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Proposed 42-day pre-charge detention in the United Kingdom

Report[1]
Committee on Legal Affairs and Human Rights
Rapporteur: Mr Klaas de VRIES, Netherlands, Socialist Group

Summary:

The Parliamentary Assembly's Committee on Legal Affairs and Human Rights has serious doubts as to the compatibility of certain elements of draft counter-terrorism legislation in the United Kingdom with the requirements of the European Convention on Human Rights and the Strasbourg Court's case-law.

The detention of terrorist suspects for up to 42 days without charge, with limited judicial review can lead to arbitrariness, in breach of Articles 5 (right to liberty and security) and 6 (right to a fair trial) of the Convention. In addition, the proposed legislation is unduly complicated and is not readily understandable.

The committee also finds the proposal to involve the legislature in the extension of pre-charge detention in specific cases as unacceptable. It is essential to maintain a clear separation of powers as regards judicial and legislative functions.

Terrorism must be fought with means that fully respect human rights and the rule of law, excluding all forms of arbitrariness. Injustice breads terrorism and undermines the legitimacy of the fight against it. The committee therefore considers that the draft British legislation should be examined by the Parliamentary Assembly within the framework of a wider comparative study of anti-terrorism legislation in Council of Europe member states, with the assistance of the European Commission for Democracy through Law (Venice Commission).

1. Reference to committee: Doc. 11644 rev, Reference No 3463 of 23 June 2008

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A. Draft resolution

1. The Parliamentary Assembly reaffirms its conviction that terrorism can and must be fought with means that fully respect human rights and the rule of law, excluding all forms of arbitrariness. Injustice breeds terrorism and undermines the legitimacy of the fight against it.

2. The Assembly is concerned about elements of draft counter-terrorism legislation in the United Kingdom. The proposed law, if enacted, would enable the detention of a terrorist suspect for up to 42 days without charge, with limited judicial review.

3. The Assembly has serious doubts whether all the provisions of the draft legislation are in conformity with the European Convention on Human Rights and the case-law of the European Court of Human Rights. A lack of appropriate procedural safeguards may lead to arbitrariness, resulting in breaches of Articles 5 (right to liberty and security) and 6 (right to a fair trial) of the Convention. The Assembly is particularly concerned that:

3.1. the judge determining the extension of a person's detention may not be in a position to examine whether there exist reasonable grounds for suspecting that the arrested person has committed an offence;

3.2. legal assistance and representation by a lawyer may be inappropriately restricted or delayed;

3.3. information on the grounds for suspicion of a person having committed an offence may be unduly withheld, even from institutions competent in deciding on continued detention;

3.4. the draft legislation may give rise to arrests without the intention to charge;

3.5. prolonged detention without proper information on the grounds for arrest may constitute inhuman treatment of the person held in these conditions.

4. The Guidelines on Human Rights and the Fight against Terrorism, adopted by the Committee of Ministers in 2002 and which confirm the established case-law of the Strasbourg Court, serve as a model for legislation. In particular, any person arrested or detained for terrorist activities must be told of the reasons for his or her arrest and must be able to challenge the lawfulness of his or her arrest and continued detention at an adversarial hearing.

5. Legislative provisions concerning deprivation of liberty, including the detention of terrorist suspects, must be clear, precise and easy to comprehend. The draft legislation is, however, unduly complicated and not readily understandable.

6. Parliamentary involvement in the extension of pre-charge detention, as proposed, is not appropriate. Hence, from the perspective of the separation of powers, the decision to maintain a person in custody is a judicial function with respect to which a legislative, political body should, as a matter of principle, have no say.

7. In view of the importance of the fight against terrorism whilst respecting human rights and the rule of law, the Assembly resolves, with the assistance of the European Commission for Democracy through Law ("the Venice Commission"), to undertake a thorough study on this subject. The British draft legislation should be examined within the framework of a more general comparative study of anti-terrorism legislation in Council of Europe member states, in order to assess, in particular, the compatibility of such legislation with the European Convention on Human Rights.

B. Explanatory memorandum by Mr Klaas de Vries, rapporteur

1. Introduction

1. This report on legislation pending before the Parliament of the United Kingdom was requested by the Bureau of the Parliamentary Assembly on 23 June 2008. The Committee on Legal Affairs and Human Rights expressed strong reservations about preparing a report on draft legislation still pending before the parliament of a member state. The Rapporteur shares the sentiment of the Committee, but feels that the issues dealt with in the draft legislation are of general importance to all member states of the Council of Europe, and therefore merit general attention as they are relevant in considering (future) legislation in all member states. For this reason, the report will discuss these general issues, notably pre-charge detention and the separation of powers, using the pending draft legislation as the focal reference point.

2. Having had little time to prepare this report, the Rapporteur is fully aware that he cannot provide a thorough analysis of this subject, and that he runs the risk of inadequately and unsatisfactorily covering all aspects of this complex subject. That said, this report, although dealing with highly technical matters relating to the United Kingdom, is meant to convey an important political message urging all member states of the Council of Europe not to diminish or set aside legal safeguards when faced by terrorist threats or acts. This report should also be seen as a contribution to an ongoing wider debate, within the United Kingdom (UK), as to the utility of such legislation at a time when the House of Lords has not yet taken a firm position on this draft legislation. It also emphasises the need to take stock – on a comparative basis – of member states' "great temptation to respond to terrorism with a law-and-order approach that gives public security [undue?] precedence over respect for human rights".[2]

3. This report will first present the context in which the British anti-terrorist Bill is being looked at (section II), then it will summarise the UK government's position and the reactions to it (section III). Section IV will provide an assessment of certain aspects of this Bill's compatibility with European human rights standards in the light of criticism made, followed by a few concluding remarks.

2. The issue: counter-terrorism legislation pending before the United Kingdom Parliament

4. At the outset, I would like to clarify the notions with respect to detention which will be used in this report:

– *Arrest:* The initial act of depriving a person of his/her liberty: judicial authorisation not being required for arrest.

– *Pre-charge detention:* Detention before being formally accused of a specific offence.

– *Charge:* The document/statement, issued by a prosecuting authority between arrest and trial, following an initial police inquiry, which provides the suspect with specific elements ("heads" "founded on facts") on the basis of which the person has been accused of a specific offence.

5. The United Kingdom has already one of the longest pre-charge detention periods in Europe (28 days) for offences relating to terrorism.[3] To extend this time-period to 42 days may, in the view of the signatories of what was originally a request for urgent debate[4] and which led to this report, undermine one of the most basic rights enshrined in UK law, dating back to the Magna Carta (1215), codified in the Habeas Corpus Act (1679)

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2. Quotation from paragraph 1 of the Introductory memorandum on "Respect for human rights in the fight against terrorism" (hereafter "Grebennikov Report"), Rapporteur: Valery Grebennikov, 12.12.2006, document AS/Jur (2006) 29, <http://www.coe.int/t/e/legal_affairs/legal_co-operation/fight_against_terrorism/3_codexter/working_documents/2007/CODEXTER%20(2007)%2014%20E%20PACE.pdf>.

3. The Secretary General of the Council of Europe, Terry Davis, has repeatedly expressed his concerns about the current 28 days pre-charge detention being already among the longest pre-charge periods in Europe, see "Do terrorists have human rights?", speech by Terry Davis, 17.01.2008, <http://www.coe.int/t/secretarygeneral/sg/speeches/discours/2008/B_17012008_Radicalisation_and_political_violence_FR.asp>; and another speech by Terry Davis, 18.01.2008, <http://www.coe.int/t/secretarygeneral/sg/speeches/discours/2008/C_18012008_Warwick_University_FR.asp>

4. "Proposed 42 days pre-charge detention in the United Kingdom", Motion for a Resolution, Doc. 11644 revised, 21.06.2008, PACE web-news of 19.06.2008, <http://assembly.coe.int/ASP/NewsManager/EMB_NewsManagerView.asp?ID=3903>; PACE web-news of 23.06.2008, <http://assembly.coe.int/ASP/NewsManager/EMB_NewsManagerView.asp?ID=3907. At its meeting of 23.06.2008 the Assembly's Bureau referred this motion to the Committee on Legal Affairs and Human Rights (AS/Jur) for report, if possible, at the Assembly's autumn 2008 part-session.

and guaranteed by the European Convention on Human Rights (ECHR): Everyone who is detained has the right to be promptly brought before a judge and told why they are being held and must have an opportunity to challenge the lawfulness of that detention at an adversarial hearing.

6. Also, lengthy pre-charge detention may have detrimental effects, *inter alia*, on private and family life (Article 8 ECHR), freedom of movement and the employment situation of the person detained. This can amount to, effectively, a "sentence" on a person who may never be charged with any crime.

7. Pre-charge detention must remain subject to proper judicial scrutiny, as has been repeatedly underscored by the UK parliamentary Joint Committee on Human Rights (JCHR) (more details below). The suggestion that Parliament be involved in a procedure to extend pre-charge detention – which is inherently a judicial function – also appears to be a slippery slope. Parliament risks being blamed for any miscarriages of justice without having the means (in particular, detailed information about the facts of the case) to perform such a supervisory role properly.

2.1. The context

8. The Council of Europe's Human Rights Commissioner, Thomas Hammarberg, and the UN Human Rights Committee have, amongst others, expressed their concerns about the British government's proposals to allow terrorist suspects to be detained for 42 days without charge.[5] In particular, the Commissioner contends that this would be out of line with equivalent detention limits elsewhere in Europe and urges the United Kingdom's Parliament to carefully review the government's proposed Bill.[6]

9. In view of this criticism, there appears to be a need for an independent comparative analysis of the compatibility of Council of Europe member states' legal regimes on detention of terrorist suspects *vis-à-vis* the requirements of the ECHR, and in particular its Article 5 ECHR.[7] Such a comparative study could be undertaken by the European Commission for Democracy through Law ("Venice Commission"), in the light of, *inter alia,* work already commenced on this subject within the Assembly's Committee on Legal Affairs and Human Rights (AS/Jur).[8]

10. Other States Parties to the ECHR have also had to face criticism with respect to their recent counter-terrorism legislation. For example, the Introductory Memorandum presented by Mr Valery Grebennikov to the Committee on Legal Affairs and Human Rights in December 2006 notes that Spanish law requires detainees to be brought before a judge in person after a maximum period of five days and that the length of this period raises questions in the light of the case-law under Article 5 § 3 ECHR.[9] The same questions arise with respect to French legislation which allows a terrorism suspect to be held in police custody from four to six days before being brought before a competent judicial authority.[10] Spain was also criticised for the possibility to extend pre-trial detention in terrorist cases for an additional two years, bringing detention before trial up to a maximum of four years.[11] Human Rights Watch recently published a report[12] criticising France for its

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5. "Brown remains defiant on 42 days", The Guardian, 02.06.2008, and Concluding Observations on the report submitted by the United Kingdom, UN Human Rights Committee, Ninety-third session, 21.07.2008 (hereafter "UNHRC Concluding Observations"),
<http://www2.ohchr.org/english/bodies/hrc/docs/AdvanceDocs/CCPR.C.GBR.CO.6.doc>, § 15.

6. See also, in this connection, the 2007 study prepared by the UK NGO Liberty: "Terrorism pre-charge detention. Comparative law study", Liberty, November 2007, <http://www.liberty-human-rights.org.uk/issues/pdfs/pre-charge-detention-comparative-law-study.pdf>. The study indicates that the longest period of pre-custody detention for persons suspected of involvement in terrorism is indeed the UK (28 days) compared with Australia (12 days), Ireland and Turkey (7 days), France (6 days), Spain and the Russian Federation (5 days), Italy (4 days), Denmark and Norway (3), the US, Germany and New Zealand (2 days), and Canada (1 day). Such comparison is, of course, indicative and does not in itself explain the specific features of, for example, the inquisitorial civil law systems in states like France, Italy, Germany and Spain, where the concept of "pre-charge detention" does not as such exist. Compare this to the UK authorities findings: "Counter-Terrorism Legislation and Practice: A Survey of Selected Countries", October 2005, <http://www.fco.gov.uk/resources/en/pdf/pdf12/fco_ref_misc_ctlegislation_oct05>. In the latter document reference is made, *inter alia,* to the fact that France allows a pre-trial detention of up to four years and that Greece permits detention – under extraordinary circumstances – of up to 18 months.

7. Including circumstances which would permit derogation under Article 15 ECHR.

8. Grebennikov Report, footnote 1 above. See also other studies mentioned above in footnote 5 and the work of the Eminent Jurists Panel on Terrorism, Counter-Terrorism and Human Rights of the International Commission of Jurists, <http://ejp.icj.org/>.

9. Grebennikov Report, footnote 1 above, § 69.

10. *Ibid.*, §§ 70 and 71.

11. *Ibid.*, § 83.

repressive counterterrorism system. The report pointed out the low standard of proof and weak evidence upon which an arrest can be based, the limited access to a lawyer and the long periods of police custody and pre-trail detention.[13]

11. Furthermore, the Grebennikov memorandum also criticises legislation in the light of articles other than Article 5 or 6 ECHR: Turkish security forces are authorised, when surrender orders are ignored, to use their guns without any hesitation against the target (problematic with regard to Article 2 ECHR: Right to life)[14]; France's, Spain's and Italy's legislation allows judges to expel foreigners to prevent terrorism also to countries where they fear torture and ill-treatment (see Article 3 ECHR: Prohibition of torture)[15]; Italian law permits preventive surveillance for up to 40 days in order to prevent the commission of a crime (see Article 8 ECHR: Right to respect for private and family life)[16]; and finally, Russia and Turkey provide for vaguely-defined and broad restrictions on the freedom of expression and the right of association (see Articles 10 and 11 ECHR: freedom of expression and freedom of assembly and association)[17].

12. In view of the purported lack of appropriate safeguards within a number of other member states' counterterrorism regimes, this issue obviously needs further consideration. However, as this report is confined to the specific draft legislation in the United Kingdom, the Rapporteur proposes that the Assembly be encouraged to ask the Venice Commission to undertake a comparative study on this subject.[18]

2.2. The procedural stage

13. In 2005, the British government unsuccessfully tried to extend the maximum length of a pre-charge detention from 14 to 90 days (the extension was eventually reduced to 28 days). Now the government has initiated a new proposal to extend the 28 day period. In its Counter-Terrorism Bill 2008[19], the government recommends *inter alia* measures to extend the 28 days to 42 days during which a person can be detained without charge. On 11June 2008, the House of Commons voted by a margin of 315 to 306 in favour of what is presently (House of Lords) Counter-Terrorism Bill 2008. It is now up to the House of Lords to decide whether the Bill shall be adopted (with or without amendments) or rejected. This subject was already debated in the House of Lords in early July 2008 and is likely to be on its agenda again in October.[20]

2.3. The content

14. The core issues of the Counter-Terrorism Bill 2008 relate to a "grave exceptional terrorist threat", and are laid down in Clauses 23-24[21] and in Part 1 of schedule 2[22] which inserts paragraphs 28-41 into schedule 8 of the Terrorism Act 2000. As an example, in the case of England and Wales, it is the Director of Public Prosecutions and the chief officer of a police force, who can submit a report on the suspicion of a threat to the Secretary of State. The report must meet two requirements: First, it has to contain reasonable grounds for believing that a pre-charge detention beyond 28 days will be necessary to obtain, preserve or analyse evidence. Second, it must affirm that the investigation is being conducted diligently and expeditiously.[23]

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12. "Preempting Justice: Counterterrorism Laws and Procedures in France", Human Rights Watch, July 2008, <http://hrw.org/reports/2008/france0708/france0708web.pdf>.
13. Concerning pre-trial detention in France, the Court acknowledged an infringement of Article 5 § 3 ECHR, because the person had been detained for more than four years. The crucial point, however, was not the time, but the lack of diligence that the national authorities displayed, see *Guarrigenc v. France*, no. 21148/02, judgment of 10.07.2008 (in French only).
14. Grebennikov Report, footnote 1 above, § 50.
15. *Ibid.*, §§ 61-63. See, in this connection, recent case of E.S.B.K. v. Italy, No. 246/07 (applicant deported to Tunisia on 03.06.2008 in defiance of Strasbourg Court's Interim Order not to do so).
16. *Ibid.*, § 96.
17. *Ibid.*, §§ 99-101.
18. Human Rights Watch has recently asked the AS/Jur to do so: see the report concerning France, footnote 11 above, at p. 82.
19. Counter-Terrorism Bill 2007-08, Government Bill, HL Bill 65 07-08 (hereafter "Counter-Terrorism Bill 2008").
20. For information on the parliamentary procedure to be followed see Parliamentary Stages of a Government Bill, Factsheet L1, Legislative Series, revised in June 2007, <http://www.parliament.uk/documents/upload/l01.pdf>.
21. Clauses 22-33 of Counter-Terrorism Bill 2008, <http://www.publications.parliament.uk/pa/ld200708/ldbills/065/08065.14-20.html#jrc20>.
22. Part 1 of Schedule 2 of Counter-Terrorism Bill 2008, <http://www.publications.parliament.uk/pa/ld200708/ldbills/065/08065.70-76.html#jrs01>.
23. Clause 24.

15. Subsequently, the Secretary of State may by order declare that the "reserve power" allowing to apply for and extend detention beyond 28 days may be exercised.[24] Before making such an order[25], the Secretary of State must obtain independent legal advice indicating that he can be properly satisfied that

a. a grave exceptional terrorist threat has occurred or is occurring,

b. the reserve power is needed for the purpose of investigating the threat and bringing to justice those responsible,

c. the need for that power is urgent, and

d. the provision in the order is compatible with ECHR rights within the meaning of Section 1 of the Human Rights Act 1998.[26]

Within two days, or as soon as practicable after the order has been made, he has to inform Parliament.[27] The order will lapse seven days after Parliament was informed unless each House of Parliament approves the order. If they do so the order will lapse 30 days after it has been issued.[28] However, nothing prevents the Secretary of States from making a new order after a parliamentary refusal. When making its decision, Parliament is not provided with any information about the name of the person detained or any material that might prejudice a future prosecution.[29]

16. Once the reserve power is declared exercisable, *inter alia* the Director of Public Prosecutions can apply for the extension of the period of detention beyond 28 days. The application has to be submitted to a senior judge (a High Court judge in the case of England and Wales). This judge has to verify the same two requirements mentioned above: the need for extension in view of the ongoing investigation and the diligence and expediency of the investigation. Where he is satisfied with those requirements, the judge can extend the warrant repetitively for seven days until the end of 42 days after the beginning of the detention. Parliament must be informed if the court authorises detention beyond 28 days.[30]

3. Arguments pro and contra the Counter-Terrorism Bill 2008

3.1. Arguments pro

17. The UK government's standpoint, to justify extension of pre-charge detention from 28 to 42 days, is principally two-fold. First, the government puts forward the seriousness of the threat from international terrorism and "the way in which that threat is developing" (JCHR Report on 42 days[31], § 10). Prime Minister Gordon Brown has referred to the fact that security services are currently investigating 2000 terrorist suspects involved in around 200 networks and 30 potential plots (The Guardian[32]). However, in the view of the UK Parliament's Joint Committee on Human Rights (JCHR), it is not clear whether the government claims that the scale of the threat from terrorism has increased since July 2006, when the pre-charge detention was extended to 28 days (*JCHR Report on 42 Days*[33], § 26).

18. Secondly, the government emphasises the increasing complexity (e.g., in terms of material seized, use of false identities) and sophistication of terrorist networks and complex terror plots involving massive amounts of evidence and data, in a great variety of forms, often with very significant international links (*JCHR Report on 42 Days*[34], § 10). As Home Office Minister Tony McNulty MP has graphically put it, "imagine two or three 9/11" (Daily Mirror[35]). The government is afraid that the time required to examine a growing number of computers, DVDs, mobile phones etc. will soon exceed the limit of 28 days. It backs up its concern with the fact that recently two suspects have been charged only on the 28th day (*JCHR Report on 42 days*[36], § 34).

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24. Clause 23.
25. *Ibid.*
26. Clause 25 (referring to requirements listed in Clause 27 [2]).
27. Clause 27.
28. Clauses 28 and 30.
29. Clause 27 (4).
30. Paragraph 41 of Schedule 2 Counter-Terrorism Bill 2008.
31. JCHR's Second Report of Session 2007-08, Counter-Terrorism Policy and Human Rights: 42 days, HL Paper 23/HC 156 (hereafter "*JCHR Report on 42 Days*").
32. The Guardian, footnote 4 above: "The Prime Minister said that the security services were currently investigating 2,000 terrorist suspects involving around 200 networks and 30 potential plots. In the most recent case to come before the courts, he said police had to examine 400 separate computers, 8,000 discs and 25,000 exhibits".
33. Footnote 30 above.
34. *Ibid*.

19. In addition to the growth in scale and complexity of terrorist cases another factor was relied upon by the government. It expresses the view that, because of the severe consequences of a successful terrorist attack, the police often need to intervene much earlier in terrorist cases and therefore often lack admissible evidence at that stage of the investigation.[37]

20. To the reproach that it had not provided the JCHR with compelling evidence of the need for an extension of the pre-charge detention, the government answers that the Counter-Terrorism Bill 2008 will not extend the pre-charge detention limit beyond 28 days immediately but will enable the limit to be extended by a senior judge in future – only if there is a clear and exceptional need to do so (Government's Reply to the Ninth JCHR Report of Session 2007-08[38], p. 1).

21. The government also faces the argument that Parliament must in such a situation take a 'blind' decision, because it cannot discuss the details of the individuals whose pre-custody detention is extended over 28 days. The government's response is that Parliament does not need the details to take its decision, because it only has to determine the exceptional nature of the investigation underway, information about the plot and its (probable) consequences and about the complexity of the investigation (*Government's Reply to the Ninth JCHR Report of Session 2007-08*[39], p. 2).

3.2. Arguments contra

22. The JCHR has, in different reports,[40] strongly criticised the government's proposals with regard to the length of pre-charge detention. It repeatedly asked for evidence of the two main claims that the government advances for the extension. However, the government has, according to the JCHR, failed to provide it with compelling evidence that terrorism is on the increase (JCHR Report on 42 Days and Public Emergencies[41], § 9). It has also, according to the JCHR, not established that the time needed for the initial investigation prior to making a charge is liable to exceed the 28 days because of the growing complexity of terrorism (*JCHR Report on 42 Days and Public Emergencies*[42], § 11). Finally, the JCHR says that the government has not made its case in explaining why – in view of the range of alternatives already available like broadly defined offences, charging suspects on the basis of reasonable suspicion, post-charge questioning, control orders and other forms of surveillance – there is a necessity to go beyond those alternatives and extend the pre-charge detention period (*JCHR Report on 42 days*[43], § 48).

23. Substantial concern has also been expressed in that this restrictive legislation is likely to be applied almost exclusively to the Muslim community.[44] The injustice of being held during six weeks in custody in the case of an innocent person could, in the words of the House of Commons Home Affairs Committee, antagonise "many who currently recognize the need for cooperating with the police".[45] The same concern is

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35. "Minister warns of 'peril' as he pushes for 42 day lock-up", *Daily Mirror*, 23.01.2008.
36. Footnote 30 above.
37. House of Lords Hansard Debates, Second Reading of Counter-Terrorism Bill, 08.07.2008, <http://www.publications.parliament.uk/pa/ld200708/ldhansrd/text/80708-0002.htm#08070843000002>, Column 634.
38. Government Reply to the Ninth Report from the JCHR Session 2007-08 "Counter-Terrorism Policy and Human Rights (Eighth Report): Counter-Terrorism Bill", Cm 7344, (hereafter "*Government's Reply to the Ninth Report of Session 2007-08*").
39. *Ibid*.
40. *JCHR Report on Counter-Terrorism Bill 2006* (Third Report of Session 2005-06), footnote 107 below, *JCHR Report on 42 Days* (Second Report of Session 2007-08), footnote 30 above; *JCHR Report on Control Orders Renewal* (Tenth Report of Session 2007-08), footnote 53 below; *JCHR Report on Counter-Terrorism Bill* (Twentieth Report of Session 2007-08), footnote 92 below; *JCHR Report on 42 Days and Public Emergencies* (Twenty-first Report of Session 2007-08), footnote 40 below; *JCHR Report on Annual Renewal of 28 Days 2008*, (Twenty-fifth Report of Session 2007-08), footnote 118 below.
41. JCHR's Twenty-first Report of Session 2007-08, *Counter-Terrorism Policy and Human Rights (Eleventh Report): 42 Days and Public Emergencies*, HL Paper 116/HC 635 (hereafter "*JCHR Report on 42 Days and Public Emergencies*").
42. *Ibid*.
43. Footnote 30 above.
44. "In the matter of pre-charge detention under the Counter-Terrorism Bill: Advice", Equality and Human Rights Commission (non-departmental public body of the UK),
<www.equalityhumanrights.com/Documents/Legislation/CTB-legal-advice.doc>, § 114. See, in this respect, also the ECRI recommendations addressed to the UK government to combat Islamophobia "Third Report on the United Kingdom", European Commission against Racism and Intolerance, 17.12.2004,
<http://www.coe.int/t/e/human_rights/ecri/1%2Decri/2%2Dcountry%2Dby%2Dcountry_approach/united_kingdom/United%20Kingdom%20third%20report%20-%20cri05-27.pdf>, § 67.
45. House of Commons Home Affairs Committee's Fourth Report of Session 2005–06, *Terrorism Detention Powers*, HC 910-I, <http://www.publications.parliament.uk/pa/cm200506/cmselect/cmhaff/910/910i.pdf>.

addressed by Mark Durkan MP saying that the government will compromise the very people in the Muslim community with whom they want to work.[46] Muhammed Abdul Bari, Secretary-General of the Muslim Council of Britain, goes even further and predicts that the legislation will be "counterproductive and will play into the hands of extremist groups".[47] To prevent this, the UN Human Rights Committee appealed to the UK to ensure that the fight against terrorism does not lead to raising suspicion against all Muslims.[48]

24. As concerns the content of the Counter-Terrorism Bill 2008 itself, the main argument is that the envisaged length of the pre-charge detention of 42 days may amount to a breach of Articles 3 and 5 ECHR (*JCHR Report on 42 Days and Public Emergencies*[49], § 44; on Article 3 ECHR see especially CPT Report UK: 11 to 15 July 2005[50], § 24). Human Rights Watch[51] has even pointed to the possibility of rolling periods of 42-day pre-charge detention if the Secretary of State immediately re-authorised a new extension.

25. At a hearing for Oral Evidence at the JCHR, it was argued that a person can be arrested on the suspicion that he or she might have been involved in the commission, preparation or instigation of terrorism acts. The fact that instigation is not even a criminal offence (Section 41 Terrorism Act 2000; see § 34 below) leads to the situation that a police officer can arrest a person without having the intention to convict him (*JCHR Report on 42 days*, p. Ev 29, Q190-192).

26. The wording of Clause 22 of the Counter-Terrorism Bill 2008 – "grave exceptional terrorist threat" – has also been criticised: This formulation is felt to be open to wide interpretation, not least because it covers planned or executed attacks outside the UK (Human Rights Watch[52]).

27. Moreover, the JCHR further deems the threshold for further detention is set too low and is therefore in breach of Article 5 ECHR. In its view, any suspect with a computer and a mobile phone would struggle to resist an application for an extension of detention (*JCHR Report on 42 Days*[53], § 92 and JCHR Report on Control Orders Renewal[54], § 20).

28. Additionally, the JCHR detects the lack of a fully adversarial hearing. It criticises the fact that the suspect and their legal representative can be excluded by the judge from any part of the hearing and that information that is provided to the judge can be withheld from the suspect and his or her legal representative if the judge is satisfied that there are reasonable grounds for believing that if the information were disclosed certain harms would be caused (*JCHR Report on 42 days*[55], § 79).

29. Finally, the role which Parliament is to play (see § 15 above) has been criticised, not least by the JCHR (*JCHR Report on 42 Days and Public Emergencies*[56], § 36). It is felt that parliamentary oversight would not be a very significant safeguard, because the debate would be heavily circumscribed by the risk of prejudicing future trials. Otherwise, as Lord Carlile, the independent reviewer of terrorism legislation, has pointed out, a parliamentary debate on the case of an uncharged person might be unfair (Lord Carlile Report on Measures for Inclusion in a Bill[57], § 48). Furthermore, Lord Boyd of Duncansby submits that a legislative organ ought not to be involved in a process that determines whether a given person's detention should be extended.[58] The decision to determine whether it is justifiable to detain individual suspects is a typical judicial function;

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46. House of Commons Hansard Debates, Second Reading of Counter-Terrorism Bill, 01.04.2008, <http://www.publications.parliament.uk/pa/cm200708/cmhansrd/cm080401/debtext/80401-0011.htm>, Column 674.
47. "Not a Day Longer – MCB Joins Coalition of Oppose Extension of Pre-Charge Detention", *Muslim Council of Britain* Press Release, 10.06.2008, <http://www.mcb.org.uk/media/presstext.php?ann_id=297>. Lord Ahmed, a labour peer, even compared the Bill to the repressive legislation in Ireland which had alienated Catholics and had further increased hostility and concludes that "Britain is poised to repeat mistakes"; see "Why I will be voting against 42-day detention", *Telegraph*, 07.07.2008,
<http://www.telegraph.co.uk/opinion/main.jhtml?xml=/opinion/2008/07/07/do0709.xml>.
48. UNHRC Concluding Observations, footnote 4 above, § 16.
49. Footnote 40 above.
50. Report to the United Kingdom Government on the visit to the United Kingdom carried out by the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (hereafter "CPT") from 11 to 15.07.2005, CPT/Inf (2006) 26.
51. "UK: Proposed 42-day Pre-Charge Detention Violates Rights", Human Rights Watch, 10.06.2008, <http://hrw.org/english/docs/2008/06/09/uk19071_txt.htm>.
52. *Ibid*.
53. Footnote 30 above.
54. JCHR's Tenth Report of Session 2007-08, *Counter-Terrorism Policy and Human Rights (Ninth Report): Annual Renewal of Control Orders Legislation 2008*, HL Paper 57/HC 356 (hereafter "*JCHR Report on Control Orders Renewal*").
55. Footnote 30 above.
56. Footnote 40 above.
57. "Report on proposed measures for inclusion in a counter terrorism bill", Lord Carlile of Berriew Q.C., independent reviewer of terrorism legislation, Cm 7262, December 2007.

parliamentary and judicial functions should not be confused.[59] The House of Lords' Select Committee on the Constitution recently devoted an entire report to this subject. They call the Bill "muddled" and "a recipe for confusion" because it risks conflating the roles of the Parliament and the judiciary in that these two institutions will be asked to answer similar questions within a short space of time (Constitution Committee Report[60], § 39). The Rapporteur is of the opinion that the proposal to involve Parliament in a decision on pre-charge detention is in flagrant contradiction with the principle of the separation of powers.

30. The Rapporteur also refers to the briefings of Amnesty International and Human Rights Watch.[61] They not only criticise the aspect of pre-charge detention, but also other sensitive issues under the Counter-Terrorism Bill 2008, such as post-charge questioning, notification requirements, definition of terrorism and secret inquests.

4. Compatibility with the European human rights standards[62]

4.1. The need for a substantive approach

31. Now the Rapporteur will give his assessment as to whether the length of a pre-charge detention of 42 days or even 28 days may be contrary to the ECHR. In order to do so, it is necessary to refer to the case-law of the European Court of Human Rights (hereafter: "the Court") concerning a maximum period within which a suspect must be "charged". Much to the surprise of those coming from a Common Law background, the Court's case-law does not appear to indicate any time-limit for a charge.[63] The reason may be the absence of a common definition of what is meant by "charge" applicable in all Contracting State Parties to the ECHR. As Stefan Trechsel, the President of the (now defunct) European Commission of Human Rights, points out: "If the international bodies were to rely on the categorisation made in domestic law, states would have the possibility to manipulate the length of proceedings by ensuring that the formal 'charge' occurs at a late stage in the proceeding, such as following the end of the investigation."[64] Therefore the Court is forced to adopt an autonomous definition of the term "charge", saying that it "has to be understood within the meaning of the Convention" and that it "is very wide in scope" (*Deweer v. Belgium*, § 42).[65] In other words, the Convention does not require a formal charge to be taken within a specific time, but only sets out procedural requirements that must be fulfilled during any detention prior to conviction, as stipulated in Article 5 ECHR.

32. This approach – to consider substantive content rather than sticking to a formal (as in Common Law) notion of "charge" – also preempts the argument that different national legislations cannot usefully be compared because Civil and Common Law systems are so different.[66] As the rules governing criminal procedure in State Parties are so different, the ECHR cannot and does not intend to create a "common judicial

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58. House of Lords Hansard Debates, Second Reading of the Counter-Terrorism Bill, 08.07.2008, <http://www.parliament.the-stationery-office.co.uk/pa/ld200708/ldhansrd/text/80708-0013.htm>, Column 711.

59. See Andrew Dismore MP, Chairman of the JCHR in the House of Commons Hansard Debates, Second Reading of the Counter-Terrorism Bill, 01.04.2008, <http://www.publications.parliament.uk/pa/cm200708/cmhansrd/cm080401/debtext/80401-0016.htm#08040183000170>, Column 705.

60. House of Lords' Select Committee on the Constitution's Tenth Report Session 2007-08, *Counter-Terrorism Bill: The Role of Ministers, Parliament and the Judiciary*, HL Paper 167.

61. "Amnesty International's briefing on the Counter-Terrorism Bill 2008", *Amnesty International*, July 2008, <http://www.amnesty.org/en/library/asset/EUR45/010/2008/en/3e281fee-4924-11dd-94d4-8d51f8ac221b/eur450102008eng.pdf>; and "Briefing on the Counter-Terrorism Bill 2008 – Second Reading in the House of Lords", *Human Rights Watch*, July 2008, <http://hrw.org/backgrounder/2008/uk0708/uk0708web.pdf>.

62. Due to severe time constraints in preparing this report, the Rapporteur has had to limit his analysis to "European" human rights standards. For a detailed analysis of international human rights standards consult, for example, Stefan Trechsel and Sarah J. Summers, *Human Rights in Criminal Proceedings*, Oxford 2005.

63. The Court has refused to define specific time-limits in abstract and therefore assesses each case according to its special features; e.g. "promptly" (*Fox, Campbell and Hartley v. United Kingdom*, § 40) in Article 5 § 2 ECHR, "promptly" (Brogan and Other v. United Kingdom, § 59) and "within a reasonable time" (Kubicz v. Poland, § 38) in Article 5 § 3 ECHR, or "speedily" (Sanchez-Reisse v. Switzerland, § 55) in Article 5 § 4 ECHR. With respect to pre-trial detention, the Court holds that "the question whether or not a period of detention is reasonable cannot be assessed in the abstract …, there is no fixed time-frame applicable to each case" (*McKay v. the United Kingdom* [GC], no. 543/03, 03.10.2006, § 45).

64. Footnote 61 above, p. 138.

65. Deweer v. Belgium, judgment of 27.02.1980, Series A No. 35, § 42.

66. According to *The Guardian*, Home Office Minister Tony McNulty said that "the Council of Europe was 'entirely wrong' to draw comparisons between Britain's judicial system and those of some continental countries which do not have the same concept of a 'charge'", see *The Guardian* in footnote 4 above. The UK, a Common Law jurisdiction, has indeed chosen a short time-limit to formulate specific charges whereas other member states – especially the continental states –

standard", but rather a set of minimum standards applicable *mutatis mutandis* to all legal systems under the ECHR's jurisdiction.[67] Consequently, the initial question needs reformulation. In ECHR terms, the crucial question is not that of how long a terrorist (or any other) suspect can be detained without "charge", but rather whether the conditions and circumstances and the safeguards under which a suspect may be held are in compliance with the minimum common procedural requirements of Articles 5 § 1(c), 5 § 2, 5 § 3 and 5 § 4 of the ECHR.

4.2. Overview of the case-law of the European Convention on Human Rights (ECHR)

33. In so far as the ECHR is concerned, the Rapporteur is of the opinion that the following questions must be answered:

– Is the detention lawful?

– Is the reason for the arrest provided promptly and in sufficient detail?

– Is there prompt judicial review?

– Is there the possibility for *habeas corpus* proceedings?

– Is the hearing fully adversarial?

– Could the length and the conditions of the detention amount to inhuman treatment?

– Is parliamentary oversight compatible with the principle of the separation of powers?

– Would invoking an "exceptionally grave terrorist threat" require a derogation of the Convention?

The following is an attempt to see whether, and if so on what basis, the Counter-Terrorism Bill 2008 may be incompatible with the ECHR, as interpreted by the Court.

4.3. Lawfulness of the detention (Article 5 § 1 ECHR)[68]

34. The Counter-Terrorism Bill 2008 does not deal with the arrest itself, as it covers only the possible extension of detention in the case where a suspect has already been detained for up to 28 days. According to the existing legislation which will also be applicable alongside the Counter-Terrorism Bill 2008, a police officer may only arrest without warrant a person "whom he reasonably suspects to be a terrorist" (Section 41 (1) of Terrorism Act 2000). According to Section 40 (1), a terrorist is defined as a person who has committed a terrorist offence, or is or has been concerned in the commission, preparation or instigation of acts of terrorism. The fact that instigation is not even a criminal offence under UK criminal law leads to the situation that a police officer can arrest a person without having the intention to charge him or her of any criminal offence (*JCHR Report on 42 days*[69], p. Ev 29, Q190-192). The Convention, by contrast, requires that a person may only be arrested on a reasonable suspicion of having committed an offence. Additionally, the public authority must have the intention to charge the person concerned and bring him/her before the competent legal authority (*Brogan and Others v. United Kingdom*[70], §§ 52-53). In this regard, the present and future legislation seem to be contrary to the Convention's requirements.

35. Article 5 § 1 ECHR is not only applicable to the initial arrest, but also during the entire period of detention. If – after analysis of the procedural requirements of Articles 5 § 2, 3 and 4 ECHR – it appears that a once lawful detention may have subsequently become arbitrary, the lawfulness of the detention as defined in

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are more flexible. In the Netherlands for instance, the public prosecutor needs to formulate the specific charges at the latest within 30 days pre-trial detention, and then can even – in complex cases – provide a general outline, without having to enter into details.

67. See in this connection, *Proposal for a Council Framework Decision on the European supervision order in pre-trial procedures between Member States of the European Union*, 29.08.2006, COM(2996)468 final, <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2006:0468:FIN:EN:PDF>, Explanatory Memorandum, p. 4.

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

69. Footnote 30 above.

70. Brogan and Others v. United Kingdom, judgment of 29.11.1988, Series A No. 145-B.

Article 5 § 1 ECHR must be reviewed again. In assessing the compatibility of a detention, especially with Articles 5 § 3 and 4 ECHR, the following case-law of the Court pertaining to Article 5 § 1 has to be kept in mind.

36. The ECHR guarantees the right to liberty and security under Article 5. Article 5 § 1 ECHR specifies a limited number of grounds for detention. In the case of terrorist offences, as in other cases, any arrest and subsequent detention must be based on a reasonable suspicion of commission of specific offences (Article 5 § 1(c) ECHR). In *Fox, Campbell and Hartley v. United Kingdom*[71], the Court acknowledged that in terrorist cases the "reasonableness" of the suspicion has a lower standard, as the government cannot be asked to establish the reasonableness "by disclosing the confidential sources … or even facts which would be susceptible of indicating such sources or their identity" (§ 34). However, the Court does not allow for the essence of the safeguard afforded by Article 5 § 1 (c) ECHR to be impaired. It requires the government "to furnish at least some facts or information capable of satisfying the Court that the arrested person was reasonably suspected of having committed the alleged offence" (§ 34).

4.4. The right to be informed of the reasons for the arrest (Article 5 § 2 ECHR)[72]

37. As pointed out above[73], there is no case-law to be found on the length of time that a person can be detained without being charged. By contrast, one could expect that the case-law under Article 5 § 2 ECHR would provide an answer, as it requires that the detainee must be promptly informed of the reason for his arrest and of any charge against him. However, the Court has never interpreted this provision literally, but instead tends to reiterate the interpretation of *Fox, Campbell and Hartley v. United Kingdom*[74], in which the Court has summarises the relevant principles as follows:

> *"Paragraph 2 of Article 5 contains the elementary safeguard that any person arrested should know why he is being deprived of his liberty. This provision is an integral part of the scheme of protection afforded by Article 5: by virtue of paragraph 2 any person arrested must be told, in simple, non-technical language that he can understand, the essential legal and factual grounds for his arrest, so as to be able, if he sees fit, to apply to a court to challenge its lawfulness in accordance with paragraph 4 [...]. Whilst this information must be conveyed 'promptly' (in French: 'dans le plus court délai'), it need not be related in its entirety by the arresting officer at the very moment of the arrest. Whether the content and promptness of the information conveyed were sufficient is to be assessed in each case according to its special features." (§ 40, emphasis added)*

38. This interpretation requires the government to give the suspect enough information to organise his/her defence, but it cannot necessarily be inferred from this that there exists an obligation to formally "charge" a person within a certain period of time.[75]

39. The applicants in the case of *Fox, Campbell and Hartley v. United Kingdom* were arrested on grounds of suspicion of being terrorists, which the Court deemed insufficient to justify the arrest (§ 41). However, the Court acknowledged that the reasons why they were suspected of being terrorists were brought to the detained persons' attention indirectly, through the questions they were asked during their interrogations (§ 41). Those interrogations were terminated within not more than seven hours after the arrest, which the Court accepted as "prompt". Whereas a delay of a few hours was deemed to be compatible with Article 5 § 2 ECHR, this was not the case with a delay of 76 hours (*Saadi v. United Kingdom (Grand Chamber)*[76], § 84). Consequently, the threshold of an acceptable delay for being informed of the reasons for the arrest must lie between 7 and 76 hours.

40. Again, the Counter-Terrorism Bill 2008 does not cover this issue, as it concerns only the extension of an already instituted detention. Although the present legislation does not require explicitly that the detainee has to be informed of the reason for his arrest, it cannot be concluded that it is contrary to Article 5 § 2 ECHR,

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71. Fox, Campbell and Hartley v. United Kingdom, judgment of 30.08.1990, Series A no. 182.
72. Article 5 § 2 ECHR reads: *"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."*
73. § 31 above.
74. Footnote 70 above, § 40.
75. In its report (*JCHR Report on 42 Days and Public Emergencies* referred to in footnote 40 above), the JCHR draws the conclusion that, if the Grand Chamber of the Court in *Saadi v. United Kingdom (Grand Chamber)* declared 76 hours to exceed the "promptness of being informed of the genuine reasons for detention", a 42-day-long detention without being informed of the charges appears not to be compatible with Article 5 ECHR either (§§ 84). Although this comparison may certainly constitute a powerful argument, there is no specific case-law of the Court on this particular point.
76. Saadi v. United Kingdom [GC], No. 13229/03, judgment of 29.01.2008.

as the Court accepts that, in specific cases, the reason of arrest might also be brought to the attention of the detainee indirectly, in the course of his interrogation. However, Stefan Trechsel, one of the foremost authorities on Article 5 of the ECHR, has strongly criticised this case-law, indicating that "the essence of the duty to give reasons for the arrest is, in my view, to prevent the person concerned from having simply to guess but to get a clear answer to the question 'why have I been arrested?'"[77]. Indeed, according the evidence taken by the JCHR, this is exactly the point at issue. At the time of arrest, a suspect is only told that he or she is suspected of being a terrorist or suspected of being involved in the commission, preparation or instigation of a terrorist offence, which tells the arrested person nothing except "I believe you are a terrorist" (*JCHR Report on 42 days*[78], § 85). The Rapporteur suggests that the approach taken by the JCHR be endorsed by the Assembly, namely the JCHR's recommendation of the need to impose more stringent requirements about information which must be contained in the statutory notice given to a suspect before a hearing (§ 89).

4.5. The right to be brought before a judge (Article 5 § 3 ECHR)[79]

41. Article 5 § 3 ECHR contains the right of an individual to "prompt" judicial control of the lawfulness of his detention. To define "promptness", the former European Commission on Human Rights adopted the general yardstick of four days (*Egue v. France*[80], p. 70), whereas the Court accepted four days and six hours (*Brogan and Others v. United Kingdom*[81], §§ 61-62). For an extensive overview of the case-law to Article 5 § 3 ECHR, see *McKay v. the United Kingdom*[82], §§ 30-47.

42. As to the time-limit for being presented to a judge, there appears to be, *prima facie*, no incompatibility between the proposed legislation and Article 5 ECHR. The person suspected of terrorism has to be brought before a judge within 48 hours after his arrest (Section 41 of Terrorism Act 2000[83]). The detention can then be continued for periods up to seven days at a time (Part 1 of Schedule 2[84] of Counter-Terrorism Bill 2008).

43. However, access to a judicial authority is not sufficient on its own. The crucial problem lies in the scope of the judicial review, defined by the Court as follows (*T.W. v. Malta*[85]):

> *"It is essentially the object of Article 5 § 3, which forms a whole with paragraph 1 (c), to require provisional release once detention ceases to be reasonable. The fact that an arrested person had access to a judicial authority is not sufficient to constitute compliance with the opening part of Article 5 § 3. This provision enjoins the judicial officer before whom the arrested person appears to review the circumstances militating for or against detention, to decide by reference to legal criteria whether there are reasons to justify detention, and to order release if there are no such reasons … In other words, Article 5 § 3 requires the judicial officer to consider the merits of the detention." (paragraph 41, emphasis added)*

44. According to paragraph 32 (1) of Schedule 8 of the Terrorism Act 2000, the judicial authority seized within the first 48 hours has only to examine whether the detention is necessary to obtain or preserve relevant evidence and whether the investigation is conducted diligently and expeditiously. It is questionable whether this narrow scope of review can live up to the broadly defined review required by Article 5 § 3 ECHR following which the judge must be in a position to decide on the merits of the detention, i.e. whether there are reasonable grounds for suspicion that the detainee may have committed the alleged offence and whether there are sufficient grounds to justify detention as a measure of restraint.[86]

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77. Footnote 61 above, p. 461.
78. Footnote 30 above.
79. Article 5 § 3 ECHR: "Everyone 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 authorized 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."
80. Egue v. France, No. 11256/84, Commission inadmissibility decision of 05.091988, Decision and Reports 57, p. 60.
81. Footnote 69 above.
82. McKay v. the United Kingdom [GC], No. 543/03, judgment of 03.10.2006.
83. Terrorism Act 2000, 2000 c. 11, <http://www.opsi.gov.uk/acts/acts2000/ukpga_20000011_en_1>.
84. See foontnote 21 above.
85. T.W. v. Malta (preliminary objections), No. 25644/94, judgment of 29.04.1999.
86. See also the scope of review under Article 5 § 4 ECHR, § 45 below.

4.6. The right to habeas corpus proceedings (Article 5 § 4 ECHR)[87]

45. Article 5 § 4 ECHR provides that a detainee has the right to a *habeas corpus* proceeding to determine the lawfulness of his detention. Additionally, periodic review of the lawfulness of the continuing detention must be available to ensure the particular objectives of the court imposing deprivation of liberty are still being met. Following the case-law of the Court in *Garcia Alva v. Germany*[88] the minimum content of this judicial hearing comprises

> *"not only compliance with the procedural requirements set out in domestic law but also the reasonableness of the suspicion grounding the arrest and the legitimacy of the purpose pursued by the arrest and the ensuing detention." (paragraph 39, emphasis added)*

46. According to Clause 40 (1) of the Counter-Terrorism Bill 2008, paragraphs 31-34 of Schedule 8 of the Terrorism Act 2000 apply *mutatis mutandis*. Accordingly, the senior judge deciding on the extension of detention beyond 28 days is required to perform the same test as the judicial authority of the first 48 hours, namely to examine whether the detention is necessary to obtain or preserve relevant evidence and whether the investigation is conducted diligently and expeditiously (paragraph 32 (1) of Schedule 8 of the *Terrorism Act 2000*). The government is of the view that it is not the role of the court to decide on the full lawfulness of the detention (Government Reply to the Nineteenth Report of Session 2006-07[89], § 13). Essentially, judicial scrutiny is limited to the necessity of detention for investigation rather than "reasonable suspicion of having committed an offence" (Article 5 § 1 ECHR), which gives the impression that detention might be used as an instrument to peaceably pursue a further investigation. Consequently, the judicial review does not encompass the test of the reasonableness of the suspicion of having committed an offence and therefore appears to be contrary to the requirements set out by Article 5 § 4 ECHR.

47. The government is of the view that the detainee has two possibilities to challenge the lawfulness of his detention: at the hearing for extending his detention and at a possible *habeas corpus* proceeding (*Government Reply to the Ninth Report of Session 2007-08*[90], p. 3). As the hearing does not appear to live up to the requirement set forth by Article 5 § 4 ECHR, it remains to be determined whether the *habeas corpus* procedure is a remedy which is "sufficiently certain, not only in theory but also in practice" (Öcalan v. Turkey[91], § 69). That said, it is not even certain whether *habeas corpus* proceedings can be initiated in the cases covered by the draft legislation. In *Nabeel Hussain v. The Hon. Mr Justice Collins*[92], the England and Wales High Court stated that the requirements of Article 5 § 4 ECHR were satisfied by the extension hearing procedure (paragraph 26). Assuming that the High Court will adhere to this case-law also under the proposed 42-day legislation, the detainee would not be able to apply for *habeas corpus* after the court had extended his detention, because his application would be struck out for abuse of process (JCHR Report on Counter-Terrorism Bill[93], § 25). In conclusion, there seems to be reasonable ground to believe that the remedy of *habeas corpus* is not sufficiently certain and therefore no sufficient judicial review, as required by Article 5 § 4 ECHR, appears to be foreseen in the present and future legislation.

4.7. The right to an adversarial hearing (Articles 5 § 3, 5 § 4 and 6 § 3 ECHR)

48. In addition to the requirements mentioned above, the Court has ruled that Article 5 § 3, "like Article 5 § 4 – must be understood to require the necessity of following a procedure that has a judicial character" (*Brannigan and McBride v. United Kingdom*[94], § 58). This opens a more general debate about the right to a fair trial of which three aspects – legal assistance, legal representation and access to information – will be examined below.

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87. Article 5 § 4 ECHR reads: "Everyone 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."
88. Garcia Alva v. Germany, No. 23541/94, judgment of 13.02.2001.
89. Government Reply to the Nineteenth Report from the JCHR Session 2006-07 "Counter-Terrorism Policy and Human Rights: 28 days, intercept and post-charge questioning", Cm 7215, (hereafter "*Government Response to the Nineteenth Report of Session 2006-07*").
90. Footnote 37 above.
91. Öcalan v. Turkey, No. 46221/99, judgment of 12.03.2003.
92. Nabeel Hussain v. The Hon. Mr Justice Collins, High Court judgment of 29.08.2006, [2006] EWHC 2467 (Admin).
93. JCHR's Twentieth Report of Session 2007-08, *Counter-Terrorism Policy and Human Rights (Tenth Report): Counter-Terrorism Bill*, HL Paper 108/HC 554 (hereafter "*JCHR Report on Counter-Terrorism Bill*"), <http://www.publications.parliament.uk/pa/jt200708/jtselect/jtrights/57/57.pdf>.
94. Brannigan and McBride v. United Kingdom, judgment of 26.05.1993, Series A No. 258-B.

49. First, since *John Murray v. United Kingdom*[95] it is clear that the right to legal assistance required by Article 6 § 3 ECHR[96] may be relevant before a case is sent to trial if and in so far as the fairness of the trial is likely to be seriously prejudiced by an initial failure to comply with its provisions" (paragraph 62). In *Brennan v. UK*[97] the Court reiterated: "although Article 6 will normally require that the accused be allowed to benefit from the assistance of a lawyer already at the initial stages of police interrogation, this right, which is not explicitly set out in the Convention, may be subject to restriction for good cause. The question in each case is whether the restriction, in the light of the entirety of the proceedings, has deprived the accused of a fair hearing" (paragraph 45).[98]

50. In the present and future legislation as presently drafted, access to a lawyer can be delayed for up to 48 hours if the police believe that, for instance, such access would lead to interference with evidence or alerting another subject (paragraph 8 of Schedule 8 Terrorism Act 2000). So far, the legislation seems to be in accordance with the *Murray* interpretation of Article 6 § 3 Convention, as it specifies for which reasons ("good causes") the officer can delay the right to legal assistance. In this respect, it has to be noted that the (former) UN Human Rights Commission has demanded that access to a lawyer shall follow immediately after the arrest.[99] This statement is in line with the general trend to recognise the right to immediate access to a lawyer.[100] Although the current and future legislation do not appear – *prima facie* – to infringe the Convention, the concern remains whether such broadly-phrased exceptions to this right might not lead to the risk of abuse.

51. Second, according to the Court's case-law, "proceedings conducted under Article 5 § 4 of the Convention should in principle also meet, to the largest extent possible under the circumstances of an on-going investigation, the basic requirements of a fair trial, such as the right to an adversarial procedure" (*Garcia Alva v. Germany*[101], § 39). Therefore, under Article 5 § 4 ECHR, "the person should have … the opportunity to be heard either in person or, where necessary, through some form of representation" (*Winterwerp v. The Netherlands*[102], § 60).

52. Under Paragraph 33 (1) of Schedule 8 Terrorism Act 2000, which will equally apply to detention beyond 28 days (paragraph 40 [1] of Schedule 2 Counter-Terrorism Bill 2008), the detainee has the right to make oral or written representations to the judicial authority and is entitled to legal representation. The judge, however, may exclude the detainee and his or her representative from any part of the hearing. The legislation therefore covers the possibility that a detention might be extended without the suspect having been heard, a situation which is likely to infringe the Convention.

53. Third, the principle of "[e]quality of arms is not ensured if counsel is denied access to those documents in the investigation file which are essential in order effectively to challenge the lawfulness of his client's detention" (*Garcia Alva v. Germany*[103], § 39). The Court, at the same time, acknowledges that, when national

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95. John Murray v. United Kingdom [GC], judgment of 08.02.1996, Reports 1996-I.
96. Article 6 § 3 (c) ECHR reads: "Everyone charged with a criminal offence has the following minimum rights: […] 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."
97. Brennan v. UK, No. 39846/98, ECHR 2001-X.
98. This case-law was recently reaffirmed by Salduz v. Turkey, No. 36391/02, judgment of 26.04.2007 (§ 22), but in a tempered form. The fact that the statements obtained during the police custody was not the sole basis for his conviction led the Court to the conclusion contrary to *Murray v. United Kingdom* (§ 60), that there was no violation of Article 6 § 3 ECHR (§§ 23-24). In a partly dissenting Opinion to *Salduz v. Turkey*, Judges Tulkens and Mularoni criticised this inconsistency and stressed that "the assistance of a lawyer already at the initial stages of police interrogation is the rule and the lack of assistance is the exception" and that the exceptions were only admitted if there was "good cause". The case is now pending before the Grand Chamber.
99. UNHRC Concluding Observations, footnote 4 above, § 19.
100. Indeed, one notices an increasing trend among State Parties to recognise the right to immediate access to a lawyer during police custody. However, in the context of anti-terrorism measures, Spain (13 days, not a lawyer of own choice), France (72 hours), Italy (5 days) and the United Kingdom (48 hours) provide for an exception to the law governing the prosecution of other crimes in allowing police custody without access to a lawyer. The main justification in this regard is that the suspected terrorist should not be able to alert any other person and therefore jeopardise the ongoing investigation. Also, for the importance that the CPT and the EU attach to the right to legal assistance, see "The CPT Standards: 'Substantive' sections of the CPT's General Reports", CPT (CPT/Inf/E (2002) 1 – Rev. 2006, <http://www.cpt.coe.int/en/documents/eng-standards-scr.pdf>, § 41; and "Proposal for a Council Framework Decision on certain procedural rights in criminal proceedings throughout the European Union", Commission of the European Communities, COM(2004) 328 final – 2004/0113 (CNS), 28.04.2004,
<http://ec.europa.eu/justice_home/doc_centre/criminal/procedural/doc/com328_28042004_en.pdf>, Article 2.
101. Footnote 87 above.
102. Winterwerp v.The Netherlands, 24.10.1979, Series A No. 33, p. 24.
103. Footnote 87 above.

security is involved, the use of confidential material may be unavoidable (*Chahal v. United Kingdom*[104], § 131). The Court qualifies this finding in saying that "[t]his does not mean, however, that the national authorities can be free from effective control by the domestic courts" and subsequently draws the attention to techniques which satisfy both the individual interest of access to information and the societal need for national security.

54. With respect to the access to information, Section 34 of Schedule 8 Terrorism Act 2000 specifies a wide range of instances in which the judge is entitled to withhold information from the detainee and his representative. The legislation conclusively appears to allow a situation in which no effective judicial control is exercised. This would be unacceptable in the light of the above-mentioned *Chahal v. United Kingdom* judgment. The same judgment suggests that this deficiency could be compensated by the introduction of a security-cleared special representative who in the absence of the suspect and his/her representative would defend the interests of the detainee and would also have access to the confidential material (paragraph 144). In the case of control orders[105], the UK has already chosen this solution. However, although the use of special advocates can help enhance procedural justice, the controlled person does not know the allegations made against him and cannot give meaningful instructions. Once the special advocate knows what the allegations are, he cannot tell the controlled person or seek instructions from him without permission, effectively denying the controlled person an opportunity to challenge or rebut allegations. In such a case, as the House of Lords (the highest court in the UK) has pointed out[106], even involving a special advocate would impair the very essence of the right to a fair hearing set out in Article 6 ECHR.

4.8. Inhuman treatment because of length of detention (Article 3 ECHR)[107]

55. A very long period of pre-charge detention could, in certain circumstances, amount to inhuman and degrading treatment under Article 3 ECHR. Already in the debate about an increase beyond 14 days, the JCHR repeatedly drew attention to the risk that because of the length of the detention, detainees may suffer inhuman and degrading treatment given the inappropriateness of police custody facilities (JCHR Report on Counter-Terrorism Bill 2006[108], § 86; criticism to Counter-Terrorism Bill 2008 in *JCHR Report on 42 Days*[109], § 78). In that respect, the CPT noted – after visiting a police station in London – that conditions had not been adequate for such prolonged periods of detention (CPT Report UK: 11 to 15 July 2005[110], § 24). After each of the following two visits to the UK, the CPT has reiterated its concern (CPT Report UK: 20 to 25 November 2005, § 28 and CPT News Flash UK: 2 to 6 December 2007)[111]. Although the likelihood of inhuman treatment increases the longer the detention lasts, the detention itself cannot in itself, *prima facie,* be regarded contrary to Article 3 ECHR. But the suffering caused by the detention itself can be compounded by the detainee's lack of knowledge of the reasons for which he or she is detained.

4.9. Parliamentary oversight

56. Parliamentary oversight is proposed in the draft legislation as an additional and unusual safeguard for the protection of the right to liberty of the detained, even though such oversight would not be automatic.[112] First, in view of the importance that the Assembly attaches to the effective separation of powers[113], the proposal to allow a legislative organ to decide on the justification of an assessment of the Secretary of State

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104. Chahal v. United Kingdom, judgment of 15.11.1996, Reports 1996-V.
105. Paragraph 7 Schedule of Prevention of Terrorism Act 2005 (c.2), <http://www.opsi.gov.uk/acts/acts2005/pdf/ukpga_20050002_en.pdf>. With respect to pre-charge detention, this solution is also advanced by the CPT, see "The CPT Standards: 'Substantive' sections of the CPT's General Reports", footnote 99 above; and Andrew Dismore MP, Chairman of the JCHR, see House of Commons Hansard Debates, Second Reading of Counter-Terrorism Bill, 01.04.2008, <http://www.publications.parliament.uk/pa/cm200708/cmhansrd/cm080401/debtext/80401-0016.htm>, Column 705.
106. *Secretary of State for the Home Department v. MB*, House of Lords judgment of 31.10.2007, [2007] UKHL 46, <http://www.publications.parliament.uk/pa/ld200607/ldjudgmt/jd071031/home-3.htm>, §§ 35 and 41.
107. Article 3 ECHR reads: "No one shall be subjected to torture or to inhuman or degrading treatment or punishment."
108. JCHR's Third Report of Session 2005-06, *Counter-Terrorism Policy and Human Rights: Terrorism Bill and related matters*, HL Paper 75-I/HC 561-I (hereafter "*JCHR Report on Counter-Terrorism Bill 2006*").
109. Footnote 30 above.
110. Footnote 49 above.
111. Report to the United Kingdom Government on the visit to the United Kingdom carried out by the CPT from 20 to 25.11.2005, CPT/Inf (2006) 28; and News Flash on the visit to the United Kingdom carried out by the CPT from 2 to 6.11.2007.
112. "Pre-charge detention – the facts", fact sheet of the British government.
113. "The functioning of democratic institutions in Turkey: recent developments", PACE Resolution 1622 (2008), 26.06.2008, § 9; and "Office of the Lord Chancellor in the constitutional system of the United Kingdom", PACE Resolution 1342 (2003), 08.09.2003, § 2:

declaring the "reserve power" exercisable seems to be out of place. Second, the Bill specifies that "[t]he statement must not include the name …, or any material that might prejudice the prosecution of any person" (Clause 27 [4] [a] Counter-Terrorism Bill 2008). In view of the small amount of information furnished to the legislature, the Rapporteur doubts Parliament's ability effectively to provide an additional safeguard to a terrorist suspect. Finally, the alleged 'parliamentary safeguard' does not in any way curtail the 7-day period during which a pending order made by the Secretary of State remains valid.[114] Also, if the Parliament refuses to give its approval, nothing "prevents the making of a new order" (Clause 28 [3] [a] Counter-Terrorism Bill 2008) before the order lapses. As a result, if on the 28th day of detention the Secretary of State issues the order, he is to submit it "as soon as is practicable" to Parliament. Assuming that this happens on the 29th day, the order will lapse seven days later, i.e. on the 36th day. If a new order is issued on this day, the 7-day period will start again a day later on the 37th and will end on the 44th day. This would enable the detention of a terrorist suspect up to the 42nd day without the approval of the Parliament (see time-line in appendix). Rather then instituting a quasi-judicial parliamentary oversight which can in any case be circumvented, more attention and energy should be concentrated on the need for appropriate judicial review.

4.10. Derogation under Article 15 ECHR[115]

57. The reserve power can only be declared exercisable in the case of a "grave, exceptional terrorist threat" (Clause 22 Counter-Terrorism Bill 2008). As to the meaning of this notion, Andrew Dismore MP, the Chairman of the JCHR, suggested two different interpretations[116]: Either a substantial threat against the nation, like for example the two or three 9/11s suggested by Home Office Minister Tony McNulty MP[117], or a less extreme terrorist case, like the London bombings in July 2005. In the latter case of a less extreme terrorist threat, a detention beyond 28 days would not be needed at all, as the July 2005 bombings were dealt with under the 14-day regime. Hence, in view of this reasoning combined with the fact that the UK government continually stresses the growing scale and complexity of the terrorist threat, it must have adopted the former interpretation. In such a case of a substantial threat against the nation, however, the UK government would be justified to file a derogation under Article 15 ECHR (from Article 5 ECHR) and would thus not need to declare a "reserve power" exercisable. Consequently, it seems wise to follow the suggestion of the JCHR[118] to include the possibility of derogation in the Bill instead of creating a complicated system, not to say a legal 'monstrosity', of "reserve power".

5. Conclusion

58. In the view of the Rapporteur, the question is not whether the length of 42 days and even perhaps 28 days detention without charge is *per se* compatible with the Convention, but whether the pre-charge detention is accompanied by sufficient legal safeguards. He refers, in this connection, to the 2002 Committee of Ministers' *Guidelines on Human Rights and the Fight against Terrorism,* which, based on the established case-law of the Strasbourg Court, are designed to serve as a guide for anti-terrorist policies, legislation and operations which are both effective and respect human rights. From the analysis of the safeguards proposed in the draft legislation, the Rapporteur draws the following conclusions:

– Contrary to Article 5 § 1 ECHR, the present and future legislation may be "unlawful" detention in that a person can be arrested without the intention to charge him or her with a criminal offence.

"The Parliamentary Assembly recalls that the separation of powers has become a part of the common basic constitutional traditions of Europe, at the very least in so far as it concerns the attribution of the judicial office to an independent state institution."

114. Clause 28 (1) (b) Counter-Terrorism Bill 2008 states that "the order shall lapse at the end of the period of seven days beginning with the date of laying unless during that period each House of Parliament passes a resolution approving it". As to the question whether during that period the order is in force, i.e. the reserve power is exercisable, Clause 28 (3) (b) Counter-Terrorism Bill 2008 makes it crystal clear that "[n]othing in this Section affects anything done by virtue of the order before it lapsed".

115. Article 15 § 1 ECHR reads: "In 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."

116. House of Commons Hansard Debates, Report stage of Counter-Terrorism Bill, June 2008, <http://www.publications.parliament.uk/pa/cm200708/cmhansrd/cm080611/debtext/80611-0012.htm>, Column 355.

117. Footnote 34 above.

118. *JCHR Report on 42 Days and Public Emergencies*, footnote 40 above, § 49: "We remain firmly of the view that if there is a genuine emergency within the terms of Article 15 of the ECHR the Government should make its case for such a derogation and not seek new legislation."

– Contrary to Article 5 § 2 ECHR, the existing legislation does not expressly provide that the detained person is informed at all of the reasons for his or her arrest. This deficiency could be corrected by imposing more stringent requirements about the information which must be contained in the statutory notice given to a suspect before a hearing.

– By contrast, the short delay foreseen for the suspect to be presented to a judge might well comply with the requirements of Article 5 § 3 ECHR.

– That said, if a person is arrested or continuously detained on the basis of participating in the preparation of grave terrorist offences, the judge has to be able to review whether the underlying facts at least give rise to a reasonable suspicion that the detained person has committed an offence. Under the present and future legislation, it does not appear that the limited review that the judge shall undertake reaches the standards laid down in Articles 5 § 3 and 5 § 4 ECHR.

– Furthermore, for there to be proper judicial scrutiny of applications for pre-charge detention and its extension, logic suggests that there must be an adversarial hearing before a judge (subject to the law of public interest immunity to protect sensitive information). It appears that the current and future legislation would enable a person to be continuously detained without, in certain cases, having immediate access to a lawyer, without having been legally represented and without having had access to relevant information in proceedings that concerns his or her right to liberty. This situation gives rise to serious concerns as to compatibility with Articles 5 §§ 3 and 4 and 6 §§ 1and 3 ECHR.

– Additionally, the length of time during which the person may be detained and the suspect's lack of information on the reasons for his detention increase the risk that the threshold of inhuman or degrading treatment may be exceeded.

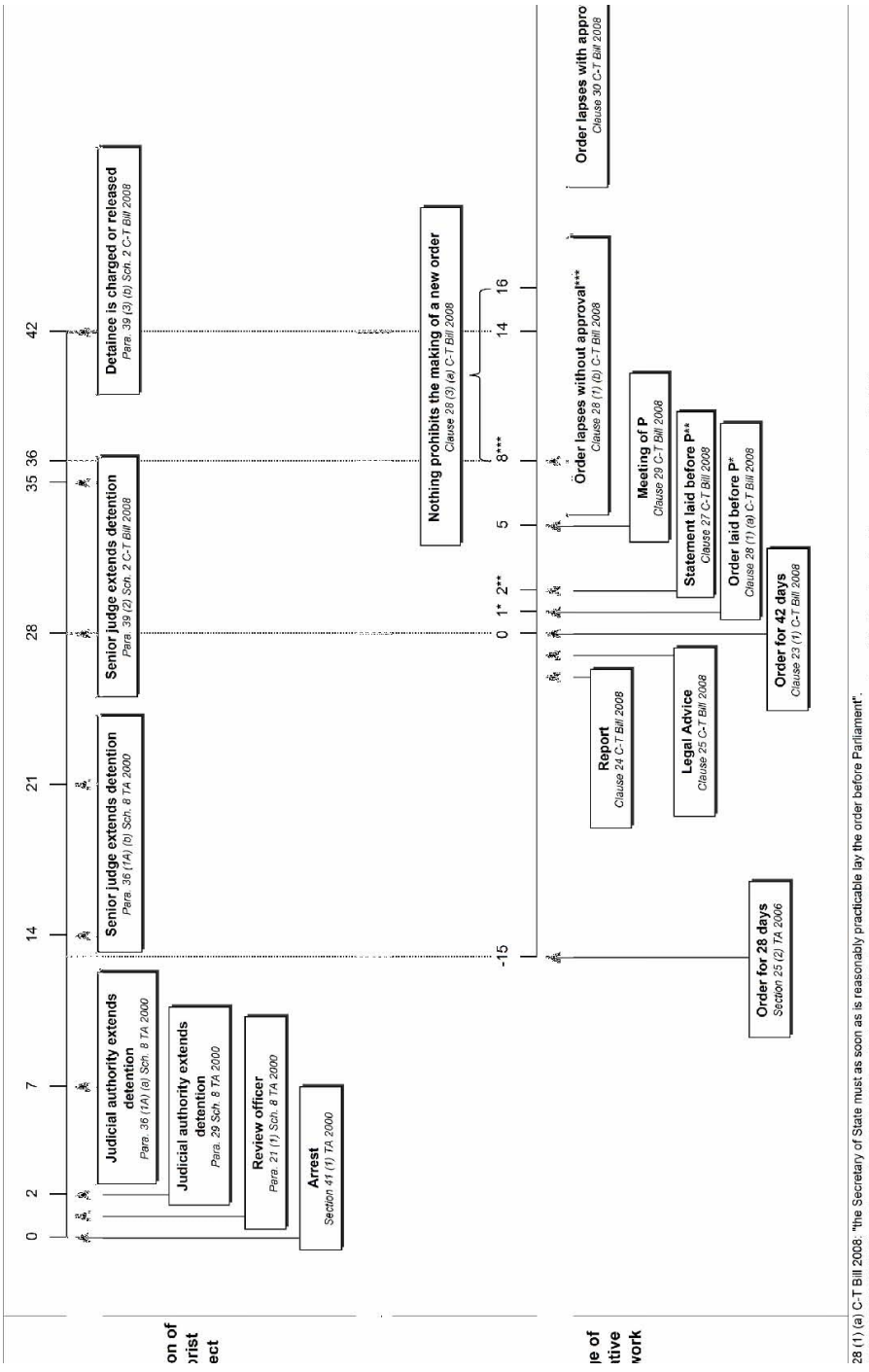
– These shortcomings cannot be compensated by a complicated system of parliamentary oversight which seems to be ineffective, easy to circumvent and which appears to infringe the separation of powers.

– Instead of instituting such a questionable parliamentary 'safeguard', the government might want to follow the recent recommendation of the JCHR (JCHR Report on Annual Renewal of 28 Days 2008[119], § 32-34) and improve the existing judicial safeguards whilst at the same time including the possibility of a derogation from the Convention in its counter-terrorism legislation, in order to be able to prevent an exceptionally grave terrorist attack.

59. In view of the important principles involved in the questions discussed and analysed in this report, the Rapporteur recommends that the Assembly invite the Venice Commission to examine the United Kingdom's anti-terrorist legislation in the framework of a comprehensive comparative study. Such a study could address the different issues raised above, placing the "42-day pre-charge detention" initiative that has given rise to the present report in the wider context of the need to provide appropriate ECHR legal safeguards for all persons detained, even those suspected of such serious crimes as acts of terrorism.

119. JCHR's Twenty-fifth Report of Session 2007-08, *Counter-Terrorism Policy and Human Rights (Twelfth Report): Annual Renewal of 28 Days 2008*, HL Paper 132/HC 825 ("*JCHR Report on Annual Renewal of 28 Days 2008*").

Appendix – Explanatory appendix: The chronology of events according to the proposed legislation as understood by the Rapporteur



Reporting committee: Committee on Legal Affairs and Human Rights

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Draft resolution adopted unanimously by the committee on 29 September 2008

Members of the committee: Mrs Herta **Däubler-Gmelin** (Chairperson), Mr Christos **Pourgourides**, Mr Pietro Marcenaro (Vice-Chairpersons), Mr José Luis Arnaut, Mrs Meritxell Batet Lamaña, Mrs Marie-Louise **Bemelmans-Videc**, Mrs Anna Benaki, Mr Erol Aslan **Cebeci**, Mrs Ingrīda **Circene**, Mrs Alma Čolo, Mr Joe **Costello**, Mr Nikolaos Dendias, Mrs Lydie Err, Mr Renato Farina, Mr Valeriy **Fedorov**, Mr Joseph **Fenech Adami**, Mrs Mirjana Ferić-Vac, Mr György **Frunda**, Mr Jean-Charles **Gardetto**, Mr Józef Gedei, Mrs Svetlana Goryacheva (alternate: Mr Arsen **Fadzaev**), Mrs Carina **Hägg**, Mr Holger **Haibach**, Mrs Gultakin Hajiyeva (alternate: Mr Ali **Huseynov**), Mrs Karin Hakl, Mr Andres Herkel, Mr Serhiy Holovaty, Mr Michel Hunault, Mr Rafael Huseynov, Mrs Fatme **Ilyaz**, Mr Kastriot Islami, Mr Željko Ivanji, Mrs Iglica **Ivanova**, Mrs Kateřina Jacques, Mr Karol **Karski**, Mr András Kelemen, Mrs Kateřina **Konečná**, Mr Eduard **Kukan**, Mr Oleksandr Lavrynovych (alternate: Mr Ivan **Popescu**), Mrs Darja Lavtižar-Bebler, Mrs Sabine Leutheusser-Schnarrenberger, Mr Humfrey **Malins**, Mr Andrija Mandic, Mr Alberto Martins, Mr Dick **Marty**, Mrs Ermira **Mehmeti**, Mrs Assunta Meloni, Mr Morten Messerschmidt, Mr Philippe **Monfils**, Mr Alejandro Muñoz Alonso (alternate: Mr Miguel **Barceló Pérez**), Mr Felix Müri, Mr Philippe Nachbar, Mr Fritz Neugebauer, Mr Tomislav Nikolić, Mrs Maria Postoico (alternate: Mr Vlad **Cubreacov**), Mrs Marietta **de Pourbaix-Lundin**, Mr John **Prescott**, Mr Valeriy Pysarenko (alternate: Mr Hryhoriy **Omelchenko**), Mrs Marie-Line Reynaud, Mr François Rochebloine, Mr Paul **Rowen**, Mr Armen **Rustamyan**, Mr Kimmo **Sasi**, Mr Ellert Schram, Mr Christoph **Strässer**, Mrs Chiora **Taktakishvili**, Lord John **Tomlinson**, Mr Mihai Tudose, Mr Tuğrul **Türkeş**, Mrs Özlem **Türköne**, Mr Vasile Ioan Dănuţ **Ungureanu**, Mr Øyvind **Vaksdal**, Mr Giuseppe Valentino (alternate: Mr Giuseppe **Saro**), Mr Hugo Vandenberghe, Mr Egidijus **Vareikis**, Mr Luigi **Vitali**, Mr Klaas **de Vries**, Mr Dimitry Vyatkin (alternate: Mr Sergey **Markov**), Mrs Renate Wohlwend, Mr Jordi Xuclà i Costa (alternate: Mr Arcadio **Díaz Tejera**), Mr Krysztof **Zaremba**, Mr Łukasz Zbonikowski

N.B.: The names of the members who took part in the meeting are printed in **bold**

Secretariat of the committee: Mr Drzemczewski, Mr Schirmer, Mrs Maffucci-Hugel, Ms Heurtin