



Commonwealth Human Rights Initiative

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SECURITY AT WHAT PRICE?

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Theme paper on counter-terrorism and police accountability

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In the current climate, terrorism is the problem that threatens human rights the most. CHRI is preparing a report on the effects of anti-terrorism legislation on civilian policing throughout the Commonwealth, for the Commonwealth Heads of Government Meeting (CHOGM) in Uganda in November this year. This report builds on our 2005 report to CHOGM on police accountability.

Today I will address some of the issues we have been looking at in terms of the effects on human rights of counter-terrorism policing, from the international perspective of the Commonwealth. In particular I will use the case study of India to explore how the anti-terrorism agenda is undermining human rights protection in civilian policing. Whilst the contexts of South Asia and Africa are very different, the similarities in terms of effect and outcome make it clear that there are lessons we can learn from each other.

In terms of the international climate of anti-terrorism there is a clear pattern in relation to its effects on civilian policing. Firstly, most Commonwealth countries have not introduced laws that affected police powers. Those who have introduced specific anti-terrorism laws have focused on financing of terrorism and controlling money-laundering.

Secondly, where countries have enacted specific anti-terrorism legislation in relation to policing, these laws have:

- i. Increased police powers
- ii. Enhanced discretion
- iii. Reduced police accountability.

The reduction of police accountability operates both directly and indirectly. Directly, police accountability has been reduced through specific immunity provisions enacted in legislation to protect police engaged in counter-terrorism activities amongst others. Indirectly, police accountability has been reduced through the failure to increase checks and balances on police in accordance with increased powers, and through expanded cultures of impunity for policing.

Police have greater powers to arrest and detain on suspicion and detention periods are increasingly extendable. The checks of judicial review, internal reporting or external oversight have not been correspondingly strengthened.

In the Commonwealth, there are some exceptions such as the Independent Police Complaints Commission in the UK, which operates as a rigorous and effective mechanism for police accountability. But the reality is that accountability remains weak in many countries, even as police are given extraordinary powers to deal with terrorism and security.

¹ This paper derives from CHRI's report on the effects of anti-terrorism legislation on civilian policing in the Commonwealth, for the Commonwealth Heads of Government Meeting (Uganda, November 2007). The CHOGM report team are Tessa Boyd-Caine, Arnaud Chaltin, Gudrun Dewey, Manjiri Dube, Sophie Earnshaw & Devika Prasad. For further information contact tessa@humanrightsinitiative.org.

We do not use the language of 'the war on terror' because the international agenda of anti-terrorism is decades old. The earliest of the 13 current UN anti-terrorism conventions was established in 1973. Whilst UN Security Council Resolution 1373, which followed the attacks in the USA on 11 September 2001, is the most well known, it builds on the legacy by the full body of international and regional counter-terrorism instruments that came before and follow it.

The pre-eminence of 11 September 2001 undermines the histories of countering terrorism for decades in many parts of the world. The Troubles between Northern Ireland and the British; the burgeoning Communist movement of the 1970s in Caribbean states that was perceived as a terrorism threat in the region and by the USA at the time; and most notably in South Asia. More recently, the attacks in the USA in September 2001 were hugely symbolic and conceivably the catalyst for a significant shift in public perceptions about terrorism. However there have been many other attacks that have contributed to that shifting consciousness, including Kenya & Tanzania in 1998 and in Kenya again in 2002, Mumbai (2001), Bali (2002 & 2005), Madrid (2004) and London (2005).

A state of war has serious implication for principles of legality at the international level. The language of war confuses rather than clarifies the nature of the conflict, the roles of the various actors, and the potential resolutions that are available. Moreover, the US led 'war on terror' does not encompass all of the international efforts to counter terrorism currently taking place.

Consequently, CHRI talks about the contemporary, international climate of anti-terrorism and counter-terrorism policing.

The effects of the international agenda on anti-terrorism have been to dilute human rights principles and standards. This conference has already discussed some of the key ways this is taking place, including:

- i. Increased use of arbitrary arrest and detention leading to rendition, and
- ii. Excessive use of force enabling the environment in which torture and custodial and extra-judicial killings are taking place.

Additionally, we have seen the dilution of protections of review, including via habeas corpus; and police and others failing to comply with judicial orders to that end, all of which are undermining the rule of law

The problem of the internationalised agenda of anti-terrorism is the permissiveness it creates for policing practices that violate human rights and the rule of law.

Additional challenges include the militarisation of policing. This is a significant challenge to civil society seeking to hold police to account. It is also a challenge for police, as they struggle to operate in joint military-police forces, with unclear or undetectable chains of command, and with agencies other than those traditionally engaged in security for the state. These agents bring different training and different objectives to the landscape of civilian policing.

The increasingly blurred boundaries between the role of police and other agencies further strengthens the need for police accountability. But it also makes that accountability more complicated, and potentially wider in scope.

Turning now to the South Asian case study of India, this is a case where counter-terrorism policing raises some of the greatest concerns for human rights. It also an example of how police accountability has been seriously undermined by the anti-terrorism agenda.

In India, human rights institutions (HRI) are the formal police accountability instruments. It is important to understand the way in which HRI operate from both a regulatory and an organisational culture perspective.

The role of HRI in South Asia:

- i. Oversight of policing, permitting review of police action and complaints against them, and forwarding for prosecution where deemed appropriate by the HRI
- ii. No oversight powers in relation to military and paramilitary agents
- iii. No oversight where police have specific immunity from prosecution without state sanction

Not surprisingly, the organisational culture of HRI is shaped by their membership and workforce. In India there is a particular phenomenon of former police and ex-military officers becoming members of HRI, and much of the investigative staff are police. These skills do not exist extensively outside of the police. Nonetheless this has a significant impact on the organisational culture of HRI. For example in the context of counter-terrorism, this has seen the idea that 'proper' policing cannot wholly and always be 100% human rights compliant, become a widely held consensus. In particular there is a clear message that effective counter-terrorism may be incompatible with human rights, but that this is a necessary aspect of the measures required. When the representatives and former representatives of HRI are speaking in these terms, it not only indicates the stance taken by those institutions, but sets the tenor for broader public and political debate about these issues. So this is one important way in which counter-terrorism policing in India operates within a culture of impunity that wrongfully permits policing which undermines human rights and the rule of law.

This culture of impunity has also been strengthened through the enactment of specific immunity provisions in law. Police are immune from prosecution if they were acting in good faith in accordance with the legal framework. This places the onus of proving an *absence* of good faith on the prosecution, an incredibly difficult task. Additionally the law includes a provision of state sanction for prosecution even where evidence has been gathered sufficient to bring a matter for prosecution. This combination of a public tone of permissiveness for police action and legislative protection are strong elements of the culture of impunity that surrounds counter terrorism and other policing in India.

The phenomenon of fake encounters in India demonstrates the extent to which this culture of impunity has provided police with protection for even the most heinous acts, enabling murder, rape, and other serious human rights violations by police to go unpunished. Extra-judicial killings by police are known as 'encounters' and are commonplace. An encounter is an engagement between the police and someone who is resisting arrest and is usually a sudden and unexpected meeting. There are even police 'encounter specialists' who are expert in dealing with suspected terrorists and gain their title from their experience in the field. In other words the more an officer kills, the more specialised they become. Widely accepted by the public, encounters are rarely questioned or investigated, and then often without serious concern to establish the nature of the incident and the legality of the killing. Moreover encounter deaths are one marker for police performance indicators, which further licenses this practice.

This practice has led to 'fake encounters', being a premeditated and staged gun battle which ends in the killing of the 'suspect'. The police later claim that the victim was a suspected terrorist or militant. 'Fake encounters' are often used to eradicate criminals and other unwanted members of society, usually from marginalised communities. However these 'terrorists' also turn out to be children, peaceful protestors or unarmed opponents and dissidents, not terrorists.

In India the phenomenon of faking encounters is so familiar that it rarely rates public concern. One notable exception was the killing of a Muslim man and his wife by police forces in Gujarat (India) in November 2005. Allegedly belonging to the banned Kashmiri terrorist group Lashkar-e-Toiba and plotting to kill the state chief minister of Gujarat, it later transpired that Sohrauddin Sheikh had been killed in a fake encounter, and his wife subsequently, with no evidence to support the allegations. As the chilling details were revealed by a brave police Inspector who spoke out against the wishes of her superiors, what emerged was a tale of cold-blooded murder, police cover-up and political protection from the highest authorities. Media coverage and public debate resulted in unusual pressure to hold the officers involved accountable in this case. However this level of public interest was rare.

In the name of security?

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The staggering degree of the violation involved in fake encounters is matched only by its scale. This practice is incredibly widespread. Yet it cannot be quantified through reliable data. Although there are legal obligations and internal rules that require investigations into all deaths in police custody, these are routinely ignored. Fake encounter killings are all the more likely in an environment where disappearances are often attributed to the police. For example an estimated 10,000 people have gone missing in the conflicted territory of Jammu and Kashmir alone, which is policed through a combination of military forces and civilian police.

Encounters are a longstanding practice by Indian police. However they have been wrongly legitimated by the international anti-terrorism agenda which prioritises a particular notion of security by force.

One of the key arguments for police accountability is that it is essential to democratic policing. But there is a difference between democracy and populism, or public opinion. The public and political fear created by terrorism lends popular support to methods of police that include gross human rights violations such as the killing of suspects. In India this support has been further entrenched by the glorification of encounters in film and television.

Our challenge therefore is not just to ensure the establishment and implementation of effective, independent police accountability mechanisms, but also to build support for this within the community.

There are a number of clear, practical steps that can be taken to improve accountability of counter-terrorism policing.

- i. Define the role of police, particularly in relation to other forces involved such as military, paramilitary and private security agents.
- ii. Evaluate the role and audit the activities of police regularly.
- iii. Ensure strict adherence to internal reporting and investigation procedures.
- iv. Extend all oversight and monitoring mechanisms to include counter-terrorism.
- v. Establish special oversight mechanisms in relation to special counter-terrorism policing units.

True Security is human rights protection

Beyond such practical steps, there must be a will to ensure their effectiveness. We have to convince not just the formal institutions of government and the police, but also the public that true security comes from human rights protection.

Civilian police, and the communities they are policing need to understand human rights not just as ideals but as practical tools that are designed to provide security.

In concluding, one remaining issue is the relationship between accountability and effectiveness. Perhaps civil society needs to explain that relationship better, more clearly, in the work that we do. We need to forge the link between human rights compliance because of obligation (to international law) and their utility in ensuring safer, secure societies.

But perhaps we also need to question whether the relationship between accountability and effectiveness is one of interaction, or rather one of parallel. Accountability is not just about keeping police powers in check. It also ensures that the police obtain and maintain legitimacy for those powers in the eyes of the community.

In the context of countering terrorism, it is not just that some police practices are clearly violating human rights and undermining the rule of law. It is also that these practices are patently counter-productive. At a time when successful policing relied upon good, reliable intelligence, police should be building strong relationships with the communities in which they operate. They cannot do this if they simultaneously alienate and isolate those communities through police practice.

