one important function of such an investigation is to ensure that "those who have lost their relative may at least have the satisfaction of knowing that lessons learned from his death may save the lives of others"[44]. The efforts of counsel to the inquest in asking, in private hearings, questions which are intended to represent the interests of the family of the deceased will be no substitute for their being told all of the circumstances of the death of their relative.

Amnesty International has recently called, in the context of allegations of European involvement in the US-led programme of renditions and secret detention[45], for all states to ensure that hearings which are investigating alleged human rights violations should be held in public except where specific evidence or submissions cannot be dealt with in open hearings; and to ensure that any assertion of the need for such confidentiality, including on the ground of national security or state secrecy, should be determined by an authority that is independent of the executive. This principle is equally applicable to coroners' inquests investigating alleged violations of the right to life, as protected by Article 2 ECHR, and would be jeopardized by the proposed changes made by the Counter-Terrorism Bill.

Amnesty International considers that, in the light of the longstanding reluctance of successive governments in the UK to allow material relating to the actions of the security and intelligence services, for instance, to be made public, on the grounds that to do so would endanger national security or the UK's relations with other states, these concerns are more than merely hypothetical. Some indication of how the system of certificated inquests might operate in practice could plausibly be drawn from the experience of coroners' inquests in Northern Ireland examining deaths which have been alleged to be the result of a 'shoot-to-kill' policy on the part of the Royal Ulster Constabulary (RUC), such as those of Gervaise McKerr, Eugene Toman and Sean Burns in 1982. In those cases the findings of the investigations into allegations of apparent cover-ups on the part of the RUC which were conducted by senior police officers John Stalker and Colin Sampson (the so-called 'Stalker/Sampson' inquiries) have never been published, nor made available to the families of the victims, nor, initially, provided to the coroner conducting the inquests. The European Court of Human Rights concluded, in its judgment on the case of Gervaise McKerr, that "there was a lack of public scrutiny and information to the victim's family concerning the [Stalker/Sampson] investigation", and that "since the [Stalker/Sampson] reports and their findings were not published, in full or in extract, it cannot be considered that there was any public scrutiny of the investigation. This

[44] *R (ex parte Amin) v. Secretary of State for the Home Department* [2003] UKHL 51, at para. 31.
[45] See *State of denial: Europe's role in rendition and secret detention*, AI Index: EUR 01/003/2008.

lack of transparency may be considered as having added to, rather than dispelled, the concerns which existed."[46]

Amnesty International is concerned that the secrecy which may surround inquests held under a certificate which take place largely or entirely in closed sessions, from which the public and the family of the deceased are excluded, could similarly add to, rather than dispel, public concern as to how the individual in question came to lose her or his life.

4.2.2. Ensuring the independence of coroners' inquests

Amnesty International is concerned that the exclusion of the public from part of a coroner's inquest held under a certificate issued by the Secretary of State could lead to insufficient public scrutiny of the investigation into the death in question. This could have the effect of undermining public confidence in the ability of coroners' inquests to deliver genuinely independent and impartial investigations into deaths which may have been the responsibility of an agent of the state. This risk is exacerbated if it is the Secretary of State who decides, in effect, whether the public should be excluded from part of an inquest, rather than – as in the limited circumstances in which the public can be so excluded at present – an independent coroner.

As has been noted, the grounds on which the Secretary of State can issue a certificate are exceptionally broadly defined: a certificate can be issued "**(a) in the interests of national security, (b) in the interests of the relationship between the United Kingdom and another country, or (c) otherwise in the public interest**". These grounds are very much wider than 'national security' alone, which is the only ground on which a coroner can at present exclude the public. In a memorandum on the bill the Coroners Society of England and Wales describe the provision as "very wide", and noted that "the Secretary of State could issue a certificate for almost any case". The Coroners Society further note that, by definition, "inquests only determine facts which are in the public interest", so that ground (c), 'otherwise in the public interest', could in theory "apply to every inquest"[47], leaving it at the absolute discretion of the Secretary of State whether or not to issue a certificate in any given case.

The exercise of such discretion on the part of a member of the executive undermines the independence of the investigation conducted by the inquest. Furthermore, the Bill as brought forward from the House of Commons imposes no obligation on the Secretary of State to give reasons for her assessment that it is not in the "public interest" for the material in question to be considered in public. Amnesty International considers that any restriction on public access to an inquest, or on the involvement in the inquest proceedings of the family of the deceased, should be as

[46] *McKerr v UK* Application no. 28883/95, 4 May 2001, paras. 157 and 141.
[47] *Memorandum submitted by Coroners Society of England and Wales*, CTB 4, April 2008: available at http://www.publications.parliament.uk/pa/cm200708/cmpublic/counter/memos/ucm0402.htm.

narrowly drawn as is compatible with the legitimate requirement of protecting the rights of those who might be endangered by the full disclosure of material being considered by the inquest, and of avoiding any disclosure which genuinely threatens national security.

Although the coroner will be able to see the material which is not made public, it appears from the Bill that he or she will not be able to challenge or overrule the decision of the Secretary of State that this material should not be made public. Amnesty International is concerned that the independence of the investigation conducted by the coroner's inquest may be compromised by what is, in effect, a transfer from the coroner – an independent judicial officer – to a member of the executive of the power to determine whether a particular piece of evidence should or should not be made public.

Finally Amnesty International is concerned that the power to direct that an inquest held under a certificate should be removed from the jurisdiction of the coroner who would ordinarily hear it, and should be heard instead by a coroner specially appointed by the Secretary of State for the purpose, subject to such regulations as the Secretary of State may in the future see fit to make, could undermine public confidence in the independence of the investigation conducted.

Amnesty International calls, therefore, for these provisions in the Bill to be withdrawn, and for any future changes to the operation of coroners' inquests to be made in a way that is fully compatible with the requirement that any investigation into an alleged violation of the right to life should be fully independent, should ensure that the interests of the family of the deceased are fully protected, and should ensure adequate public scrutiny of the circumstances of the death.