

ANTI-TERRORISM LEGISLATION AND HUMAN RIGHTS: A COMPARATIVE ANALYSIS OF THE COMMONWEALTH MODEL LAW

Background paper for Working Session Three¹

"He who battles monsters must beware, lest a monster he becomes." -Friedrich Nietzsche

INTRODUCTION

Although terrorism is not a new phenomenon, it took on a new meaning in terms of international responses after September 11, 2001. Following decades of resolutions against terrorism by the United Nations (UN) General Assembly, the UN Security Council passed Resolution 1373 in 2001. The Resolution mandates states to develop strategies to prevent and punish terrorist acts and establishes a Counter Terrorism Committee to monitor implementation. All states were required to report to the Committee within 90 days on actions taken.

Attempting to live up to the mandate of Resolution 1373 to ensure that "threats to international peace and security" were combated "by all means", states have passed anti-terror laws that neglect their obligations under international human rights law. In recognition of the violations of human rights which resulted from the pressures brought on by Resolution 1373 across the globe, in 2003 the Security Council passed Resolution 1456. It urged states to "ensure that any measure taken to combat terrorism comply with all their obligations under international law ...in particular international human rights, refugee and humanitarian law."

There is no question that states must follow the imperatives of Resolutions 1373 and 1456. Security Council resolutions are decisions arising under Chapter VII of the UN Charter, which Article 25 of the Charter obliges all UN member states to follow. Article 103 even provides that if there is any inconsistency, the obligation to implement Security Council resolutions prevails over all other treaty obligations.

Thus, while states must pass new laws or amend existing ones to implement Resolution 1373, they are equally bound to respect human rights in combating terrorism. And while various initiatives (such as the Council of Europe Convention on the Prevention of Terrorism issued in October 2005 and the UN treaty envisaged at the 2005 World Summit) have sprung up in the form of cooperation between states in this area, it is imperative that human rights standards not be forgotten in the process.

As a grouping of fifty-three states with many shared legacies not the least of which is similar legal systems, the Commonwealth could greatly impact the observance of human rights within the context of fighting terrorism. In 2002 the Commonwealth Secretariat issued a Model Legislative Provision on Measures to Combat Terrorism (model law) that was based on the Report of the Expert Working Group on Legislative and Administrative Measures to Combat Terrorism.

Unfortunately this model law doesn't measure up to international human rights standards because rather than promoting best practices, it describes existing measures in Commonwealth states. The anti-terror laws in many Commonwealth countries don't adhere to the requirement of legality (which says that criminal offences must be clearly defined when an offence takes place so that the accused can know s/he is committing an offence) the right to a fair trial, freedom from torture, and freedom from arbitrary and prolonged detention.

This paper analyses the model law with respect to these human rights norms, and compares it with the anti-terror laws in Australia, Canada, and the United Kingdom. The laws of these countries suffer in many instances from similar failings as the model law although all have some positives, particularly the Canadian law. The focus is on three countries within the Commonwealth that are commonly looked to for good practice to be adopted elsewhere. At the time this paper went to press in November 2005, Australia and the United Kingdom were both considering changes to their laws governing terrorism that might among other things extend maximum detention times for terrorist suspects. Their existing laws were analysed here.

¹ Draft paper prepared by Swati Mehta and Stephanie Aiyagari, *Commonwealth Human Rights Initiative*, 2005.

Taking the position that Commonwealth states must not ignore international law while combating the very real threat of terrorism, nor should they trade their citizens' freedom in the name of security, this paper urges the Commonwealth to adapt its model law on anti-terrorism to more accurately reflect the ideal of human rights to which they have on so many occasions committed themselves.

PART I: BACKGROUND - TRADING FREEDOMS FOR SECURITY

"They that can give up essential liberty to obtain a little temporary safety deserve neither liberty nor safety."

-Benjamin Franklin, Historical Review of Pennsylvania, 1759

INTERNATIONAL LAW

Human security is undoubtedly important, and is one of the main duties of the state. States rightly protect citizens' right to life through laws that accord with their constitutions. Security does not however exist in a vacuum, and states also have a duty to treat citizens in accordance with fundamental norms and values. In international law, these fundamental values and norms are found in custom, treaties, court decisions, the writings of legal scholars and the decisions or determinations of international institutions. As states willingly take on obligations in this sphere, international law has become increasingly important as a source of legal authority over the last fifty years.

Of the many treaties and conventions signed and ratified by nation states that oblige them to adhere to standards which respect the rights of the individual, the International Covenant on Civil and Political Rights (ICCPR) is extremely influential. More than 151 countries have ratified or acceded to it, including 37 Commonwealth countries. These countries are as obliged to abide by its provisions, as they are to implement Security Council Resolution 1373².

In order to fight terrorism which threatens human security and sometimes the security of the state as well, states all too often succumb to the temptation to stop recognising the full human rights of the individual because they see human rights as an obstacle to efficiency in investigating and prosecuting terrorist crimes. Under international law any restrictions on fundamental rights must follow certain rules.

While states parties to the ICCPR may derogate from (temporarily suspend) some of the rights mentioned under the convention if a public emergency arises that threatens the life of the nation,³ such measures must be strictly required in that particular situation and cannot be inconsistent with states' obligations under international law. Restrictive measures may not involve discrimination solely on the grounds of race, colour, sex, language, religion, or social origin.⁴

The Human Rights Committee, the UN body charged with monitoring compliance with the ICCPR, has stated clearly that not every disturbance or catastrophe qualifies as a public emergency threatening the life of a nation⁵.

Non-derogable rights

ICCPR⁶ provides that no derogation can be made from certain rights mentioned specifically in the convention. These include the right to life,⁷ the prohibition of torture or cruel, inhuman or degrading punishment,⁸ and the freedom of thought, conscience and religion.⁹ The first non-derogable right to be considered in this paper is the principle of legality in criminal law, which requires both criminal liability and punishment to be limited to clear and precise provisions in the law that was in place and

² Although Article 103 of the UN Charter provides that to the extent of any inconsistency, the obligations to implement Security Council Resolution prevails over all other treaty obligations, there is no apparent inconsistency between the UNSCR 1373 and international obligations. In any case, UNSCR 1456 passed in 2003 mandates the states to implement UNSCR 1373 in accordance with their obligations under international law and in particular with international human rights, humanitarian and refugee laws. See S/RES/1456 (2003), operative para 6.

³ ICCPR, Art. 4.

⁴ *Id.*, Art. 4.1.

⁵ See Para No. 3; General Comment No. 29 on Article 4, ICCPR.

⁶ ICCPR, Art. 4(2).

⁷ *Id.*, Art. 6.

⁸ *Id.*, Art. 7.

⁹ *Id.*, Art. 18.

applicable at the time a proscribed act or omission took place, except in cases where the later law imposes a lighter penalty.¹⁰

The Human Rights Committee established under the ICCPR has specified that certain rights not mentioned in the list of non-derogable rights under Article 4 are nevertheless non-derogable. This is because certain rights by their very nature are peremptory norms of international law. Thus states cannot impose arbitrary deprivations of liberty or deviate from fundamental principles of fair trial, including the presumption of innocence merely because these norms are not explicitly mentioned as non-derogable principles in article 4 of the ICCPR¹¹.

It is in this context that one must consider the interaction between anti-terror laws and the specific rights¹² that flow from the ICCPR and other conventions relating to human rights and humanitarian law. This paper attempts to analyse the relevant provisions of the Commonwealth model law.

The model law was prepared on the basis of the Commonwealth Secretariat document: Report of the Expert Working Group on Legislative and Administrative Measures to Combat Terrorism. Although the introduction to the model law states that “these model legislative provisions do not represent a single approach to counter terrorism legislation that is to be adopted within the Commonwealth”, clearly any model provided by the Commonwealth Secretariat will have a strong persuasive value for countries within the Commonwealth. Consequently, a model law to address terrorism must be drafted in consonance with human rights standards, especially considering the Commonwealth’s stated commitment to human rights. If this is not the case, countries within the Commonwealth will take shelter behind those provisions of the model law that violate human rights and argue that such is required in order to enforce Resolution 1373.

¹⁰ *Id.*, Art. 15. See Part II, Principle I of this paper.

¹¹ Human Rights Committee, General Comment No. 29, CCPR/C/21/Rev.1/Add.11, 2001) para. 11.

¹² Some of these rights are enumerated in *The Digest of Jurisprudence of the UN and Regional Organizations on the Protection of Human Rights While Countering Terrorism* prepared by the United Nations Office of the High Commissioner for Human Rights.

PART II - COMPARATIVE ANALYSIS OF THE MODEL LAW – CASE STUDY 1: PRINCIPLE OF LEGALITY

“He that would make his own liberty secure must guard even his enemy from oppression; for if he violates this duty, he establishes a precedent that will reach to himself”.

-Thomas Paine (1737-1809)¹³

GENERAL PRINCIPLES

Criminal conduct requires a precise legal definition before an offence can be said to have been committed. This principle is formulated as a Latin maxim *nullum crimen sine lege, nulla poena sine lege*. No person can be punished for an act that was not specifically defined as a criminal act under the criminal law at the time the act was committed. This means that crimes must always be precisely defined so as to avoid arbitrary enforcement.

Article 15 of the International Covenant on Civil and Political Rights postulates that “No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence, under national or international law, at the time when it was committed.”

The Human Rights Committee has repeatedly expressed concern “that the relatively broad definition of the crime of terrorism and of membership of a terrorist group under the State party’s Criminal Code may have adverse consequences for the protection of rights under article 15 of the Covenant, a provision which is non-derogable under article 4, paragraph 2.”¹⁴ Similarly, the European Court of Human Rights (ECHR) observes that article 7 (which is similar to article 15 of the ICCPR) “should be construed and applied, as follows from its object and purpose, in such a way as to provide effective safeguards against arbitrary prosecution, conviction and punishment....”¹⁵

Despite such clear guidelines from the Human Rights Committee and the example from the European Court, most anti-terror laws define terrorism or terrorist acts very broadly. This is done out of a zeal to cover all possible activities within the ambit of the law. The model law as well as the anti-terror laws of Australia, Canada and the UK all suffer from a too-broad definition of terrorism that mitigates the legality principle.

Model Law

The model law deliberately does not provide a definition of terrorism but instead restricts its definition to the terrorist act. “The members of the Expert Group¹⁶ emphasized that in this exercise, they were not in any way attempting to arrive at an acceptable international definition of terrorism, recognizing that this was a serious and complex question which was still under consideration by the United Nations¹⁷”.

The model law provides two options for defining a terrorist act. The Expert Group drew guidance from the various Security Council and General Assembly resolutions on terrorism, existing UN counter-terrorism conventions¹⁸, and the laws of Singapore, Canada, the United Kingdom and the existing Mauritius terrorism Bill. The Group found that all the definitions were comprised of two or three basic ingredients, moderated by an exclusion clause:

¹³ ‘Dissertation on First Principles of Government’. *Common Sense and Other Political Writings*.

(Ed) Nelson Adkins (1953) New York : Liberal Arts Press. p. 155

¹⁴ CCPR/CO/77/EST, 2003, para. 8.

¹⁵ *Ecer and Zeyrek v. Turkey*, ECHR, 27 February 2001, para. 29.

¹⁶ The Expert Group refers to a group of legal experts who were present in a meeting convened by the Legal and Constitutional Affairs Division of the Commonwealth Secretariat in London from 15th-17th January 2002. These participants belonged to Canada, Mauritius, Singapore, St. Kitts & Nevis, UK, and the Commonwealth Secretariat and all worked for their respective governments or the Commonwealth Secretariat). Strangely none of the participants represented civil society. It is the report of this Group - i.e. the *Report of Expert Group on Legislative and Administrative Measures to Combat Terrorism* – that form the basis of the model law.

¹⁷ *Report of Expert Working Group on Legislative and Administrative Measures to Combat Terrorism*, Criminal Law Unit, LCAD, Commonwealth Secretariat, February 2002; page 4.

¹⁸ This term refers to the 12 conventions listed in the Annex.

1. First, the definitions enumerate a list of underlying acts seen as terrorist acts.
2. Second, one or more of these acts must be threatened or committed to intimidate or threaten the population or to compel a government or international organisation to do or refrain from doing an act.
3. Third, – though this element is found in some of the legislative provisions – the requirement that the act is motivated by a political, religious or ideological cause¹⁹.
4. Many countries exclude certain acts done in pursuance of strike, advocacy and protest from the definition of a terrorist act.

At the 2005 World Summit, United Nations members resolved to agree upon a definition of terrorism in the near future. In the meantime any appropriate definition of a terrorist act in an anti-terror law must be precise and narrow while the list of excluded acts must be broad. This will avoid arbitrary enforcement against individuals and lessen the chances that a person will be tried under a much harsher legal system than ordinary criminal law, one that might allow pre-trial detention, tougher bail conditions, a lesser presumption of innocence and trial by special or military tribunals. Therefore, it is imperative that the definition of terrorism or terrorist act should not be too wide and should cover only those acts that are actually terrorist in nature.

UNDERLYING ACTS

Model law

For the Expert Group, the fundamental problem was how to craft a provision that was sufficiently comprehensive and flexible to capture the various activities of terrorists and yet avoid an overly broad definition that would extend well beyond real terrorist acts and have the potential for abuse.²⁰ After discussion the Group concluded that in order to provide countries with a comprehensive view of the issue, “*it would be best to incorporate an extensive, rather than a limited, list of underlying acts, drawn from all of the legislative provisions examined*”.

The list of acts is the same in both of the optional definition clauses provided by the Commonwealth Secretariat. The list is very broad and includes serious bodily harm, serious damage to property, acts endangering human life, and acts creating risk to health and safety of public. Acts involving mere use of firearms or explosives, releasing into the environment or distributing or exposing the public to any hazardous, dangerous, radioactive or harmful substance, are also covered. Acts intended to disrupt computer systems, communications infrastructure, banking services, transportation or other essential infrastructure are also included too, as are acts prejudicial to national security, or those intended to disrupt essential emergency services.

In merely borrowing definitions of terrorism from existing domestic legislation, the model law covers a wide range of activities that may not properly be deemed terrorist in nature. For example, protesters who spray aerosol paint on walls could be prosecuted under the model law for releasing a dangerous substance into the environment with the intent (as reasonably understood by the prosecution) of compelling a government or international organisation to do or refrain from doing any act. Releasing harmful substances into the environment can indeed be a terrorist act if it results in death or serious bodily injury, although the latter are already offences under criminal law and elsewhere in anti-terror law. It is difficult to understand why releasing harmful substances must be listed separately as underlying acts.

If Commonwealth states mimic this kind of over-breadth in defining terrorist acts, it will result in some actions being simultaneously considered offences under criminal law. Law enforcement agencies could therefore apply different standards to two individuals accused of committing similar acts. This clearly violates the principle of legality.

Rather than provide a comprehensive overview of possible acts underlying terrorism, somehow seeking a middle ground, the model law should instead provide a standard for Commonwealth states to follow.

¹⁹ *Report of Expert Working Group on Legislative and Administrative Measures to Combat Terrorism*, Criminal Law Unit, LCAD, Commonwealth Secretariat, February 2002; page 4.

²⁰ *Id.*; page 5.

Australia

Australian law²¹ does not specifically provide that mere use of firearms or explosives is a terrorist act. Neither does it cover release of harmful substances into the environment as a terrorist act *per se*. But if these acts result in death or injury to people, they could be covered within the clauses that cover acts involving death or injury to a person; if death or injury do not result, these should not be terrorist acts at all. The model law would wrongly suggest that Australian law should make these acts terrorist offences.

United Kingdom

Like the Commonwealth model, the UK law²² includes a very broad list of acts that constitute terrorism. Serious damage to property and use of firearms and explosives constitute terrorist acts; however, in not including the disruption of essential services or release of dangerous substances into the environment dangerous substances the UK definition is not as broad as the model law.

Canada

Like other laws mentioned, the Canadian law²³ also provides that an act is a terrorist act if it causes death or serious bodily harm to a person, endangers a person's life, causes a serious risk to the health or safety of public. However in criminalizing damage to property as a terrorist act, the Canadian law additionally mandates that such damage to property should be likely to either cause death, bodily harm, or to endanger a person's life, health or safety. Mere damage to property does not constitute a terrorist act in Canada law .

EXCLUSION CLAUSES

Model law

The Commonwealth model law states that an act that “disrupts any services” and is “committed in pursuance of a protest, demonstration or stoppage of work shall be deemed not to be a terrorist act...so long as the act is not intended to result in any harm referred to in paragraphs, (a), (b), (c), or (d) of subsection (2).²⁴” A possible non-sensical result in the above illustration would see a demonstrator using aerosol spray but not disrupting any services as not covered within the exclusion clause and therefore liable for committing a terrorist act.

In the model law, for a person to invoke the exception, the act disrupting the service should not be “intended to result in serious bodily harm, *serious damage to property*, endangers a person's life and creates a serious risk to the health or safety of the public.

Australia

Under Australian law, property damage (whether intentional or not) is not a terrorist offence as long as human life or public health is not placed under risk.²⁵

Australia's exclusion clause is much wider in scope than the one in the model law, covering all kinds of acts and not merely those involving disruption of services. It protects any act of advocacy, protest, dissent, or industrial action that is not intended to cause serious physical harm or death, endanger human life, or create a serious risk to the health or safety of the public.

Canada

Similarly to Australia, Canada²⁶ does not make the intention to damage property during an act of disruption of services (if it is the result of a protest, demonstration or stoppage of work) a terrorist act.

²¹ Section 100.1 of the *Criminal Code Act 1995* as amended by the *Security Legislation Amendment (Terrorism) Act 2002*.

²² Terrorism Act 2000, § 1 contains the definition of terrorism and is applied in concert with the Anti-terrorism, Crime and Security Act 2001 (ATCSA). Part V of ATCSA was replaced by the Prevention of Terrorism Act (2005).

²³ Anti-terrorism Act, Chapter 41 of the Statutes of Canada (2001), commonly referred to as Bill C-36. See § 83.01(1)(b).

²⁴ See Subsection (3) (both Option 1 and 2) of the model law. Clauses (a), (b), (c), and (d) of subsection 2 of the Model law covers act that involves serious bodily harm, *serious damage to property*, endangers a person's life and creates a serious risk to the health or safety of the public.

²⁵ Criminal Code (2003) §§ 100.1(2)(b), 100.1(2)(f).

An unusual feature among the laws studied in this paper is the Canadian exclusion of acts or omissions committed during an armed conflict that, at the time and in the place of its commission, were in accordance with customary international law or conventional international law applicable to the conflict. Similarly the activities undertaken by military forces of a state in the exercise of their official duties, to the extent that those activities are governed by other rules of international law, are also excluded.²⁷

Although the model law noted that “countries may choose narrower definitions” and “may also wish to include specific exclusion clauses such as those relating to self-determination or national liberation movements”, it could have gone farther by included this exclusion clause in the model definition, which would have persuasive value to other Commonwealth states.

United Kingdom

The UK law²⁸ is extremely wide not only because it includes a wide range of acts as terrorist acts but also because it fails to provide any kind of exclusion clause for actions committed in pursuance of advocacy, dissent, protest, demonstration or stoppage of work that may turn out to be violent in nature.

In fact, the UK Government has stated that animal rights activist should be punished as terrorists. In its consultation paper *Legislation Against Terrorism*²⁹ having posed the question whether the current, or probable future, threat from domestic terrorism could be such that special powers were needed to deal with it, the Government went on to say that *in the last 25 years the main domestic terrorist threat in UK had come from militant animal and environmental rights activists* and to a lesser extent from Scottish and Welsh nationalist extremists. That such logic can be used to justify such broad definition of terrorism with the consequent broad powers given to the law enforcement agencies would be laughable - if it were not so disturbing.

CONCLUSION

The Australian and Canadian illustrations are not presented as best examples for defining terrorism – and in fact these laws have been criticised for their wide definitions – but to show that the model law definition falls much below the standard expected of it. If the Commonwealth equivocates by on the one hand taking the position that it is the United Nation’s job to arrive at an acceptable definition, while on the other seeming to promote a very broad definition, an opportunity is missed for the Commonwealth to lead by example. The fundamental political values of the Commonwealth would surely be better served by concise definitions of terrorism so that arbitrary enforcement of terrorism laws, which are harsher than ordinary criminal ones, can be avoided. Even if the Commonwealth Secretariat chooses not to adopt any specific definition of terrorism, it should recommend that when member states do so, they don’t cast the term too broadly.

The Report of the Expert Group *is* truly equivocal. It does not critically analyse any of the legislation it considers, but merely presents options. It fails to recommend that states adhere to accepted norms of international criminal law and human rights. The Expert Group is clear that “in the domestic context, it is for each country to decide upon the sensitive and complex policy considerations relating to a definition and to adopt a legislative provision appropriate for that country.”

It may very well be true that complex policy considerations are best decided locally. Nevertheless, one of the operating aims of the Commonwealth is mutual assistance in promoting good governance, development, and human rights, and the Secretariat should remind Commonwealth members of their commitments to these principles in the Harare Declaration³⁰ and various communiqués as well as international treaties and conventions.

The Expert Group saw its role as providing general information about the structure of existing definitions of terrorism rather than suggesting ways in which future anti-terror laws or amendments

²⁶ Anti-terrorism Act (2001) § 83.01(1)(b)(ii)(E).

²⁷ *Id.*, § 83.01(1)(b).

²⁸ See note 20, *supra*.

²⁹ *Legislation Against Terrorism* CM 4178 Home Office & Northern Ireland Office December 1998 paras. 3.8-3.13.

³⁰ The Harare Commonwealth Declaration, 1991 issued by the Heads of Government in Harare, Zimbabwe.

could be framed to comport with the legality principle as required under international law. This is not to say that human rights and rule of law did not figure at all in the deliberations of the Expert Group, but it does not appear that these were given the priority and attention they deserve.

Consequently, countries such as the Bahamas that have passed legislation after the drafting of the model law have adopted the model law definition blindly. Though the model law might be an improvement over some existing laws, it is nevertheless broader than others existing definitions as shown above and it is susceptible to being abused by governments in their aim to prosecute terrorists whatever the cost.

The need to arrive at an acceptable definition of terrorism need not fall entirely on the Commonwealth's shoulders. Several possibilities have been suggested. For example Israeli terrorism scholar Boaz Ganor argues that an objective definition of terrorism is required to effectively combat the phenomenon and to enable international cooperation. He suggests terrorism be defined as "the intentional use of or threat to use violence against civilians or against civilian targets, in order to attain political aims."³¹

Liberty, a U.K. based civil liberties group argues that: "Any definition of terrorism should be linked to the issue of democracy. So that terrorism should be defined as extremely serious violence which is designed to undermine the democratic process. It is fundamental that human rights exists in a democratic context ...the justification for any special laws ought to lie in the preservation of that democracy."³²

While there may exist many problems with these definitions they might on the other hand be helpful for achieving a consensus definition of terrorism. Clearly, there have been better formulations of terrorist acts than what the model law produced. While defining terrorism is not easy, the Commonwealth could have achieved a more narrow and precise definition that would live up to the internationally accepted standards already agreed to by Commonwealth states. The broad options it offers instead run the risk of invoking special powers against individuals who are thereby significantly impaired in defending themselves under the parallel system.

³¹ Boaz Ganor (undated) *Defining Terrorism: Is One Man's Terrorist Another Man's Freedom Fighter?* available at <http://www.ict.org.il/articles/define.htm#proposal>.

³² See "Anti-terrorism legislation in the United Kingdom" available at <http://www.liberty-human-rights.org.uk/resources/publications/pdf-documents/anti-terrornew.pdf>.

PART III - COMPARATIVE ANALYSIS OF THE MODEL LAW – CASE STUDY 2: ADMINISTRATIVE DETENTION

In modern legal systems, courts are entrusted with the power to decide whether an individual may be deprived of his liberty by the state. The purpose is usually as punishment for a crime, but it can also take place leading up to a trial or for limited periods of police questioning.

In some cases the executive can authorise detentions for sectors of society needing protection, or by whom society will be threatened or inconvenienced. For example, refugees and asylum seekers are routinely held in detention prior to processing their claims.³³ In addition, in many countries, political dissidents and those deemed to be a threat to national security are also held by the executive under “preventive detention” or “internment” provisions. These are all methods of “administrative” detention because the executive authorises them rather than a court.

PREVENTIVE AND INVESTIGATORY DETENTIONS BY THE EXECUTIVE

Although the executive may sometimes authorise detention without trial for preventive and investigative purposes, international law requires that administrative detention be subject to judicial control, that the accused be told the charges against him/her at the earliest opportunity, and that the duration of pre-trial detention be limited.³⁴

The UN Human Rights Committee has clarified that protection from arbitrary detention and judicial control over administrative detention are essentially non-derogable rights, even during terrorism investigations, although they are not enumerated in Article 9 of the ICCPR.³⁵

Model Law

The model law in effect encourages derogation from the ICCPR without explaining why such a drastic step is necessary. It allows a police officer to apply *ex parte* (without informing the person who is to be detained) to a judge of the High Court for a detention order to prevent a terrorism offence or prevent interference in a terrorism investigation.³⁶ Such an application can only be made by a police officer upon the written consent of the Attorney General. Furthermore the initial period of detention cannot exceed 48 hours, and the total duration of detention when any court-granted extensions are added cannot exceed 5 days in total.

The Expert Group fails to make it clear why such detention powers are imperative in an anti-terrorism law. It is unclear how the Expert Group reached the conclusion that “depending on the particular circumstances in the country, it may be important to have such a power in order to react effectively in some situations.”³⁷ The Expert Group merely mentions that it reached this conclusion “after lengthy discussion.”

While many States may argue that such powers are necessary to implement Resolution 1373, the Resolution itself does not mandate including such powers in the anti-terror laws. Subparagraph 2 (e) obliges states to ensure that those who engage in terrorist activity face trial, but it does not require the adoption of any specific forms of investigative measures. Clearly, the decision of the Expert Group to include investigative detention provisions, which have been adopted or are under consideration by some countries, is not required by Resolution 1373.

Detention Of Suspects And Non-Suspects

Model law

³³ Many developed countries have put in place excessive restrictions on refugee and asylum regime including detention of non-nationals and asylum seekers. This shall be dealt with separately.

³⁴ ICCPR Art. 9.

³⁵ Human Rights Committee (2001) General Comment 29.

³⁶ §21.

³⁷ *Report of Expert Working Group on Legislative and Administrative Measures to Combat Terrorism*, Criminal Law Unit, LCAD, Commonwealth Secretariat, February 2002; page 16.

The model law preventive detention provision allows the police to detain a person (even if s/he is not likely to commit a terrorist offence) merely on suspicion that s/he may interfere with the investigation. This implies that a person who is not even a suspected terrorist but for example knows that a terrorist offence is being investigated, may be detained for a long period to prevent him/her from disclosing the fact of the investigation to a suspected terrorist or his/her allies. Under such a broad provision, the person detained could be an internet service provider who has been questioned by the police and has knowledge that the police are investigating one of his/her customers, or could include members of a suspect's family.

The first danger of such a provision is that an investigating authority can seek detention of any person, not necessarily because s/he has committed any offence but because the investigating authority believes that s/he may interfere with an investigation. Thus a person not even suspected of terrorism may be held on the same terms as a terrorist suspect.

Secondly, the need to seek the Attorney General's consent for such a detention before applying to a high court judge does not necessarily safeguard the process from abuse. Experience has shown that the Attorney General can be corrupt or co-opted into believing the government position that it is expedient for investigation's sake to detain people even with insufficient proof. Courts may also defer to the government whom it believes is in a better position to judge whether a person is a security threat. Therefore broad provisions that permit administrative detention of non-suspects without charges are extremely dangerous. It is a matter of concern that the Model law permits this.

United Kingdom

In the UK a person must be a terrorist suspect before the government can detain him/her under terrorism law. The model law should have followed this more liberal example from a Commonwealth country rather than suggest that states follow regressive laws that treating suspects and non-suspects the same.

Canada

The Canadian anti-terror law allows preventive detention of a person suspected of a terrorist activity up to 72 hours. The Anti-terrorism Act also allows 'investigatory detention' during which anyone can be detained for an unlimited period if s/he invokes the right to silence.³⁸ Since a person who need not even be a terrorism suspect could potentially be detained indefinitely due to refusing to answer a question, it is of little comfort that detained persons have a right to retain and instruct counsel at any stage of proceedings.

Australia

Law enforcement authorities in Australia may detain people to prevent or investigate terrorist crimes and gather intelligence. A person may be deprived of his/her liberty for 7 days merely because the investigating authority believes that s/he has information to give or may alert another person about the investigation into a terrorist offence.

Prolonged Or Indefinite Detention Periods

Model law

The model law fails to address the problem that application for detention orders can go on *ad infinitum*. There is no provision that bars a police officer from making repeated applications to a court for preventive detention of the same person even after the expiry of 5 days on the ground that continued detention is needed to prevent an act of terrorism or to interference in an investigation.

United Kingdom

Currently detention of a person up to a period of 14 days is permissible³⁹. The police may initially detain a person without charge up to a period of 48 hours. Thereafter an application has to be moved before a court for the extension of the period up to 7 days. The court may extend the period to seven

³⁸ See section 83.28 and 83.29 of Bill C-36 of Canada.

³⁹ Initially, it was for a period of seven days but a recent amendment to Part III of Schedule 8 to the Terrorism Act 2000 by Section 306 of the Criminal Justice Act 2003 extends the maximum period of detention for which a terrorist suspect can be held without charge from seven to fourteen days. Section 306 of the Criminal Justice Act 2003 was brought into force by Commencement Order on 20 January 2004.

days if reasonable grounds exist for believing that the further detention of the person concerned is necessary to obtain relevant evidence and the investigation is being conducted diligently and expeditiously⁴⁰. Thereafter a further application has to be made before the court to extend the period up to a maximum of 14 days from the date of detention.

The European Court of Human Rights in the Brogan case⁴¹ has held that preventive detention in order to enable further investigation into a given case is in accordance with Article 5 (1)⁴². However, the period of detention should not be very long and the person detained should have a right to consult a lawyer and have enough privacy to do so⁴³. In the Brogan case, the court specifically held that the detention period of 4 days and 6 hours violated Article 5 (3) of the European Convention. Article 5 (3) corresponds to Article 9 (3) of the ICCPR, which requires that a person arrested or detained on a criminal charge shall be brought promptly before a judge.

When the Brogan case was decided, there was no provision for judicial oversight. Current UK law allows extension of detention orders after 48 hours only with a court's permission. Nevertheless the 14-day period without charges is long and violates the spirit of the ICCPR and the European convention. In spite of this and enormous political opposition the government's Terrorism Bill 2005 seeks to extend the detention period to 90 days.

Since access to counsel is restricted by the anti-terrorist laws, the possibility of the detaining authority violating the procedural rights of the person detained becomes even greater as the permissible detention period lengthens, as does the risk of torture, which can be more easily hidden. Further, once the person is released, nothing prevents a constable from arresting him/her repeatedly on the same suspicion as before without any requirement that charges be brought.

Canada

Although the law provides for judicial control over administrative detention, even after the expiration of this period, the release of the suspect is made conditional upon his/her agreeing to abide by such restrictions as a judge imposes. Refusal to abide by these conditions can result in imprisonment without trial for up to a year.⁴⁴ Upon the expiration of the year of imprisonment, the individual could be re-arrested under the section and detained for an additional year. This process of re-arrest and imprisonment could continue in perpetuity.

Australia

The Australian Security Intelligence Organization Amendment (Terrorism) Act 2003 (ASIO Act) authorises the Director-General of the Australian Security Intelligence Organisation (ASIO) to seek the Minister's consent to request the issue of a warrant by the appropriate authority for detention of a person for up to seven days.⁴⁵ The Minister required to give consent should be satisfied that if the person is not taken into custody and detained immediately, s/he may alert a person involved in a terrorism offence that the offence is being investigated; or may not appear before the prescribed authority; or may destroy, damage or alter something the person may be requested to produce in accordance with the warrant.⁴⁶

The law violates the prohibition against prolonged executive detentions as it clearly provides that a warrant may be issued against the same person even if s/he has already been detained section for the maximum period of seven days. By implication a person may be detained ad infinitum without any charges, as long as fresh warrants are issued. The Minister's consent that is required to make an application before the appropriate authority is no guarantee against abuse. Instances in the recent past abound across the Commonwealth where Ministers have thought it expedient to allow detention of persons based on the flimsiest of evidence.

⁴⁰ See paragraph 32 of Schedule 8 of the Terrorism Act, 2000.

⁴¹ Brogan v/s UK; (1989) 11 EHRR 117.

⁴² Article 5 of the ECHR is similar to Article 9 of ICCPR and provides that every one has a right to liberty.

⁴³ *Brennan v. The United Kingdom*; Appl. No. 39846/98 decided on 16 October 2001.

⁴⁴ C-36 (2001) § 83.3.

⁴⁵ Australian Security Intelligence Organisation (ASIO) Amendment (Terrorism) Act (2003) No. 77, *Division 3 – Special powers relating to terrorism offences*.

⁴⁶ ASIO Act, § 34C(3)(c)(i)-(iii).

Access To Counsel

Model law

The model law does not include any provision allowing the detainee access to counsel or right to inform the family about the detention. The presence of the lawyer undoubtedly goes a long way to ensuring that the detaining authority does not violate the rights of the detained person. Failure to include such a provision in the model law could increase the chances of torture occurring in the Commonwealth during the war on terror. Failure of the model law to provide such an important safeguard to ensure that rights of the detained persons are not violated is, to say the least, disturbing.

United Kingdom

The UK law goes a step further than the model law in so far as it does envisage access to counsel and the right of the detainee to inform a person of his/her choice about his/her detention. Nevertheless, the detainee may be denied the right to access a counsel or inform someone about his/her detention for the first 48 hours.⁴⁷ As an additional safeguard, a person can be detained incommunicado or denied access to counsel only under specified conditions where the police officer is under the belief that: the contact may interfere with or harm evidence or any other person, alert other people who have not yet been arrested for a serious offence, hinder the recovery of property, make it more difficult to prevent an act of terrorism, or interfere with the gathering of information regarding acts of terrorism.

Although the UK law is better than the model law in so far as it allows access to counsel, a provision denying access to counsel and providing for incommunicado detention for even a limited period can increase chances of torture and therefore should be avoided. In any case, the detained person can consult with her/his counsel only in the sight and hearing of a police officer.⁴⁸ This effectively denies meaningful access to counsel since both lawyer and client may be hesitant to speak freely in the presence of a police officer.

Canada

Canada does not place any restrictions on the access to counsel during detention or in the course of questioning that might lead to 'investigatory detention.' It is to be congratulated because the presence of counsel increases the chance that the right to silence will be respected, as well as reduces the chance that detainees are mistreated or tortured.

Australia

The Australian Act severely limits the right to access to counsel. Under the Act, a detained person has the right to contact a lawyer of his choice but only if the government approves of that lawyer. Therefore a detained person has to inform the government of the identity of the lawyer that s/he proposes to contact and suffer the consequences if the lawyer is not known by name. Further, the investigating authority has the power to prevent the detained person from contacting the lawyer, if it is satisfied, on the basis of circumstances relating to that lawyer, that someone may be alerted to the fact that a terrorism offence is being investigated, or something that the person may be requested to produce in connection with the warrant may be destroyed, damaged or altered.⁴⁹ Also, the Act allows questioning to begin prior to the arrival of the lawyer chosen by the detainee.⁵⁰

The Act further provides that the contact between the counsel and the detainee must be capable of being monitored.⁵¹ During questioning itself, the lawyer cannot interject or object to questioning, nor can s/he actively advise the client, but has to wait till the expiry of the eight-hour questioning block. If the lawyer "disrupts proceedings" by doing anything other than requesting clarification of a question, s/he can be ejected.⁵² Further, if a lawyer communicates any information about the client's detention or questioning to any entity other than the Federal Court, the lawyer has committed an offence punishable by up to five years' imprisonment.⁵³ All of this effectively denies the right to meaningful

⁴⁷ See Para 6,7 and 8 of Schedule 8, Terrorism Act 2000, UK.

⁴⁸ Terrorism Act 2000, Schedule 8, para. 9.

⁴⁹ ASIO Act (2003), § 34TA.

⁵⁰ *Id.*, § 34TB.

⁵¹ *Id.*, § 34U(2).

⁵² *Id.*, §§ 34U (3), (4), and (5).

⁵³ *Id.*, § 34U(7).

access to counsel and increases the possibility of torture. The right to access a counsel exists effectively only on paper in contravention of the international law.

DETENTION OF NON-NATIONALS INCLUDING ASYLUM SEEKERS

General Principles

Foreigners and asylum seekers have special rights during administrative detention when compared to criminal or terrorist suspects.

Treatment of non-nationals by the state involves a variety of international norms and laws. The prohibition against discrimination on grounds of race, colour, sex, religion, political opinion, and national or social origin is a core human rights norm considered to be of such compelling character that it overrides other norms and is binding worldwide (*jus cogens*).⁵⁴ The ICCPR also clearly specifies that all persons within its territories are to be treated with respect and without discrimination on the basis of race, colour, sex, religion, political opinion, and national or social origin. The Refugee Convention defines who is a refugee and her/his rights of asylum and treatment in a country. The Universal Declaration of Human Rights also provides a right to seek asylum. For our purposes, the relevant rights are:

1. Right to seek asylum

A person may seek asylum in a country other than his/her own as a 'refugee'⁵⁵. A person who leaves her/his country of origin on a well-founded fear of persecution generally needs asylum in another country and remains there either permanently or at least on a temporary basis pending resettlement elsewhere. It also implies protection, by virtue of the principle of non-refoulement (return), against expulsion or return to a country where s/he has reason to fear persecution⁵⁶.

2. Prohibition of imposing penalties on illegal entry of asylum seekers

The Refugee Convention prohibits penalties being imposed on refugees present in or entering a country of asylum illegally, provided they come directly from a territory where their life or freedom have been threatened, present themselves without delay to the authorities, and show good cause for their illegal entry.⁵⁷

3. Prohibition against discrimination

The Refugee Convention further provides that a refugee must be treated without discrimination as to race, religion or country of origin.⁵⁸ The ICCPR⁵⁹ and the International Convention on the Elimination of All Forms of Racial Discrimination⁶⁰ (CERD) also prohibit discrimination on the basis of race, religion and country of origin.

⁵⁴ The doctrine that some principles form a body of "higher" law of such compelling character that it overrides other law is embodied in Article 53 of both the 1969 and 1986 Vienna Conventions on the Law of Treaties and affirmed in the International Court of Justice *Nicaragua* Case, 4 ICJ Reports (1986) 100.

⁵⁵ Article 14 of UDHR provides the right "to seek and to enjoy in other countries asylum from persecution." Article 1 A (2), of the Refugee Convention read with Protocol relating to the Status of Refugees, 1967 defines refugee as a person who "owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable, or owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence as a result of such events, is unable or, owing to such fear, is unwilling to return to it."

⁵⁶ See "*Note on Asylum*" EC/SCP/4. Principle of non-refoulement prohibits a state party from returning or expelling a refugee or a person to country where s/he may be tortured or persecuted "on account of his [or her] race, religion, nationality, membership of a particular social group or political opinion". See Article 31(1) of the Refugee Convention and Article 3 of the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment.

⁵⁷ Refugee Convention, Art. 31.

⁵⁸ *Id.*, Art. 3.

⁵⁹ ICCPR, Art. 26.

⁶⁰ Art. 2.

Comparative Analysis

Model law

The model law and the Report of the Expert Group is shocking in its blatant disregard for states' international obligations relating to refugee protection. Section 38 of the model law gives the executive three kinds of powers:

1. The power to refuse entry to the country,⁶¹
2. The power to expel a person from within the country,⁶² and
3. The power to detain a person and place her/him in a vessel/aircraft leaving the country.

Although the model law does not use the words non-national or refugee for persons who are to be refused entry into a country or asked to leave it if already present, it is clear that the relevant sections cannot apply to citizens of a nation. In the provisions relating to refusal of entry or expulsion, the model law does not recognise asylum seekers and refugees as groups needing special protection.

Although asylum seekers have a right not to be returned to countries where they fear persecution, the model law completely fails to require any decision to expel refugees to accord with due process of law.⁶³ The model law does not allow refugees to submit evidence in their own defence or give the requisite right to appeal a negative decision or allow access to counsel.⁶⁴ All these safeguards are mandated by the Refugee Convention and cannot be denied to a refugee unless there are compelling reasons of national security. The Model law ignores all of this and merely provides for denial of admission into the country or expulsion without any of the safeguards required by international law.

The model law, contrary to the international position, mandates that once the Minister asks someone to leave the country, s/he may be detained prior to her/his removal from the country for an unlimited period. It provides for no judicial review of this detention. Since *refoulement* is prohibited under international law, many countries could end up detaining non-nationals indefinitely because they are obligated under international law not to expel them. Such cases could easily go unnoticed in the world envisioned by the model law, which provides no court to oversee the process.

United Kingdom

In the past, UK law allowed indefinite detention of non-nationals. Section 21(1) of the Anti-terrorism, Crime and Security Act 2001 (ATCSA) empowered the Secretary of the State to issue certificate if s/he reasonably believed that the non-national's presence in the country was a threat to national security or suspected that the person was a terrorist.

Once a person was 'certified', the law allowed such a person to be detained indefinitely, if s/he could not be deported or extradited because of a point of law or other "practical considerations"⁶⁵. Recognising that this contradicted UK obligations under laws of the European Union, the UK declared its intention to not be bound by ("derogating" from) Article (5)(1)(f) of the European Convention on Human Rights which required the UK to respect the life and liberty of people within its jurisdiction.⁶⁶

In a landmark case⁶⁸ referring to foreign terrorism suspects held in Britain without charge, the Law Lords declared on 16 December 2004 that indefinite detention of foreigners was a breach of human rights under article 5 of the European Convention on Human Rights and the implementing Human Rights Act (1998) thereby declaring the derogation from Article 5 invalid. As a response to this ruling, the Prevention of Terrorism Act (2005) was passed which allowed the Home Secretary in an emergency to unilaterally detain suspects (citizens or foreigners) to prevent them from fleeing, subject

⁶¹ § 38(1).

⁶² § 38(2).

⁶³ Refugee Convention, Art. 32(2).

⁶⁴ *Id.*

⁶⁵ *Id.*, § 23(1).

⁶⁶ See The Human Rights Act 1998 (Designated Derogation) Order 2001; Statutory Instrument 2001 No. 3664. Article 5 of ECHR is similar to Article 9 of ICCPR and both guarantee right to life and liberty.

⁶⁷ See The Human Rights Act 1998 (Designated Derogation) Order 2001; Statutory Instrument 2001 No. 3664.

Article 5 of ECHR is similar to Article 9 of ICCPR and both guarantee right to life and liberty.

⁶⁸ *A and others v. Secretary of State for the Home Department*, available at: <http://www.publications.parliament.uk/pa/ld200405/ldjudgmt/jd041216/a&others.pdf>

to judicial confirmation within a week. Measures ranging from house arrest, electronic tagging, curfews, and restrictions on mobile phone and internet can be imposed on a suspect. Although redress to the courts is available, an accused person does not necessarily have access to the evidence against him/her in making an appeal.

The Prevention of Terrorism Act (2005) expires in November 2005, and new legislation⁶⁹ is being debated that would extend the time suspects could be held without charge to up to 90 days.

It cannot be disputed that in cases where a person is suspected to be a security threat (although it can't be proven) and cannot be deported or extradited because of international obligations under the Refugee Convention or the Convention Against Torture, the government is facing a difficult problem. But since (non-deportable) citizens can also be a security threat states have no excuse for failing to devise methods of handling such persons. Similarly, the Commonwealth should point the way to best practice with regard to the handling of non-nationals perceived as security threats in ways which respect international refugee law. Instead the model law sought the lowest common denominator in terms of state practice. Expediency for the state should not be achieved at the expense of refugee protection and non-discrimination principles.

An appeal against certification can only be filed in Special Immigration and Appeals Commission (SIAC). The SIAC has wide discretion in making its rules of procedure for appeals⁷⁰ and rules can be made to give the Commission such ancillary powers as are deemed necessary.⁷¹ "Proceedings may be carried out in the absence of the applicant, the applicant's lawyer or both. Evidence can also be given without the applicant or his legal representative being present. Moreover, the reasons for decisions can be withheld."⁷² Only a very limited right of appeal to the Court of Appeal is allowed on points of law.

Although detention is now limited to 14 days,⁷³ nothing prohibits the Secretary of State from issuing repeated certificates against a certified person, "whether on the grounds of a change of circumstance or otherwise."⁷⁴ Even worse, the ability of the SIAC to overturn a Secretary of State's decision concerning certification is doubtful. Law Lords have deferred to the government in matters of national security, saying what is "conducive to public good" in the Immigration Act 1971 is primarily a matter for the Home Secretary to determine.⁷⁵

Australia

Australia has a policy of mandatory detention of all unauthorised entrants. The detention requirement remains in force until the person is either determined to have a lawful reason to remain in Australia - such as being an asylum seeker who is entitled to a refugee protection in Australia - or is removed or deported from Australia. Consequently, an asylum seeker may be detained for life if s/he is not found eligible to be a refugee on ground of security risk and cannot be deported because no other country is willing to accept him/her. A similar thing could happen to a foreign terrorist suspect who the government can't prosecute due to insufficient evidence, but whom it likewise can't deport to another country where the suspect is likely to face persecution. Both situations contravene international law against arbitrary detention as provided by Article 9 of the ICCPR.

The term 'arbitrary' includes not only actions that are unlawful *per se* but also those which are unjust or unreasonable even if lawful⁷⁶. The jurisprudence of the Human Rights Committee indicates that, to avoid the taint of arbitrariness, detention must be a proportionate means to achieve a legitimate aim, having taken into consideration whether there are alternative means available which are less restrictive of rights⁷⁷. The Executive Committee of the High Commissioner for Refugees Programme [ExCom] lists the circumstances that may make it necessary to detain asylum seekers:⁷⁸

⁶⁹ Terrorism Bill 2005.

⁷⁰ Special Immigration and Appeals Commission Act 1997, Section 5(1.)

⁷¹ *Id.*, section 5(5)(b) referred to in Liberty's paper on "Anti-terrorism Legislation in the United Kingdom".

⁷² See Liberty's paper on "Anti-terrorism Legislation in the United Kingdom", page 23.

⁷³ See note 37, *supra*.

⁷⁴ ATCSA, § 27(9).

⁷⁵ *Secretary of State for the Home Department v. Rehman*, (2001) UKHL 47.

⁷⁶ Human Rights Committee, General Comment No. 8 (1982), paragraph 1.

⁷⁷ Australian Human Rights and Equal Opportunity Commission, "Submission to the Senate Legal and Constitutional References Committee inquiry into Australia's refugee and humanitarian program."

⁷⁸ See Excom Conclusion 44.

1. To verify identity; or
2. To determine the elements on which the claim for refugee status or asylum is based; or
3. To deal with cases where asylum seekers have destroyed their travel and/or identity documents or have used fraudulent documents to mislead the authorities of the State in which they intend to claim asylum; or
4. To protect national security and public order

The UNHCR *Guidelines on Detention of Asylum Seekers* state that as a general rule “the detention of asylum-seekers is in the view of UNHCR inherently undesirable⁷⁹”. The Guidelines make it clear that asylum seekers should be detained only as a last resort on exceptional grounds. If exceptional grounds exist, then detention must be prescribed by a national law which conforms with general norms and principles of international human rights law⁸⁰. The Guidelines affirm that the only permissible grounds for detention are the four grounds provided in ExCom Conclusion 44. Detention of asylum seekers for any other purpose, “for example, as part of a policy to deter future asylum seekers, or to dissuade those who have commenced their claims from pursuing them, is contrary to the norms of refugee law.”⁸¹

In its Report of 2002⁸² on Australia, the Working Group on Arbitrary Detention states that “to detain unlawful non-citizens is not, in itself, arbitrary. In case of illegal entry the need for the immigration authorities for identity checks and initial immigration screening may justify temporary detention of unlawful non-citizens, particularly if they are likely to abscond. But any deprivation of liberty must be proportionate to the aims pursued and a fair balance shall be struck between the conflicting interests: the interest of the State to implement its immigration policy and to protect the community against illegal immigration, on the one hand, and the fundamental right to liberty of the unlawful entrants, on the other hand.” The Working Group was concerned about three aspects of the system of mandatory detention of unlawful non-citizens in Australia.

1. The detention was mandatory, automatic and indiscriminate and even in cases where the immigration agent is convinced that in a particular case detention is unnecessary, s/he may not disregard the presumption created by law that all illegal entrants represent a danger to the community. Despite the fact that administrative detention is not in the form of punishment, the “conditions of detention are in many respect similar to prison conditions.”⁸³
2. The period of detention is prolonged and indefinite in the case of asylum seekers, especially those whose application has been refused by a final decision and who are awaiting removal or deportation.
3. There is no provision for meaningful access to courts to challenge the lawfulness of detention. Section 196 of the Migration Act prevents the release, even by a court, of a person in immigration detention (otherwise than for removal or deportation) unless the non-citizen had been granted a visa.

Through recent amendments to its Migration Act,⁸⁴ Australia has created a legal fiction by which certain territories have been excised from the migration zone⁸⁵ for purposes related to unauthorized arrivals. A person who becomes an ‘unlawful non-citizen’ by entering an ‘excised offshore place’ is an ‘offshore entry person.’⁸⁶ Section 198A of the *Migration Act* allows offshore entry persons to be taken to a “declared safe country” such as Nauru or Papua New Guinea. The asylum seekers are thus detained in detention facilities in the declared safe countries with restricted rights in suspect detention

⁷⁹ Introduction para 1.

⁸⁰ Guideline 3: Exceptional grounds of Detention.

⁸¹ *Id.*

⁸² E/CN.4/2003/8/Add.2; 24 October 2002.

⁸³ Report of the Working Group; E/CN.4/2003/8/Add.2; 24 October 2002.

⁸⁴ See the Migration Amendment (Excision from Migration Zone) Act 2001.

⁸⁵ The migration zone is the area of Australia where a non-citizen must hold a visa in order to legally enter and remain in Australia and is made of the land area of all the states and territories of Australia at the mean low water mark. See Fact Sheet No. 71, Department of Immigration and Multicultural and Indigenous Affairs (DIMIA)

⁸⁶ Section 5 of the *Migration Act*.

conditions. This is contrary to the mandate of the Refugee Convention [keep this phrase because otherwise it is not clear at all how the refugee convention prohibits what Australia is doing:] that prohibits imposition of penalties on refugees present in or entering a country of asylum illegally, [the following are important conditions that can't just be deleted:] provided they come directly from a territory where their life or freedom have been threatened, present themselves without delay to the authorities, and show good cause for their illegal entry.⁸⁷

Canada

Unlike Australia, Canada does not require mandatory detention of non-nationals. However, the recent *Immigration and Refugee Protection Act, 2001* significantly broadens grounds for detention to include matters such as lack of identity documents and suspicion of being a security risk. The Canadian Human Rights Commission, while recognising that “there are some instances where detention may warranted, and this is clearly provided for in international law” cautions that “detention should not be used as a shortcut to solve administrative or security screening problems.”⁸⁸

CONCLUSION

Post September 11, many countries within the Commonwealth are enacting regressive detention provisions in the name of security which need to be reconsidered and not replicated as has been done by the model law.

Some are post-offence investigative detentions, others are preventive in nature. There are still others that allow administrative detention for purposes of intelligence gathering. People are denied personal liberty for days and even months, not necessarily because the investigating authority believes that these people have committed a crime or may do so but perhaps because they have some information or link to suspected terrorists. In many cases, right to access to counsel is denied, deferred or modified so that it becomes ineffective. There are also instances where there is no judicial control over detention for a specified period.⁸⁹ The Human Rights Committee has, on numerous occasions, stated that the presumption of innocence must be respected. In order to protect non-derogable rights, the right to take proceedings before a court to enable the court to decide without delay on the lawfulness of detention, must not be diminished by a State party's decision to derogate from the convention.⁹⁰

There is ample experience within the Commonwealth to show that such detention provisions are open to abuse by authorities. Rights group Liberty alleges that “of the more than 7,000 people detained in Britain under the Prevention of Terrorism Act, the vast majority were released without charge and only a small fraction have ever been charged with terrorism related offences. Almost without exception these people could have been arrested under the ordinary criminal law.”⁹¹

The experience has been similar in many countries, which provided the context within which the Expert Group worked. The Indian experience, for instance, shows extreme abuse of detention provisions under the Terrorist and Disruptive Activities (Prevention) Act, 1987 (TADA), the predecessor to Prevention of Terrorism Act, 2002 (now repealed). The total number of detainees under TADA numbered around 76,000. Of these, 25 per cent were dropped by the police without framing charges; trials were completed in only 35 per cent of the cases and 95 per cent of these trials ended in acquittals. The conviction rate was less than 1.5 per cent and there were reports of

⁸⁷ Article 31 of the Refugee Convention.

⁸⁸ See http://www.chrc-ccdp.ca/publications/2001_ar/page4-en.asp.

⁸⁹ Malaysia's Internal Security Act, 1960 (ISA) provides for preventive detention for up to two years with the possibility of renewal every two years. Under Section 73 (1) of the ISA, police may detain any person for up to 60 days, without warrant or trial and without access to legal counsel, on suspicion that “he has acted or is about to act or is likely to act in any manner prejudicial to the security of Malaysia or any part thereof or to maintenance of essential services therein or to the economic life thereof.” After 60 days, the Minister of Home Affairs can then extend the period of detention without trial for up to two years, without submitting any evidence for review by the courts, by issuing a detention order, which is renewable indefinitely. The right of ISA detainees to be fairly charged and tried is restricted not only by the provisions in the ISA for indefinitely renewable detention without trial, but also by a June 1989 amendment removing the jurisdiction of courts to hear *habeas corpus* petitions from ISA detainees and prohibiting any kind of judicial review.

⁹⁰ See Para 16, General Comment No. 29 of the Human Rights Committee on Article 4, ICCPR, CCPR/C/21/Rev.1/Add.11, 2001.

⁹¹ See www.liberty-human-rights.org.uk/issues/terrorism.shtml.

excessive human rights violations committed by the police abusing their excessive powers under the Act.

It is in this context that the Expert Group brought out its report on legislative and administrative measures to combat terrorism. It is disturbing that the Expert Group argues for preventive detention provisions without addressing what is happening at the ground level in various countries of the Commonwealth, and ignores the need to address human rights concerns if such powers are included in a terrorist law. The Commonwealth Secretariat not only fails to warn states from curtailing civil and political rights but also gives undue importance to Resolution 1373 as if it existed in a vacuum rather than with its rider, Resolution 1456.

The Expert Group could have at minimum analysed some of the provisions of preventive and administrative detentions from a human rights and civil liberties perspective and then balanced the need for preventive detention with the right to personal liberty. The model law does not address pertinent issues of the risk of torture, incommunicado detentions and judicial control over detentions, nor does it suggest suspects have a right to know the charges/reasons for detention, right to access counsel, right to complain against torture even when in detention and the right to challenge detention and its conditions.

Rather than promoting a culture of human rights in the Commonwealth, the model law makes it even harder for advocates to work with governments to strike a proper balance between human rights concerns and security issues in making state anti-terror laws. Undeniably, the Commonwealth Secretariat should lead by example. It is under an obligation to remind states of their commitments to human rights under international law including the ICCPR and the persuasive Commonwealth Harare Declaration.

Asylum seekers and refugees fleeing their states to avoid torture and/or persecution have been among the worst sufferers in recent years. The unfortunate incidents of September 11 have been used to justify refusing entry to suspected non-nationals without affording them basic procedural guarantees to seek asylum, thus increasing the risk of *refoulement*. Where the countries do refrain from expelling asylum seekers, they have provided for indefinite detention of such persons.

The international community must strongly condemn such practices or they may become more widespread. Commonwealth voices must be loudly heard on these issues. The Commonwealth model law promotes detention, expulsion, and denial of entry in utter disregard for international law. This is odd because even Resolution 1373 reminds states to provide protection for refugees.

PART IV - COMPARATIVE ANALYSIS OF THE MODEL LAW – CASE STUDY 3: RIGHT TO FAIR TRIAL

The right to fair trial is undoubtedly an important pillar of any criminal justice system. Even though Article 4 of the ICCPR does not include the right to fair trial as a non-derogable right, the Human Rights Committee stresses the importance of this principle even during state emergency. The Committee considers certain fundamental norms as non-derogable even if they are not listed as such under Article 4 of the ICCPR. Since certain elements of the right to fair trial are guaranteed under humanitarian law during an armed conflict, the Committee rightly proceeds on the basis that there is no justification from derogation from these guarantees during other emergency situations.⁹²

Out of the many components of the right to fair trial, this paper looks at those that are of particular relevance in the context of anti-terror laws. Since none of the laws state that an accused is not entitled to a trial by court or to cross-examination, the principles examined are those that relate to presumption of innocence and the right to silence.

PRESUMPTION OF INNOCENCE

Indisputably, everyone has the right to be presumed and be treated as innocent, until they are convicted according to law in the course of proceedings which meet the minimum prescribed requirements of fairness.⁹³ Presumption of innocence is “fundamental to the protection of human rights”, and the fairness of a trial depends on observation of this guarantee.⁹⁴ Its purpose is to minimise the risk that innocent persons may be convicted and imprisoned. If accused persons are not given this benefit of doubt, any person can be charged with any crime by the state. Given the fact that the state has the resources behind it and an individual is powerless in comparison with the state, this principle is sacrosanct.

Presumption of innocence casts the burden of proof on the prosecution and the accused has the benefit of doubt. No guilt can be presumed until the charge has been proved beyond reasonable doubt.⁹⁵ The presumption of innocence contains three fundamental components: the onus of proof lies with the prosecution; the standard of proof is beyond reasonable doubt; and the method of proof must accord with fairness.⁹⁶

Reverse burden

Rules of evidence and conduct of a trial ensure that the prosecution bears the burden of proof throughout a trial. However, the onus of proof shifts such that the accused must prove elements of certain defences. For example, the accused may be required to explain their possession of certain things (stolen goods or contraband or show the possession of a licence in the case of an offence involving the performance of an act without a licence). The prosecution is not required to shoulder the virtually impossible task of establishing that a defendant does not have a licence when it is a matter of comparative simplicity for the defendant to establish that s/he has it.⁹⁷ Such explanations or requirements are known as statutory presumptions of law or fact. It is commonly accepted that statutory presumptions do not violate presumption of innocence *per se* if they are defined by law and reasonably limited. They must also preserve the right of the accused to a defence so that they must be capable of rebuttal by the accused.⁹⁸

Whether a statutory presumption, or a reverse burden as it is sometimes called, amounts to a reasonable incursion on the presumption of innocence will depend upon:

⁹² See Para 16, General Comment No. 29 of the Human Rights Committee on Article 4, ICCPR, CCPR/C/21/Rev.1/Add.11, 2001: “The principles of legality and the rule of law require that fundamental requirements of fair trial must be respected during a state of emergency. The presumption of innocence must be respected.”

⁹³ See article 11 of the Universal Declaration, and Article 14(2) of the ICCPR.

⁹⁴ Human Rights Committee General Comment 13.

⁹⁵ Human Rights Committee General Comment 13, para 7.

⁹⁶ *R. v. Oakes*, Supreme Court of Canada (1987), LRC (Const) pp. 477 and 489.

⁹⁷ Halsbury's Laws of Hong Kong 2001, pg. 470.

⁹⁸ See *Pham Hoang v. France*, (66/1991/318/390), 25 September 1992.

- a. What does the prosecution have to prove in order to transfer the onus to the defence?
- b. What is the burden on the accused – does it relate to something which is likely to be difficult for him/her to prove or does it relate to something which is likely to be within his/her knowledge?
- c. What is the nature of threat faced by the society which the provisions is designed to combat?⁹⁹

The real concern is not whether the accused must disprove an element or prove an excuse, but whether an accused may be convicted while a reasonable doubt exists. When that possibility exists, the presumption of innocence is lost. If the accused is required to prove some fact on the balance of probabilities to avoid conviction, the provision violates the presumption of innocence because it permits a conviction despite a reasonable doubt about the guilt of the accused.¹⁰⁰

No common formula determines whether a statutory presumption of law or fact conflicts with presumption of innocence. Whether an exception is justifiable will in the end depend upon whether it remains the responsibility of the prosecution to prove the guilt of an accused to the required standard and whether the exception is reasonably imposed. The less significant the departure from the normal principles, the simpler it will be to justify the exception. If the prosecution retains responsibility for proving the essential ingredients of the offence, it is less likely that an exception will be regarded as unacceptable. This is the basic premise on which the incursions into the presumption of innocence are tested in various countries, although there do exist minor difference from jurisdiction to jurisdiction.

Presumption applicable at the pre-trial stage?

The Lawyer's Committee for Human Rights states that "rule [of presumption of innocence] applies from the moment of arrest until the conclusion of the trial."¹⁰¹ Amnesty International's Fair Trial Manual states that "the right to be presumed innocent applies not only to treatment in court and the evaluation of evidence, but also to treatment before trial. It applies to suspects, before criminal charges are filed prior to trial, and carries through until a conviction is confirmed following a final appeal."¹⁰²

Comparative Analysis

The model law includes provisions that make incursions into the presumption of innocence. This is grave because the model law can be cited by the states to justify similar incursions. Since the model law itself fails to take into account the basic principle of presumption of innocence in some of its provisions, it is difficult to exhort the nation states to do so. The paper looks at one provision of the model law to illustrate how inroads are made into the presumption of innocence.

Model law

The model law penalizes mere membership of a terrorist group.¹⁰³ However, it fails to define membership. Therefore, there is a possibility of the law enforcement agencies defining the concept of 'membership' very broadly and using it to more easily incarcerate suspected persons. The Inter-American Commission considers that the definition of a criminal offence based on mere suspicion or association should be eliminated as it shifts the burden of proof and violates the presumption of innocence.¹⁰⁴

The model law states that it shall be a defence for the accused person to prove that the group was not a terrorist group on the date that s/he became a member and that s/he has not taken part in the activities of that group after it became a terrorist group. A person who has not committed any offence except to be a member of a group that is now listed as a terrorist group will have a huge burden to discharge. The prosecution does not have to prove anything except membership. The accused will

⁹⁹ As per Lord Hope (UK), in *R. V. DPP ex parte Kebline* [1999] 3 WLR 175.

¹⁰⁰ As per Dickson (South Africa), in *Reg. v. Whyte* (1988) 51 DLR (4th) 481, 493; also see *R. v. Oakes* (1986) 26 DLR (4th) 200.

¹⁰¹ *Advocate's Guide: Rights Violations In The Criminal Prosecutions Of Kosovar Albanians In Serbia*, Lawyers Committee for Human Rights, October 2000, pg. 21.

¹⁰² See http://www.amnesty.org/ailib/intcam/fairtrial/indxftm_b.htm#15.

¹⁰³ §17.

¹⁰⁴ See Annual Report of the Inter-American Commission, 1996, OEA/Ser.LV/II.95, doc. 7, para.4 p.745, Peru [example taken from Amnesty International's Fair Trial Manual http://www.amnesty.org/ailib/intcam/fairtrial/indxftm_b.htm#15].

have to prove that s/he became the member prior to the listing of the group as a terrorist group. Even if the suspect can achieve this, s/he must still prove his/her lack of participation in any of the activities of that group after it was listed as a terrorist organisation. This would require knowledge of a large number of acts that by definition the suspect claims not to have participated in. This could be extremely unfair if not impossible, and failure to do so could lead to substantial deprivation of liberty.

United Kingdom

The UK also makes membership of a terrorist group an offence *per se*¹⁰⁵ without defining membership. Like the model law, it is a defence for the accused person to establish that the organisation was not proscribed (banned as a terrorist group) on the occasion when s/he became its member and that s/he has not taken part in any of its activities since it was banned. The model law appears to have copied this provision from the UK law without any analysis of how it violates the presumption of innocence.

Australia

The Australian law also penalises membership of a terrorist organization.¹⁰⁶ Once again, membership is not defined, but it appears better than the UK law and the model law provisions. This provision is implicated only if the “person intentionally is a member”¹⁰⁷ of such an organisation and “knows the organization is a terrorist organization.”¹⁰⁸ Further a person cannot be prosecuted if s/he took “all reasonable steps to cease to be a member.”¹⁰⁹

The prosecution has to prove not only that a person is a member of a terrorist organisation but that s/he became a member intentionally and also knew that s/he was a member of a terrorist organisation. It is only after the prosecution has proved this that the person has to prove that s/he took all reasonable steps to cease to be member. It may be possible to furnish a letter to the organisation declaring cessation of membership. Even though a legal burden is put on the accused person, it is at least easier to prove that the person took all reasonable steps to disassociate from the organisation as compared to having to prove that s/he has not participated in any of the activities of the organisation after it was listed.

Canada

Canadian law does not make membership of a terrorist group punishable in itself, simply because of the difficulty of proving membership. It also recognises that penalising mere membership violates the right to freedom of political association.

Concerning this point the model law argues in a note that states need to consider if prohibition of membership will be allowed under their constitutions. It does not go any further to analyse why criminalising membership in terrorist groups might be unconstitutional. Rather, it actually encourages penalising membership in a terrorist organisation without defining either membership or terrorism.

Conclusion

All factors that threaten the presumption of innocence in anti-terror laws cannot be analysed here. It is true, however, that very many anti-terror laws do threaten just that. Some punish the collection of or making a record of information of a kind likely to be useful to a person committing or preparing an act of terrorism,¹¹⁰ arranging meeting for terrorist purposes or those that mandate a court to “draw adverse inference” if fingerprints of the suspect are found at the site of the offence.¹¹¹ There are others that penalise receiving and/or giving training to a terrorist organisation, even if the person did not know it was a terrorist organisation.¹¹²

¹⁰⁵ Terrorism Act 2000 § 11.

¹⁰⁶ *Criminal Code Act 1995* § 102.3.

¹⁰⁷ *Id* at § 102.3 (1)(a).

¹⁰⁸ *Id* at § 102.3 (1)(c).

¹⁰⁹ *Id* at § 102.3 (2).

¹¹⁰ See section 58 of the UK Terrorism Act 2000.

¹¹¹ Section 53 of the Indian Prevention of Terrorism Act, 2002.

¹¹² See section 102.5(2) of the Australian Criminal Code Act 1995.

Investigatory detention provisions also minimise the presumption of innocence. In Canada and Australia, a person can be detained for a long period if the sought information is not given to the authorities.¹¹³ The person may be excused if s/he raises the defence that s/he does not have the information. However, once again, the burden of proving that s/he does not have the required information is on the person. The state does not need to prove that the person has particular information. It merely detains a person and asks for the information and it is now upon the defendant to prove that s/he does not have the required information. It may be virtually impossible for a person to discharge this burden.

Given the existence of numerous examples of provisions violating the presumption of innocence, an inviolable principle of fair trial, it is strange that the Expert Group merely copied some of these provisions into the Commonwealth model law instead of critiquing them. There is no discussion of the need for a fair trial and the presumption of innocence in the entire report of the Expert Group. Despite stating that anti-terror measures “need to be adopted and applied in a manner consistent with fundamental values and principles, in particular respect for human rights and rule of law”, the Expert Group fails to take the fundamental values of human rights and rule of law, including the right to fair trial, into account. References to human rights in the Expert Group report are mere lip service. Implementation of UNSCR 1373 at whatever cost seems to have been uppermost in the mind of the Expert Group

THE RIGHT TO SILENCE

General Principles

An accused person has the right to remain silent, both before and during trial. The ICCPR says that this right is not explicitly guaranteed in the Covenant. Does this imply that the state can compel suspects to answer questions during interrogations and testify at trial? Would that mean that if the accused failed to answer and chose to remain silent, this silence can be used against him/her in determination of guilt? The obligations of a state under international law could be better appreciated in the context of other rights under the ICCPR like the presumption of innocence and the right not to be compelled to give evidence against oneself. This will indicate how the right to silence is linked with and flows from these rights.

Experts are unified in their view that the right to silence is not a single right but consists of a cluster rights. As Law Lord Mustill puts it, the right to silence “arouses strong but unfocused feelings. In truth it does not denote any single right, but rather refers to a disparate group of immunities, which differ in nature, origin, incidence and importance, and also so as to the extent to which they have already been encroached upon by statute.”¹¹⁴ He lists six different “immunities” as forming a part of the ‘right to silence.’¹¹⁵

1. A general immunity, possessed by all persons and bodies, from being compelled on pain of punishment to answer questions posed by other bodies or persons.
2. A general immunity possessed by all persons and bodies from being compelled on the pain of punishment to answer questions the answer to which may incriminate them.
3. A specific immunity, possessed by all persons under suspicion of criminal responsibility whilst being interviewed by police officers or others in a similar position of authority, from being compelled on pain of punishment to answer questions of any kind.
4. A specific immunity, possessed by accused persons undergoing trial, from being compelled to give evidence, and from being compelled to answer questions put to them in the dock.
5. A specific immunity, possessed by persons who have been charged with a criminal offence, from having questions material to the offence addressed to them by police officers or persons in a similar position of authority.

¹¹³ See section 83.28 and 83.29 of Bill C-36 of Canada. Also see section 34G(8), ASIO Act.

¹¹⁴ *R v. Director of Serious Fraud Office ex parte Smith* [1993] AC 1, 30.

¹¹⁵ *Id.*

6. A specific immunity (at least in some circumstances) possessed by accused persons undergoing trial, from having adverse comment made on any failure
 - a. To answer question before the trial; or
 - b. To give evidence at trial.¹¹⁶

The Human Rights Committee has called on states to pass legislation to ensure that evidence elicited by means of such methods that compel the accused to confess or to testify against himself or use any other form of compulsion are wholly unacceptable.¹¹⁷ In 1995, the Human Rights Committee reviewed the fourth periodic report of the United Kingdom and found that the modification of the right to remain silent in allowing the judge and jury to draw adverse inferences in certain situations “violate various provisions of Article 14 of the Covenant [fair trial], despite a range of safeguards built into the legislation and the rules enacted thereunder.”¹¹⁸

More recent international documents like *The Draft Body of Principles on the Right to a Fair Trial and a Remedy*,¹¹⁹ in elaborating on the accused’s right not to be compelled to testify against him or herself or to confess guilt, specifically set out that “silence by the accused may not be used as evidence to prove guilt and no adverse consequences may be drawn from the exercise of the right to remain silent.” Unlike older documents such as the ICCPR, the more recent documents have explicitly included the right to remain silent. Both the Rule of Procedure and Evidence adopted by the criminal tribunals established by the United Nation Security Council for the Former Yugoslavia and Rwanda provide for an explicit right to silence during investigation.¹²⁰ The Rome Statute of the International Criminal Court not only confers a right to silence, but also provides that silence cannot be used as “a consideration in the determination of guilt or innocence.”¹²¹ These explicit expressions of the right to remain silent in the international arena shows that any procedural measures which may pressure suspects to speak against their will violates international human rights.¹²²

In regional and national interpretations, the courts have held that an individual’s right to remain silent under police questioning and the privilege against self-incrimination are “generally recognized international standards which lie at the heart of the notion of a fair procedure.”¹²³ However, both the regional and domestic courts also accept that the right to silence is not an absolute right. The courts accept that while it would be incompatible with the international standard to base a conviction solely or mainly on the silence or refusal of the accused to answer questions or testify, reasonable inferences could be made under certain circumstances that may require explanation. In these situations, adverse inference could be drawn if certain safeguards were in place, including the right to counsel, providing a caution in clear terms and ensuring that the accused understood the possible consequences of their decision and proper recording of the police interviews.¹²⁴ Some national courts still maintain that the mere exercise of an accused’s right to silence at the pre-trial stage should not result in any adverse inference as to his/her guilt being drawn in a subsequent trial.¹²⁵

Scope of the Right to Silence

¹¹⁶ Also see *R v. Swaffield* (1998) 151 ALR 98, 114 (Brennan J).

¹¹⁷ General Comment 13 of the Human Rights Committee.

¹¹⁸ CCPR/C/79/Add 55, July 27, 1995 at para 17.

¹¹⁹ *The Draft Body of Principles on the Right to a Fair Trial and a Remedy*, Annex II of the “*The Administration of Justice and the Human Rights of Detainees – The right to a fair trial: Current recognition and measures necessary for its strengthening – Final Report prepared by Mr. Stanislav Chernichenko and Mr. William Treat*”, E/CN.4/Sub.2/1994/24, 3 June 1994.

¹²⁰ International Criminal Tribunal for Rwanda, Rules of Procedure and Evidence, adopted on 29 June 1995 and amended thereafter, consolidated text dated 31 May 2000, Rule 42 (www.ict.org) and International Criminal Tribunal for the Former Yugoslavia, Rules of Procedure and Evidence, last amended 12 April 2001, Rule 42 (www.un.org/icty/basic.htm).

¹²¹ Rome Statute of the International Criminal Court (UN Doc A/CONF.183/9) Article 66 (presumption of innocence) and Article 67 (to remain silent, without such silence being a consideration in the determination of guilt or innocence). See www.un.org/law/icc/statute/romefra.htm.

¹²² This paragraph borrows heavily from the paper titled “*The Right to Silence – International Norms and Domestic Realities*” by Eileen Skinnider and Frances Gordon.

¹²³ *Murray v. UK* (1996) 22 E.H.R.R. 29 (ECHR).

¹²⁴ See *Condron v. UK* (2000) 8 BHRC 290 (ECHR); *R v. Herbert* [1990] 2 SCR 151 (Canadian Supreme Court case); *R v. Noble* (1997), 6 C.R. (5th) 1 (S.C.C.)

¹²⁵ See the Canadian Supreme Court decision in *R v. Chambers* (1990), 80 C.R. (3rd) 235 (SCC).

Proper discussion of the right to silence in different jurisdictions and its ramifications would better be handled outside of this report. In addition to developments through case law, many countries such as the UK¹²⁶ and Australia¹²⁷ have set up independent commissions to study the scope of the right and the limits on its curtailment by allowing adverse inferences to be drawn from the silence of the accused. In short, the accused has a right to remain silent; whether an adverse inference can be drawn shall depend on the evidence. Usually if the prosecution has established its case against the accused, adverse inferences may be drawn. However the use of the accused's right to remain silent in order to establish guilt beyond reasonable doubt is impermissible even in the case of overwhelming evidence.

Reasons for retaining the Right to Silence

There are many reasons for retaining the right to silence.¹²⁸ Defendants may utilise the right to remain silent in legitimate ways that are consistent with innocence. For example, they may mistrust the police, wish to protect others from finding out something potentially embarrassing but which is not under investigation, may be in shock and confusion at police accusations, or may be genuinely unable to answer the police questions. Sometimes suspects refuse to answer questions upon the advice of a lawyer.

The right to silence provides a necessary incentive to police to investigate thoroughly for evidence beyond mere confessions. If it is abolished or reformed, there is a danger that trial by a court will be substituted by trial in a police station, which is repugnant to the rule of law.

Many Commonwealth states are nonetheless chipping away at the right to silence. The unfortunate incidents of September 11 gave them the perfect opportunity. Various provisions in anti-terror laws require a person, whether a suspect or not, to appear before a judge/investigating authority and provide the information/documents sought by the investigating authorities. This violates the right to silence of the suspects.

Comparative Analysis

Model law

Section 22 of the model law allows an investigating officer to make an application to the court seeking information from any person. This can be done if there are reasonable grounds to believe that either an offence under this law has already been committed or will be committed and that information concerning the offence or information revealing the whereabouts of the person suspected by the police to have committed or about to commit the offence would be obtained as a result of the order. The law mandates the person named in the order to answer all questions put to him/her and even self-incrimination is not a ground for refusal to answer. The model law does have some safeguards in the sense that the person is required to give that information in the presence of a judge. Answers may be refused on the grounds that the information sought is protected by law relating to non-disclosure of information or privilege. Although answers cannot be refused on the ground of self-incrimination, no information given under this provision can be used against the person in a trial against her/him.

¹²⁶ In 1968, the Justice Evidence Committee was set up to suggest whether to abolish, retain or modify the right to remain silent. It proposed to retain the right to silence at trial but recommended that the prosecution be permitted to comment to the jury on the failure of the accused to give evidence at trial. The Criminal Law Revision Committee issued a report in 1972, where the majority of the Committee recommended that adverse inferences could be drawn from both pre-trial and at-trial silence "as appear proper" and these could be the subject of comment by the judge and the prosecutor. Due to strong opposition to this report, it was not implemented. The Royal Commission on Criminal Procedure in 1981 proposed the existing law to be retained and introduced a number of reforms including the duty solicitor scheme and substantive rights to legal aid during police questioning. In 1988 the Home Office established the Home Office Working group on the Right to silence which has as the term of reference to advise the government on how to change the law, not whether or not in principle some form of change was justified.

¹²⁷ The two most recent reviews of the right to silence in Australia were conducted by the Law Reform Commissions of the two states of New South Wales and Victoria. See New South Wales Law Reform Commission "*Discussion Paper 41: The Right to Silence*" (May 1998) and Scrutiny of Acts and Regulations Committee, "*The Right to Silence: An Examination of the Issues*" available at <http://www.parliament.vic.gov.au>.

¹²⁸ See Eileen Skinnider and Frances Gordon "*The Right To Silence – International Norms and Domestic Realities*" presented at the Sino Canadian International Conference on the Ratification and Implementation of Human Rights Covenants Beijing, 26-16 October 2001.

The right to silence also ensures that there is no incentive for the police to torture suspects for 'confession'. Once inroads are made into this right, police could opt for torture as an investigative tool to get information out of the suspect rather than undertake a detailed investigation. Even if 'confessions' are not used against the person, torture does help in getting (albeit untrustworthy) information from suspects. One way of ensuring that the investigating authorities do not resort to torture is respect the right to silence of the suspects. Unless the Commonwealth is ready to accept the unpalatable not to mention illegal position that it is permissible to use torture in investigating terrorist crimes, basic rights like the right to silence should not be violated.

Canada

Many countries in the Commonwealth have enacted provisions for what are called "investigative hearings". The Canadian law provides for investigative hearing in a manner similar to the model law except for the fact that the Canadian law allows a person to be arrested if s/he is evading being served the order, or is about to abscond; or did not attend the examination or remain in attendance as required by the order. A magistrate may order him/her to be detained or released on recognisance until the witness complies with the order. If a witness refuses to comply by refusing to answer questions asked, s/he will presumably be prosecuted under a number of different offences including disobeying a court order, obstructing justice, or contempt of court. In any case, a person may be detained indefinitely unless they surrender their right to silence.

Australia

In Australia, The Australian Security Intelligence Organisation Amendment (Terrorism) Act 2003 (ASIO Act) authorises the detention of persons for the purposes of gathering intelligence/information. A person so detained for question is bound to provide all information required of him/her in accordance with the warrant¹²⁹. The detainee is not allowed to refuse answering a question on the grounds of self-incrimination.¹³⁰ However, information provided by the witness can't be used against him/her in a criminal proceeding.¹³¹ Failure to provide information results in an imprisonment of five years.¹³² If a person contends that s/he does not possess the information, the burden is on her/him to prove this fact.¹³³

Collectively these requirements clearly infringe upon the right to silence, the right not to be compelled to testify against oneself, and a reversal of the presumption of innocence. Cumulatively, these measures violate the fair trial requirement under the ICCPR. An accused individual faced with the might of the state has only the basic human rights standards and procedures to protect her/him from being unfairly tried and punished. Such blatant violations of basic rights of the accused must be opposed vehemently by the Commonwealth.

United Kingdom

The UK has had a longer history of violating the right to silence in the name of counter terrorism measures.¹³⁴ The law relating to silence was substantially modified in Northern Ireland by the Criminal Evidence (Northern Ireland) Order 1988 and in England and Wales by the Criminal Justice and Public Order Act 1994. These laws permit the jury to draw adverse inference from the exercise of the right to remain silent by an accused when questioned by the police or at trial, and allow the trial judge to direct the jury accordingly. Both pieces of legislation allow the court to draw whatever inferences "appear proper" from the accused's silence under four circumstances:

1. When the accused fails to mention during questioning or upon charge any fact which s/he later relies on in her/his defence at trial, if under the circumstances, s/he would have been "reasonably expected" to mention that fact.¹³⁵
2. Where the accused refuses to be sworn or to answer any question at her or his trial.¹³⁶

¹²⁹ ASIO Act, § 34G(3).

¹³⁰ *Id* at § 34G(8).

¹³¹ *Id* at § 34G(9).

¹³² *Id* at § 34G(3).

¹³³ *Id* at § 34G(4).

¹³⁴ This paragraph is taken from a paper by Eileen Skinnider and Frances Gordon titled "*The Right To Silence – International Norms and Domestic Realities*" presented at the Sino Canadian International Conference on the Ratification and Implementation of Human Rights Covenants Beijing, 26-16 October 2001.

¹³⁵ 1988 Order, Article 3 and 1994 Act Section 34.

3. Where the accused fails to account for any objects, substances, marks upon her/him, or upon her or his clothing, or in her/his possession at the time of his arrest.¹³⁷
4. Where the accused fails to account for her/his presence at a particular place.¹³⁸

Clearly, there may be many reasons for a person not to mention certain facts during questioning. Although it may not help her/his case, it should not result in her/his being imprisoned for years without having committed any crime.

The 1994 Act applicable in England and Wales contains some safeguards. It provides that no adverse inference may be drawn if the person was not given an opportunity to consult a lawyer prior to being questioned. In situations 3 and 4 above, no adverse inference can be drawn unless the officer cautioned the person in ordinary language about the possibility of adverse inference being drawn from refusing to comply with the request made of her/him. Further, no adverse inferences can be drawn against child defendants or defendants with certain physical or mental conditions. Also, a defendant cannot be convicted solely on an inference drawn from her/his silence. Even with these safeguards, the fact remains that the right to silence is being severely curtailed. This puts terrorism suspects in a very vulnerable position.

Conclusion

Countries have made inroads into the right of fair trial through their anti-terrorism laws. Some have established special courts or military tribunals¹³⁹ to try terrorist cases more speedily. Such measures must not sacrifice the right to a fair trial conducted by a competent, independent and impartial tribunal. These military tribunals and special courts may be independent in some countries but are often not impartial. The right to be presumed innocent until proven guilty and the right to silence and freedom from compelled self-incrimination are being severely limited in the name of war against terror. Alas, the casualty in this war is not terror but civil rights.

Sadly, the model law glosses over the context in which the laws are to be applied and merely copies the existing models of anti-terror laws, without analysing them. With patent disregard for the human rights violations Commonwealth states commit in enacting anti-terror laws, the model law condones such violations when it adopts similar provisions. While promoting clauses that are a blatant assault on the right to a fair trial, the Expert Group did little to ensure true realisation of human rights during the war on terror.

¹³⁶ 1988 Order, Article 4 and 1994 Act Section 35.

¹³⁷ 1988 Order, Article 5 and 1994 Act Section 36.

¹³⁸ 1988 Order, Article 6 and 1994 Act Section 37.

¹³⁹ See the Pakistan's Anti-terrorism (Amendment) Ordinance, 2002 that established new courts comprising one military officer nominated by the government besides two civilian judicial officers.

PART V - CONCLUSIONS

The Model Legislative Provisions on Measures to Combat Terrorism fall short of the expectations of Commonwealth citizens with respect to human rights and is of a low standard when compared with some aspects of selected Commonwealth anti-terror laws. The Expert Group did not give human rights obligations and the rule of law their proper priority. It provided structural overviews of existing legislation rather than suggesting good practice or critiquing laws that violated human rights. Although the Commonwealth Secretariat and Foundation rightly stress the importance of participatory governance and civil society consultation, no representatives of civil society or human rights advocates took part in the Expert Group's deliberations. The resulting message from the Commonwealth is that it is sufficient to implement Resolution 1373 and that the equally authoritative requirement of respecting human rights as outlined in Resolution 1456 can be ignored.

To be fair, the United Nations does not give ideal guidance on anti-terrorism law. Terrorism still escapes any internationally agreed definition. The Security Council is accused of being unrepresentative, undemocratic, and lacking in transparency or accountability.¹⁴⁰ Its decisions often diverge from those adopted by the UN General Assembly.¹⁴¹ Nevertheless Security Council Resolutions such as 1373 and 1456 are binding on member states. Even if human rights concerns are prone to dilution in the Security Council as a general rule, Resolution 1456 definitively resolves this dilemma with respect to UN member states' obligations to prevent and punish terrorist acts by requiring that they ensure that any anti-terror measures comply with obligations under international law, in particular international human rights, refugee and humanitarian law.

Even so the emphasis at the UN level has clearly leaned more towards developing responses to threats and attacks rather than taking a comprehensive view to address root causes of terrorism or to ensure that responses to it do not themselves violate human security. The Preamble of Resolution 1373 "reaffirmed the need to combat *by all means*, in accordance with the Charter of the United Nations, threats to international peace and security caused by terrorist acts"¹⁴² (emphasis added). The focus on using "any means" to combat terrorism seems to say that human rights are not important. Indeed, even after Resolution 1456, states continue to flout international obligations with impunity in the name of implementing UNSCR 1373, and Commonwealth governments from all regions are no exception.

The Counter Terrorism Committee (CTC) established by the UNSCR 1373 to monitor the implementation of the Resolution does not see its role as "monitoring performance against other international conventions, including human rights law," and leaves it to "other organisations to study state's reports and take up their content in other forums."¹⁴³ This is despite the fact that the former High Commissioner for Human Rights, Mary Robinson, and the late High Commissioner, Sergio Vieira de Mello, both urged the CTC to take account of human rights in its review of counter-terrorism measures.

In June 2003 (after the passing of the new UNSCR 1456) Sir Nigel Rodley, Vice-Chairperson of the Human Rights Committee, once again urged the Security Council "not [to] leave [monitoring the human rights component] wholly to those parts of the United Nations system that have a specific

¹⁴⁰ Vera Gowlland-Debbas (1994) *Security Council Enforcement Action and Issues of State Responsibility*, 43 International and Comparative Law Quarterly, p. 71;

¹⁴¹ "Koskeniemi provides the following examples: "A non-aligned draft resolution in the Council (S/21048) would have deplored the intervention [of the US in Panama in December 1989] but was vetoed on 23 December by the US, France and United Kingdom (the vote having been 10-4-1). A resolution closely following the text of the earlier non-aligned draft was passed by the General Assembly on 29 December, UNGA Res. 44/240 (75-20-40). A comparable method was used by the Assembly in 1980 to condemn the Soviet invasion in Afghanistan - where a resolution essentially similar to that passed in the Assembly had been subject of the Soviet veto; and the US invasion of Grenada - where the Assembly passed a resolution essentially similar to an earlier draft vetoed in the Council by the US." [Martti Koskeniemi, *The Police in the Temple: Order, Justice and the UN - A Dialectical View*, 6 European Journal of International Law 325, Chapter VI, n.63 (1999)] <http://www.ejil.org/journal/Vol6/No3/art2-05.html#TopOfPage>".

¹⁴² S/RES/1373 (2001).

¹⁴³ The Chairperson of the CTC in his briefing to the Security Council on 18 January 2002, See http://www.un.org/Docs/sc/committees/1373/human_rights.html.

human rights mandate.”¹⁴⁴ Sir Rodley once again urged the CTC to include human rights as a component of its review of the State party’s report on implementation of 1373. The CTC still does not accept any such role for itself.

Clearly this role could be to some extent taken up by the Commonwealth, who is in a unique position to encourage its members to abide by their international obligations and live up to the aspirations of the association, which has long been to cooperate in the furtherance of good governance, democratic principles, human rights and development of Commonwealth peoples.

The UK is currently considering¹⁴⁵ extending the period allowed for detention without charge in terrorism cases from two weeks to 90 days. Australia hopes¹⁴⁶ to authorise secret detentions of people merely suspected of having knowledge of terrorist activities for up to two weeks without charge. There could be no better time for the Commonwealth to put pressure on states to abide by human rights.

The Commonwealth differs from the UN in that in all members are equal and all decisions are made collectively. The Commonwealth Secretariat must encourage states to follow human rights standards and obligations while combating terrorism. If the Harare Declaration and relevant communiqués are not to lose their meaning, the Commonwealth must treat human rights not as dispensable instruments but as vital to good governance. The Commonwealth should become a model of good practice for the world rather than a casualty to UN reticence or the bad behaviour of individual member states.

In fact, in their statement issued on 25th October 2001, Commonwealth Leaders while welcoming UNSCR 1373, pledged that their “actions will reflect the fundamental values upon which the Commonwealth is based including democracy, human rights, the rule of law, freedom of belief, freedom of political opinion, justice and equality.” Sadly, the model law does not fulfil these expectations of the people of the Commonwealth as expressed by their leaders.

In forming its Expert Group comprising government representatives without including human rights lawyers and activists and other participants from the civil society; in mirroring its model law on existing anti-terror laws without taking into account the criticisms levelled at these laws for violating human rights; in failing to critique the existing anti-terror laws for violating human rights; in blindly asking the states to adopt 1373 without stressing unambiguously the need to respect human rights in doing so; the people of the Commonwealth have been let down.

The Secretariat must redraft the Model Legislative Provisions on Measures to Combat Terrorism to make them accord with international human rights, refugee, and humanitarian law, and in particular these norms:

Norm	Current model law provision
The right to life and prohibition against torture can't be suspended by anti-terror laws.	Places no limit on administrative detention, in effect condoning environment where torture risk is high.
Legality principle requires clear and precise definitions of terrorism to avoid arbitrary enforcement.	Broad definition lacks clarity and unnecessarily restricts freedom of association and legitimate political protest and freedom of speech.
Freedom from arbitrary detention and judicial control over administrative detention are non-derogable.	Encourages derogation from ICCPR. Does not limit extension of detention after 5-day 'limit.' Provides no right to access counsel to challenge the detention.
Right to asylum can't be curtailed. Anti-terror laws can't be used to discriminate against asylum seekers due to race, religion, or country of origin. No punishment for illegal entry of asylum seekers	Allows executive to refuse entry, expel or detain people without due process of law or judicial review. Promotes/condones indefinite detention of failed asylum seekers.

¹⁴⁴ Briefing by Sir Nigel Rodley, Vice-Chairperson Human Rights Committee, Human Rights and Counter-Terrorism Measures to the Security Council Counter-Terrorism Committee UN Headquarters, (19 June 2003). See [http://www.unhcr.ch/hurricane/hurricane.nsf/\(Symbol\)/ctc.2003.En?OpenDocument](http://www.unhcr.ch/hurricane/hurricane.nsf/(Symbol)/ctc.2003.En?OpenDocument).

¹⁴⁵ Terrorism Bill (2005) (UK).

¹⁴⁶ Terrorism Bill (2005) (Australia).

allowed.	
Right to fair trial, presumption of innocence and right to silence are nearly absolute.	Shifts burden to accused to prove non-membership in a terrorist organisation, authorises compelled testimony, and doesn't provide right to access counsel.

ANNEX

EXISTING UN CONVENTIONS ON TERRORISM

1. Convention on Offences and Certain Other Acts Committed on Board Aircraft, signed at Tokyo on 14 September 1963.
2. Convention for the Suppression of Unlawful Seizure of Aircraft, signed at the Hague on 16 December 1970.
3. Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation, signed at Montreal on 23 September 1971.
4. Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents, adopted by the General Assembly of the United Nations on 14 December 1973.
5. International Convention against the Taking of Hostages, adopted by the General Assembly of the United Nations on 17 December 1979.
6. Convention on the Physical Protection of Nuclear Material, signed at Vienna on 3 March 1980.
7. Protocol on the Suppression of Unlawful Acts of Violence at Airports Serving International Civil Aviation, supplementary to the Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation, signed at Montreal on 24 February 1988.
8. Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation, done at Rome on 10 March 1988.
9. Protocol for the Suppression of Unlawful Acts against the Safety of Fixed Platforms Located on the Continental Shelf, done at Rome on 10 March 1988.
10. Convention on the Marking of Plastic Explosives for the Purpose of Detection, signed at Montreal on 1 March 1991.
11. International Convention for the Suppression of Terrorist Bombings, adopted by the General Assembly of the United Nations on 15 December 1997.
12. International Convention for the Suppression of the Financing of Terrorism, adopted by the General Assembly of the United Nations on 9 December 1999.